

**PROPOSALS FOR A SELF-DIRECTED
SUPPORT (SCOTLAND) BILL**

CONSULTATION

**SCOTTISH GOVERNMENT
MARCH 2010**

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GUIDANCE ON HOW TO RESPOND

Responding to the Consultation

The Self-Directed Support Team welcomes responses to this consultation paper by **Wednesday 23 June 2010**. Please send your response with the completed Respondent Information Form to:

selfdirectedsupport@scotland.gsi.gov.uk

or

Kenneth Pentland
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Adult Care and Support Division
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If you have any queries contact Kenneth Pentland on 0131 244 5455

We would be grateful if you could clearly indicate in your response which questions or parts of the consultation paper you are responding to as this will aid our analysis of the responses received.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at <http://www.scotland.gov.uk/consultations>.

The Scottish Government now has an email alert system for consultations (**SEconsult**: <http://www.scotland.gov.uk/consultations/seconsult.aspx>). This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). SEconsult complements, but in no way replaces SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the **Respondent Information Form** as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government are subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore

have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public and after we have checked that they contain no potentially defamatory material, responses will be made available to the public in the Scottish Government Library (see the attached Respondent Information Form). These will be made available to the public in the Scottish Government Library by on 14 July 2010 the Scottish Government consultation web pages on 21 July 2010. You can make arrangements to view responses by contacting the SG Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us reach a decision on the Self Directed Support (Scotland) Bill. We aim to issue a report on this consultation process shortly after the end of the consultation.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to:

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Edinburgh

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INTRODUCTION

1. This consultation asks for your views on the government's proposals to consolidate and extend the legislation relating to direct payments as well as on introducing legislative provision for self-directed support. Detailed definitions are provided in the section Glossary and Definitions. A simple definition of direct payments is payments in lieu of services provided directly to individuals assessed as being in need of community care services. Self-directed support is wider and refers to the method by which individuals and families can have informed choice about the way that support is provided to them. Individual budgets are an allocation of funding given to users after an assessment for support.

2. This consultation is published alongside one on the self-directed support strategy which you can access at the following hyperlink:-

<http://www.scotland.gov.uk/Publications/2010/02/05133942/0>

3. The strategy sets out a ten year framework for the development of self-directed support as the main way to deliver social care, supporting the personalisation of services in Scotland. The development of self-directed support generally may lead to the evolution of a wide range of new models of care delivery, with individuals having opportunities to individually or collectively commission support through, for example, care co-operatives. This consultation seeks your views on changes to the law that would aim to support the strategy and deliver an increase in the uptake of self-directed support.

4. The proposals contained within both consultations build upon earlier discussions with client groups and service providers. A National Reference Group, with representation from key interests including people who use support, representatives from central and local government, the Convention of Scottish Local Authorities (COSLA), voluntary organisations and private care providers, was established by the Minister for Public Health and Sport in 2008 to consider how best to develop self-directed support in Scotland. The group supported the development of new legislation to address specific concerns. There was broad support for existing legislation to be clarified, to be made more concise through consolidation in a new Act, and for the introduction of the term 'self-directed support' to statute. Engagement with most local authorities and a number of user led and third sector organisations has helped to identify the main proposals that are explored in this paper.

5. Should a Bill be introduced to Parliament, we would wish to take the opportunity to consider whether existing limitations on entitlement to, or the use of, direct payments should be amended. We also want to discuss the type of framework that would enable the increased uptake of self-directed support.

Take-up rates for self-directed support and direct payments

6. The benefits of self-directed support, and particularly direct payments, are clear: it increases the autonomy of those who choose how their support should be delivered and enables packages to be tailored more closely to people's needs. At the same time, self-directed support will not be the best solution for everyone. Indeed some

people may not welcome nor benefit from the increased control and the responsibility that comes with a direct payment or individual budget.

7. Despite a steady increase over the last ten years, the use of direct payments for social care remains low. On average, Scottish local authorities make less use of direct payments per head of population than England and Wales. The Government wants to build on the achievements made to date, remove any unnecessary barriers put in place by existing legislation and provide a clear and consistent framework to allow for development in the future.

Who can use Direct Payments under the current laws?

8. Currently, the law in Scotland allows the following groups of people to receive direct payments for social care:

- Disabled adults assessed as requiring community care services, including housing support services
- Disabled 16 and 17 year olds assessed as requiring community care services, including housing support services
- Disabled adults and 16 and 17 year olds to purchase housing support services
- Disabled people with parental responsibility to purchase the children's services their children have been assessed as needing
- Parents and people with parental responsibility for a child in need (under the age of 16) who has been assessed as requiring children's services
- Parents and people with parental responsibility for children whose health or development may be impaired or below a reasonable standard without services from the local authority
- Older people aged 65 years and over who are assessed as needing community care services due to infirmity or age.

9. Direct payments can be used to purchase a service, or to employ a personal assistant. A range of community care services can be purchased with a direct payment except for residential care, other than for very short stays of up to four weeks.

10. Those community care service users aged 65 or over who are accessing free personal and nursing care can arrange for the personal care element of the package to be made as a direct payment

11. In addition, it should be noted that attorneys and guardians, with the relevant powers, can receive direct payments on behalf of people who are unable to give consent to arranging their own services. People who lack capacity to consent can only receive a direct payment where guardianship arrangements are in place. In other words, they require to have in place the formal consent of their attorney/guardian as defined by the Adults with Incapacity (Scotland) Act 2000.

12. The following categories of people cannot currently use direct payments to pay for their social care:

- People subject to a compulsory treatment order under the Mental Health (Care and Treatment) (Scotland) Act 2003 where a certificate has been granted suspending the measure authorising detention
- People subject to a compulsion order under the Criminal Procedure (Scotland) Act 1995 where a certificate has been granted suspending the measure authorising detention
- People subject to an emergency detention certificate granted under the Mental Health (Care and Treatment) (Scotland) Act 2003 where a certificate has been granted suspending the measure authorising detention
- People subject to a short term detention certificate granted under the Mental Health (Care and Treatment) (Scotland) Act 2003 where a certificate has been granted suspending the measure authorising detention, and
- People subject to a compulsion order under the Criminal Procedure (Scotland) Act 1995 and a restriction order under the same Act who have been conditionally discharged.

13. Carers can only receive direct payments when they have met one or more of the eligibility criteria set out in the legislation, for example, they have been assessed as needing community care services in their own right. The law in Scotland does not provide local authorities with a positive power to provide direct payments to carers as is the situation in England.

14. There are also limitations on employment of personal assistants, for example local authorities have the power to permit the employment of a relative as a Personal Assistant (PA) only in exceptional circumstances.

15. This consultation includes proposals to remove a number of these exclusions but not all of them. In addition to the exclusions raised in the remainder of this document we would be interested to hear if consultees think that any of the remaining exclusions should be removed.

16. The legal provisions relate only to direct payments and they are contained within a number of Acts and Regulations. You can see a detailed summary of the various pieces of legislation in Annex A. The main duties are set out in Section 12B and 12C of the Social Work (Scotland) Act 1968 and the accompanying Regulations from 2003. However, these have been updated over a number of years. Discussions with client groups and service providers have suggested that there is some confusion about the rights of client groups and the responsibilities of service providers under the current legislation.

17. You can find some statistical information on direct payments in Annex B to this document. The statistics show that direct payments remain a fairly small part of social care services. The Scottish Government wants to encourage the wider use of direct payments through increasing the uptake of self-directed support, removing any barriers which exist in legislation, and by clarifying the rights and responsibilities with regard to direct payments and self-directed support more generally.

18. The remaining sections in this consultation look at each aspect of the proposals and asks for your views. We want to know if you support the proposals or not and if you think they will make a difference. We want to hear if you think that the proposals

are realistic or not. If you think there should be changes, we want to know what you would change and why. We would like to hear your views on the potential impact of the legislative changes. Finally, we want to hear if you have any further proposals on DPs/SDS that you think should be considered as part of any legislation that may be developed.

CONSOLIDATING EXISTING STATUTE

19. Direct payments are available to eligible people following an assessment for community care services or children's services. There have been significant developments in the design and delivery of health and social care since the introduction of direct payments in legislation and new legislation on Equality and Human Rights. The assessment process should now focus on outcomes rather than outputs, and on offering support to meet those outcomes, instead of fitting people into available services. Government policy on the provision of health care is also promoting a mutual approach that sees citizens as partners rather than recipients of care.

20. The main proposals for a Self-directed Support Bill are based firmly on existing statute relating to the duty of care. Local authorities have a duty to provide assistance to persons in need. Having decided that a person is in need of assistance, a local authority then has a duty to assess that person's needs, and to determine whether community care services are required to meet those needs. If the need is urgent, the services can be provided without prior assessment of need, although an assessment should be done as soon as possible. Rather than providing the care directly themselves, the local authority may, with the consent of the person requiring community care services, or someone acting on his behalf, offer direct payments to allow them to secure services. The 1968 Act details some of the specific ways in which the local authority can provide community care services for persons in need. This includes making arrangements with voluntary organisations or other persons, to assist in the performance of its functions.

21. As described in the introduction to this paper, the law relating to direct payments in Scotland is spread across a number of pieces of UK and Scottish statute. Numerous amendments have been made in Acts and regulations from the introduction of direct payments as a choice, in 1996, to recent amendments on the employment of close relatives in the Adult Support and Protection (Scotland) Act 2007 ("the 2007 Act").

22. One of the main proposals for new legislation is to consolidate the existing law on direct payments under one piece of statute. The consolidation could provide an opportunity to set out the eligibility for and use of direct payments along with provisions on the process involved in the offer of a direct payment (or as discussed later, other forms of self-directed support) taking account of the needs and wishes of the individual and, where appropriate, the carer. Consolidation could also promote independence and equality for disabled people as the Disability Discrimination Act now requires.

23. Should a Bill be introduced to Parliament, it could be based on a set of guiding principles, in line with other similar Acts that relate to the protection or support of citizens, such as the 2007 Act referred to above. Principles that relate to duties and powers in legislation ensure a focus on the best interests and wellbeing of the individual and promote the involvement of family members in making decisions where appropriate.

24. The main goal of self-directed support is to empower individuals to live independently and to be supported to exercise choice and control over the support they receive. We therefore suggest that the guiding principles for new legislation should focus on:

- **Better outcomes for individuals:** rules and processes work for the individual and their best interests. The cared for person and carers' outcomes, in terms of better health and well being, should be at the centre of both the legislation and the way that it is implemented.
- **Choice:** individuals are enabled to live independently and have the right to choose the method by which they obtain care and support and to select the method which best meets their needs.
- **Participation:** individuals are provided with the tools with which to participate in decisions on the way that they obtain their care and support and the type that they select.
- **Mutuality:** family carers are affirmed as partners rather than recipients of care.
- **Equality:** people have the right to obtain a high standard of care and support regardless of the particular choices they may make and the method they choose.

25. The new framework and the guiding principles which underpin the framework should provide flexibility for service users and local authorities so that they can achieve the best possible outcomes for individuals. It should support creative and forward thinking models of care which meet their needs.

26. In summary, consolidating existing statute would help to clarify the rules, rights and obligations on direct payments and bring them up-to-date with current practice. It would ensure that direct payments and self-directed support – in other words, the *method* of obtaining care – is provided with its own framework in statute. It could reinforce the personalised approach to engagement with individuals that is central to delivering cultural change. A set of guiding principles would help to ensure that the law is framed in a way which meets the needs of those who require social and health care. We would like to hear your views on these proposals.

The government proposes that a new Bill on self-directed support consolidate and update existing legislation on direct payments.

- Do you agree with the proposal to consolidate and update existing legislation on direct payments?
- If not, why not?
- Should a new Act be based on a set of guiding principles? If so, what are your views on the most important principles?

SETTING THE FRAMEWORK FOR SELF-DIRECTED SUPPORT

27. Developments in social care in recent years have focused on the personalisation of services with an emphasis on citizens' rights to information and choice. This reflects the shifting expectations of people in society today that they should be able to exercise choice and control over their own lives, including decisions about the services provided by local authorities, health care providers and other public sector agencies. Self-directed support is a term that describes the ways in which individuals and families can have informed choice about the way support is provided to them.

28. Direct payments, through existing legislation, involve a payment *direct* into a bank account controlled by the individual so that they can employ their own support. They can be made on a one off or on an ongoing basis. They are an alternative to local authority arranged community care and children's services and therefore are offered at the point where the local authority has assessed the need for services. Direct payments should not put people who choose to receive local authority services at a disadvantage or advantage them either.

29. While direct payments provide individuals with the greatest level of choice over the support they receive, some people would prefer an option that does not give them responsibility for managing the allocated budget. The government's policy on self-directed support is therefore that individuals should be able to have more choice in how the resources available to them can be used to meet need. Self-directed support allows individuals to choose from taking a direct payment, having a direct payment managed by a third party, or to direct the available individual budget to arrange support from the local authority or commission it from a provider. Some people may choose a combination of these options.

Introducing the term self-directed support

30. Self-directed support is not referenced in statute, nor is there a clear framework setting out where direct payments fit in alongside other forms of self-directed support. The law currently places a duty on councils to carry out an assessment of an individual's needs, and in doing so to take account of the views of the individual and where relevant, their carer. In restating the right to direct payments, new legislation

could specify the range of choice as to how support is to be provided following assessment.

31. We would welcome your views on provisions which:

- introduce and define the term self-directed support in statute;
- incorporate in the new self-directed support framework the existing laws governing the circumstances under which direct payments can be made and the procedures that must be followed when making them;
- make it clear that direct payments are one mechanism within the options for self-directed support alongside the more traditional forms of support;
- set out the obligations upon local authorities to advise individuals about the various forms of self-directed support which are available to them following assessment, and;
- re-state the obligations on social care provider organisations.

The government proposes that the new legislation introduce the term self-directed support into statute, define this term and make it clear that self-directed support includes the choice of direct payments.

Consultation questions

- What are your views on the proposal to place legislation on direct payments in a Bill that defines the term self-directed support?
- If you do not agree with this proposal, why not?

Providing a framework for future developments in self-directed support

32. The development of direct payments was due in no small part to the efforts of the independent living movement to have a say in their package of support so that it meets their needs and is not imposed upon them. In recent years, it has become clear that a much wider group of people can benefit from this approach. Although limited, there is now some experience in Scotland in providing direct payments packages that are jointly funded by the NHS and the local authority, with a few examples of packages wholly funded by the NHS but allocated and administered by social work.

33. The benefits of self-directed support in delivering personalisation, and better outcomes for individuals are also being recognised across a range of services in conjunction with social care. Direct payment practice in some parts of Scotland has supported individuals to bring together a number of funding streams in one bank account, to manage as an individual budget. The rules around entitlement to and accountability for these funding streams are diverse, resulting in onerous bureaucratic processes. In England, legislation that allows the piloting of individualised or personal budgets for services provided by the NHS, local authorities and Jobcentre Plus has been introduced, including provision for direct payments of these funding streams. For example, regulations for the Right to Control trailblazers allow information sharing between agencies and define rights and responsibilities on the delivery of Right to Control in pilot areas. The regulations include a framework for direct payments that

mirrors that in community care legislation. Evaluation of these and other developments may provide evidence of better streamlining of assessment and accountability processes and a seamless experience for individuals directing their own support.

34. The Scottish Government is not proposing to extend self-directed support to other separate funding streams through this proposed Bill. However, a Bill could provide a clear framework within statute that facilitates this modernisation over the years ensuring a coherent approach to principles.

35. In light of this the Government proposes to frame the new Bill in such a way as to create the legislative basis for potential future developments in self-directed support through social care. The Bill could provide opportunities to maximise choice for individuals and create flexible and creative ways to integrate health and social care provision. This proposed Bill could provide a framework that would ensure consistency in the delivery of direct payments for public funding. In doing so, it could ensure those who wish to use and those who provide direct payments are much clearer about the processes and conditions that apply to them.

36. In summary, the framework aspects that the Government would like to introduce into a new Bill would:

- set the parameters for the areas where Scottish Ministers would be able to bring forward further legislation to amend the SDS Bill for areas beyond current social care provision in the future, and;
- set the parameters to allow for the combining of social and health care and other budgets into one direct payment or individual budget.

37. In addition, we may wish to consider certain framework provisions that would permit the Government to bring forward further legislation to allow Ministers to create pilot areas for self-directed support and direct payments arrangements in specific policy areas such as health care provision. We would welcome views on whether this would be a desirable thing to do at this stage or whether the core framework provisions outlined above would be sufficient.

The new Bill on SDS should provide a legislative framework that would allow the Government to consider extending direct payments in the future.

Consultation questions

- Do you agree that the proposed bill should set a framework that would allow the Government to consider in future extending direct payments and other forms of self-directed support?
- If not, why not?
- What are your views on the broad areas where Ministers should be permitted to bring forward further legislation? If you think it should cover other areas what should these be?

MOVING FROM OPT-IN TO OPT-OUT

38. Despite evidence of a gradual increase over the past 8-10 years the uptake of direct payments is still fairly low at around 3,000 clients. Research evidence highlights a number of factors that support or hinder the growth of direct payments, with strong local and national leadership playing a significant role. There are a number of different approaches to promoting direct payments across the 32 local authorities in Scotland, with dedicated teams or champions in some areas. Some activity is focused on considering direct payments at the initial assessment or review, while others aim for broader awareness raising amongst staff or service users. Currently, the law places a duty on local authorities to offer a direct payment to eligible groups following a formal assessment. In reality, this means that the individual has a right to opt in to direct payments but that the traditional method of obtaining care remains as the "default" position. The lack of awareness of this option also means that many people are not given choice. Recent personal budget pilots in England and some demonstration projects in Scotland have shown that a significant number of people who were made aware of the budget and choices available to them elected to take a direct payment.

39. The Government's wider strategy, also under consultation, will help to address the low take up rates but we are seeking your views on the role of legislation in ensuring choice. Choice can be demonstrated in a number of ways, through:

- providing a summary of the available services and asking individuals if they want to choose a DP/SDS instead;
- providing individuals with information on DP/SDS and asking if they want to opt out – and leave the decision on who provides the care to the local authority;
- including a specific question as part of the care and support planning process on whether the person wants to receive their support as a direct payment, or;
- an entirely balanced set of options are provided to the person with no guidance as to which one is used most often by others.

40. Legislation is seen as a powerful tool to bring about a significant shift in the number of people choosing a direct payment as opposed to an arranged service. In discussions with service users and providers it is suggested that the law should be changed to make SDS the preferred route of service delivery that people should have to opt out of, not opt into. A change from opt in to opt out would not remove the right of individuals to refuse a direct payment but it would ensure that clients were presented with this option as a matter of course and it would embed self-directed support into the assessment process. In line with existing legislation, the local authority would still have the power to provide a service without carrying out an assessment where this was considered necessary, and the opt-out would only apply at the point of agreeing assessed need.

41. The proposal to introduce an opt out for self-directed support, in its broadest sense, or more specifically for direct payments has been discussed with the Self-directed Support Reference Group and at events with both service users and providers, where views were generally favourable.

42. The Government would now like to hear a wider set of views. This is important as your views may have implications on the timing of any implementation of the change to the law. For example, the Government may decide to recommend phased implementation with sufficient time to prepare for introduction of the specific provisions in relation to opt out.

The new Bill on SDS may require for the offer of self-directed support to be provided on an opt-out as opposed to an opt-in basis.

Consultation questions

- Do you agree with our proposal to amend the legislation so that self-directed support is the default position for the provision of social care, requiring individuals to opt out of this method as opposed to the current situation whereby they can choose to opt in?
- If a default position is introduced, should it be for the broader range of options for self-directed support, or for direct payments?
- If you do not agree, why not?

PEOPLE WHO LACK THE CAPACITY TO CONSENT

43. The law requires all eligible adults to give consent to receiving direct payments or, if they lack capacity to do so, to have the consent of their nominated attorney or guardian appointed under the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act"). A power of attorney is an authority granted by an individual to another person to deal with financial or welfare or both matters for the individual in the event of their incapacity. An attorney only has authority to act under the powers of attorney if and when the adult is incapable and once it is registered with the Office of the Public Guardian (OPG). Guardianship orders can only be obtained once the adult has lost capacity and, in contrast to powers of attorney, applications must be made to the sheriff. If the application is granted, the sheriff informs the OPG who then registers it.

44. In the course of our discussions with user groups and service providers it has been suggested that the administrative processes involved with guardianship orders, and the need for the courts to be involved, are creating an unnecessary barrier to the uptake of direct payments. There may be instances where an individual may lack the ability to consent to a direct payment but where they and their carer or family member do not wish to hand over or receive the responsibility for all of the other decisions that come with a formal guardianship arrangement. In addition, the current requirements may be leading some care staff to misunderstand which client groups can be considered for direct payments.

45. In light of this, we would like to explore if the law should be amended to remove the requirement for a guardianship order or a power of attorney before someone can receive a direct payment on behalf of an adult with incapacity. This would remove the requirement for individuals and their carers, family members or the local authority to have a power of attorney or to apply to the sheriff for a guardianship order before they can be considered for a direct payment. Instead, the decision on whether the

individual should manage the direct payment on the cared for person's behalf would rest with the local authority.

46. Where a guardianship order or a power of attorney with relevant powers is in place, any direct payment for an adult with incapacity would be payable to the guardian or attorney. Other people could only become eligible to receive direct payments on behalf of an adult with incapacity if a relevant guardianship order or power of attorney was not in place. This would ensure conflicts would be avoided between people acting on behalf of an adult with incapacity.

47. One option for extending eligibility to receive direct payments on behalf of adults with incapacity could be to expand the Access to Funds scheme. Under the Access to Funds scheme, persons known as "withdrawers" acting on behalf of an adult with incapacity can access funds on his or her behalf. They can use the money to pay taxes; to cater for the adult's basic needs; for the provision of other services provided for the purposes of looking after or caring for the adult; to settle debts; and to pay for other items authorised by the OPG. More information on the current Access to Funds scheme can be found on the OPG's website at [http://www.publicguardian-scotland.gov.uk/whatwedo/intromit with funds.asp](http://www.publicguardian-scotland.gov.uk/whatwedo/intromit%20with%20funds.asp)

48. This scheme could be expanded so that "withdrawers" could receive direct payments on behalf of an adult with incapacity. This option would have the following benefits:

- It would not require applications to be made to the sheriff for a guardianship order where more extensive powers are not necessary;
- withdrawers are monitored by the OPG to ensure that they are using their powers properly and to guard against fraud, and;
- access to Funds is an existing and established scheme.

49. Another option would be to introduce new legislation governing the rules and procedures whereby the direct payment or other form of self-directed support is made. For example, there could be safeguards built into the legislation to ensure that all relevant parties are made aware of, and deliver, their duty of care. Alternatively, the law could take a less prescriptive approach, leave the majority of matters to the discretion of local authorities and subsume any checks into the existing process of completing the community care assessment.

We are considering expanding the categories of persons who can receive direct payments on behalf of an adult with incapacity. This would allow other categories of persons to receive such payments, so long as a guardianship order, or power of attorney, with relevant powers was not already in place.

Consultation questions

- Do you agree that the categories of persons who can receive direct payments on behalf of adults with incapacity should be expanded? If not, why not?
- Do you agree with the proposal to remove the current requirement for Guardianship or Power of Attorney to be in place before a direct payment can be offered?

- Do you agree that where a guardian or an attorney is not already in place, the Access to Funds scheme should be capable of being used as an alternative way of receiving Direct Payments? If not, why not?
- Do you consider that arrangements other than the Access to Funds scheme should be put in place to expand the categories of persons who can receive direct payments on behalf of adults with incapacity? If so, what arrangements?
- Do you have any other views that you would like us to consider if we proceed to bring forward legislative changes on this matter?

EXTENDING ELIGIBILITY

50. The law defines the client groups and situations where direct payments can and cannot be used. The Government has looked at the groups that are excluded and would be interested in your views on amending legislation to allow the following groups and circumstances to become eligible:

- people with mental health problems who are subject to certain compulsory treatment orders;
- to remove the exclusion on the use of direct payments for the purchase of residential care, and;
- to allow carers to obtain certain prescribed forms of support in their own right under a direct payments arrangement.

51. The rest of this section takes each group in turn, presents the pros and cons of making the change and presents the detail of what we propose to do. In addition to the exclusions raised in this document we would be interested to hear if you think that any of the remaining exclusions should be removed.

People who are granted a leave of absence while subject to a Compulsory Treatment Order

52. Currently the law prohibits people who are subject to a compulsory treatment order from receiving a direct payment where the measure authorising detention in a hospital has been temporarily suspended. The recent changes to UK legislation granted local authorities a power to make Direct Payments to individuals on short term absences from hospital.

53. We can see benefits in giving local authorities a power to offer direct payments to this group. This would ensure that the local authority could have regard to the known wishes of the individual but retain the right to refuse a direct payment where it was deemed to be inappropriate under the legislation.

The new Bill on SDS may remove the restriction to direct payments and other forms of self-directed support for people with mental health problems who are subject to certain compulsory treatment orders.

Consultation questions

- Do you agree with our proposal to amend the legislation in order to remove the restriction on providing direct payments and other forms of self-directed support to those with mental health problems who are subject to certain compulsory treatment orders?
- If not, why not?
- Do you agree with our proposal to provide local authorities with a power to provide self-directed support to these people, as opposed to a duty to use this method of support?

Residential Care

54. When direct payments first emerged they were seen by many – including policy makers in Government - as a way for younger people to leave long term residential care. They are still seen as a way to help people to live independent lives and a key part of the Government's priorities to shift the balance of care. However, they are also a method to ensure better outcomes for people whatever these may be and to support the principles of client control and client influence. At present direct payments cannot be used to purchase residential care for any longer than a period of four weeks. We would like to explore whether we should use the opportunity provided by any new legislation to remove the current restriction. The main arguments in favour of such a change are:

- to provide parity between the provision of residential care and other forms of care provided to individuals in their own home;
- to ensure that the law allows for the maximum possible degree of choice and control for individuals who are seeking to or require to, enter residential care, and;
- to provide those who are considering residential care with the full range of social care options that come with a direct payment arrangement.

What is the current process to purchase residential care?

55. Currently, where individuals are assessed as needing residential care on a long term basis the following procedure applies.

56. First of all a financial assessment is needed to determine whether the individual is a "self funder" or "publicly funded" client. The financial assessment is kept under regular review and an individual initially assessed as being a "self-funder" may in time become publicly funded when their capital is depleted.

57. Self funders have capital (including the value of their property) in excess of the upper capital limit as set out in the Charging for Residential Accommodation Guidance (CRAG) and associated regulations made under the National Assistance Act 1948. Self funders 65 and over receive free personal and or nursing care payments from the local authority and fund the balance of the cost of the residential care themselves until their capital falls below the capital limit. Those under 65 qualify for free nursing care (but not free personal care) where assessed as needing it. Publicly funded have capital below the lower capital limit as set out in the CRAG. They do however contribute to the cost of their care from benefits, pensions and other items but the local authority funds the balance.

58. There are 3 routes into residential care:

- **Route 1 – Self Determined:** This route applies to those arranging their own care without a social work assessment or because they have been assessed as not having a level of need which makes them eligible for residential care. In these cases the contract for the provision of care and charges are a matter between the individual and the care home owner.
- **Route 2 – The Mutual Route:** This route covers those assessed by the social work department as needing residential care where the individual chooses to negotiate and purchase a place in a care home of their choosing and to their specification. The local authority will contract with that home for the provision of the free personal and nursing care component of the package only. The contract for the remaining services will be between the individual and the care provider and as for the self-determined route the amount paid is a matter between the individual and the care home manager.
- **Route 3 – The Integrated Route:** This route applies where the individual is assessed as needing residential care and asks the local authority to manage the contractual arrangements on their behalf. The individual should have a choice of care home as long as:
 - the accommodation is suitable in relation to their assessed needs
 - to do so would not cost the Local Authority more than it would usually expect to pay for accommodation for someone with those assessed needs
 - the accommodation will be available
 - the person in charge of the accommodation is willing to provide the accommodation

59. For those over 65, a National Care Home Contract (NCHC) has been developed by COSLA and representatives of independent care home providers and a national rate is negotiated annually for residential care and residential care with nursing. Additional payments can be made in exceptional circumstances for additional assessed needs. The NCHC was developed to standardise terms and conditions and the cost of care homes places for publicly funded clients.

60. While the current arrangements do not deny people choice we would like to explore whether the option of a direct payment arrangement would allow for a greater degree of choice and control for individuals in certain circumstances. For some

people, particularly those who have used direct payment previously, DPs/SDS may be a desirable method to obtain their care package, where their circumstances change (for instance there is a deterioration in their condition) and they require residential care.

61. If it is decided not to remove the blanket ban on purchase of residential care, we may wish to amend the legislation in order to extend the maximum period of residential care that can be purchased under the Regulations. At present, individuals can only receive direct payments for a total of four weeks of residential care added together in this way in any 12-month period. Should we consider extending the maximum time period to cover, for example, end of life care and situations where individuals want to make use of a direct payment arrangement?

62. We would like to hear your views on these proposals and the potential impact of each option. In particular, we would like to hear from service providers and local authorities about the potential impact of any change upon this sector. For example, if direct payments were extended to the provision of personal care in a residential setting how might this change interact with the provision of free personal care, particularly in terms of the payments for what are known as "self-funders" in care homes?

63. Another key issue is whether the individual would be given sufficient funds under a DP arrangement to allow them to purchase the residential care of their choice. The National Care Home Contract rate may not apply to those purchasing their own care and self funders can often pay considerably more than the National Care Home Contract rate. We would welcome views on how many people might want to take up the offer of a direct payment for long-term residential care. Research has shown that some people are reluctant to opt for a direct payment. This can be due to a perception that direct payments bring quite extensive burdens, such as the responsibilities and paperwork that come with entering into a contract with a care home. It may be the case that many prospective residential care home customers may decide not to take up the option of a direct payment. At the same time, it may be argued that there are few compelling reasons *not* to allow direct payments to be used to purchase residential care. We would like to hear your views on the relative merits of this proposal and how it might work in practice.

We are considering options to amend or remove the restriction on the use of direct payments for the purchase of residential care

Consultation questions

- What are your views on the proposal to remove the current restriction on the use of DPs/SDS for residential care?
- If you think the restriction should remain, please explain why
- What are your views on the potential impact of an extension of DPs/SDS to residential care, in particular the impact on care home provision?
- Is there any advantage to extending DPs/SDS to the free personal and or nursing care element of care purchased under Route 2 (see above)?
- Should DPs/SDS be extended to care home places purchased under Route 3 (see above)?

- | |
|--|
| <ul style="list-style-type: none">• Would the advantages of DPs/SDS for Route 3 contracts be greater than the benefits currently derived from the National Care Home Contract? |
|--|

Carers

64. There are over 657,000 unpaid carers in Scotland. Unpaid carers help to support people affected by illness, disability or substance misuse to live safely and independently at home, to enjoy a quality of life and to maintain links with their families, friends and local communities. However, some carers experience stress and this can impact on the carer's own quality of life and on their health. This might include problems that can lead to a deterioration in the condition of the cared for person or problems that can affect the ability of the carer to continue to provide care and support to their loved one. It can impact on their employment and their financial situation and on relationships, ambition and opportunity. In turn, this can sometimes affect the quality of life of the cared for person. Without appropriate and timely support and information carers can be at real risk of experiencing crisis.

65. Some scenarios where a small expense incurred in the short term might help to prevent deterioration of the situation, provide assistance to carers and, arguably avoid the need for greater expense in the longer term, are provided below.

- The local authority may wish to make a direct payment to support the carer in specific tasks and demands associated with caring. This may be provided as an alternative to the council paying for provision of a service to the household, or the council providing a training course to the carer.
- Respite care is already funded by local authorities to allow short breaks for both the carer and the cared for person. The service user is supported and the carer can benefit from a break. However, the service is provided through traditional means on behalf of the cared for person or it is provided as a direct payment to the cared for person. In some situations it may be more appropriate to make a direct payment to the carer so that they can have a short break.
- The local authority may already be making payments towards costs to transport the cared for person. It may benefit the carer and cared for person (and be more cost effective in the long-term) for the council to instead pay for driving lessons and a test to enable the carer to transport the service user.
- The provision of other services which relieves the carer of other responsibilities (for example housework, childcare, gardening) and enables the carer to focus on providing the more personal forms of care

66. It is in the interests of all parties – the carer, the cared for person and the providers of social care – to ensure that carers and their families receive a package of social care which meets their needs and delivers the best possible outcomes for the individual in terms of better health and well being. For its part the law should be flexible enough to provide carers and service providers the widest possible set of tools to do this.

67. We would like to explore the potential to amend the legislation to provide local authorities with the power to make direct payments to carers. The proposal is to limit the scope of such payments to apply to a limited range of circumstances. This change would be provided to councils as a power as opposed to a duty and, as with other DP arrangements, the direct payment could only be available in place of a service that would otherwise be provided by the council to the benefit of either the carer or the cared for person. Any change would have to focus on those interventions which help to prevent the deterioration of the condition of the carer or cared for person. In other words, the type of payments which would help to prevent the local or health authority incurring greater expense at that time or at a later date

68. In England and Wales¹ since 2001 carers have been eligible for direct payments in place of the services they have been assessed as needing. In Scotland the law does not allow for direct payments to be made to carers in their own right. Nor does the law prescribe a social care *service* to carers as such, other than in situations where the carer meets one or more of the eligibility criteria set out in the legislation for community care services.

69. This means that the scope to amend the law for the very specific circumstances outlined above are both limited and fairly complex however there are some options that we would like to explore. One option, for example, is to amend the current regulations to prescribe "carers" as persons to whom the local authority may make available services and facilities provided by them under the 1968 Act. Alternatively, the definition of "person in need" could be amended to include a new category for carers and the regulations could then be amended to refer to this new category. Simply being a carer would not render someone eligible for direct payments. To satisfy the requirements of Section 12 of the 1968 Act, the carer would need to demonstrate that he or she is in need of assistance and thereafter the existing assessment procedure would commence.

70. We might also want to prescribe some of the circumstances in which local authorities would not be allowed to provide payments. For example:

- the purchase of any services which would not directly meet the assessed needs of the cared for person;
- the purchase of any services from a close relative living in the same household – similar to the rules which govern the purchase of services by the cared for person at the moment, or;
- instances where the carer meets the description of any of the excluded groups as defined by the Regulations updated by the new Bill

71. Finally, we would like to hear your views on the principles which need to guide any change to the law on DPs for carers. For example, the principle that any new legislation should reflect carers' wishes to continue in their caring role. Alternatively, there is the principle that any extension of eligibility to carers should not affect the carer's entitlement to Carer's Allowance and any other benefits.

¹ See Section 5 of the (Carers and Disabled Children Act 2000

72. As stated above, we propose that any new legal provisions should explicitly relate to circumstances that help to *prevent* aggravation of the needs of both the carer and the cared for individual. Indeed, the extension of DPs to carers may well guard against even greater expense to the local authority or the health care sector arising from the escalation of the condition of the cared for person or added pressured placed upon the carer.

A new Bill on SDS may remove the restriction placed on local authorities to provide direct payments or other forms of self-directed support to unpaid carers, where this supports carers to continue to provide care.

Consultation questions

- Do you agree with the principle that carers should be made eligible to receive self-directed support and direct payments in certain circumstances?
- If not, why not?
- If so, what are your views on the detailed proposals for how this might be achieved?

CONCLUSION

73. In summary, the Government would like your views on our proposals for a new Bill on self-directed support, in particular the following proposals:

- to consolidate and update existing legislation on direct payments for social care;
- to place the term self-directed support into statute, provide a statutory definition of this term and place both direct payments and individual budgets and the accompanying rights and obligations for both processes, under this framework;
- to provide the framework for SDS that would allow for its extension beyond social care in the future;
- to move from an opt-in to an opt-out arrangement for the offer of a DP/SDS arrangement;
- to amend the requirements for those who lack the capacity to consent and the individuals who wish to consent on their behalf;
- to extend the eligibility to DPs/SDS to those with mental health problems who are subject to certain compulsory treatment orders;
- to remove the restriction on the use of DPs/SDS to purchase residential care, and;
- to extend eligibility to carers.

74. We would like to hear your views on both the principle and the detail of what we propose.

Proposals over and above those suggested in this document

75. If you think that any new legislation should contain proposals on SDS in addition to those put forward in this consultation document we would also be happy to hear from you. Suggestions must cover the rights, obligations and duties in relation to self-directed support for social and health care. We cannot consider proposals relating to wider aspects of social or health care or for that matter any policy matter beyond the particular subject matter of self-directed support for social and health care. We would appreciate if you could provide the reason why you think that your proposal is necessary, what impact it would have in terms of the client group for social care and the social care sector in general and what things would need to be considered if it was to work in practice.

Partial Regulatory Impact Assessment

76. During the consultation period we will publish a Partial Regulatory Impact Assessment. This will contain a more detailed assessment of the costs and benefits of each part of the legislative proposals. It will contain an assessment and seek your views on, the potential impact on administration and regulations for local authorities and social care providers such as companies and voluntary organisations.

Equalities Impact Assessment

77. You will also be able to access a draft Equalities Impact Assessment. The EIA considers how new legislation may impact, either positively or negatively, on different sectors of the population. The assessment is based on existing evidence around SDS and on our consultation work up to this point. The assessment considers six equality strands age, disability, gender, race, lesbian, gay, bisexual and transgender, and religion and belief.

ANNEX A: GUIDE TO CURRENT LEGISLATION

78. This annex provides a short guide to each Act and set of Regulations which provide the law governing direct payments for social care. The legislation that enables self-directed support is contained within:

- The Social Work (Scotland) Act 1968
guidance on the sections relating to direct payments can be found at:
<http://www.scotland.gov.uk/Publications/2003/03/16777/20192>
- The Community Care (Direct Payments) Act 1996
<http://www.opsi.gov.uk/acts/acts1996/1996030.htm>
- Regulation of Care (Scotland) Act 2001
<http://www.opsi.gov.uk/legislation/scotland/acts2001/20010008.htm>
- Community Care and Health (Scotland) Act 2002
<http://www.opsi.gov.uk/legislation/scotland/acts2002/20020005.htm>
- The Community Care (Direct Payments) (Scotland) Regulations 2003 (SSI 2003 No. 243)
<http://www.opsi.gov.uk/legislation/scotland/ssi2003/20030243.htm>
- The Community Care (Direct Payments) (Scotland) Amendment Regulations 2005 (SSI 2005 No. 114)
<http://www.opsi.gov.uk/legislation/scotland/ssi2005/20050114.htm>
- The Mental Health (Care and Treatment) (Scotland) Act 2003 (Modification of Subordinate Legislation) Order 2005 (SSI 2005 No. 445)
http://www.opsi.gov.uk/legislation/scotland/ssi2005/ssi_20050445_en.pdf
- The Disability Equality Duty (DED)
www.drc-gb.org/disabilityequalityduty/
- National Health Service Reform (Scotland) Act 2004 (asp 7)
<http://www.opsi.gov.uk/legislation/scotland/acts2004/20040007.htm>
- Adult Support and Protection (Scotland) Act 2007
<http://www.opsi.gov.uk/legislation/scotland/acts2007/20070010.htm>
- The Community Care (Direct Payments) (Scotland) Amendments Regulations 2007 (SSI 2007 No. 458)
http://www.opsi.gov.uk/legislation/scotland/ssi2007/ssi_20070458_en.pdf

79. In addition to these "core" items of legislation the arrangements also relate to the following pieces of legislation:

- Children (Scotland) Act 1995

http://www.opsi.gov.uk/ACTS/acts1995/ukpga_19950036_en_1

- Adults with Incapacity (Scotland) Act 2000
http://www.opsi.gov.uk/legislation/SCOTLAND/acts2000/asp_20000004_en

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The Social Work (Scotland) Act 1968

80. The Social Work (Scotland) Act 1968 ("the 1968 Act") contains a wide range of duties, responsibilities and powers related to social care in general and social care assessments in particular. Sections 12B and 12C of the 1968 Act place a duty on local authorities to make direct payments available to certain adults and children who wish to receive them. This includes people with disabilities. A detailed summary of the key sections that are relevant to direct payments are set out below:

- **Section 12A** of the 1968 Act places certain duties on local authorities before they provide the individual with social or community care. Amongst other things, it requires the local authority to conduct a formal assessment of an individual's needs for community care services, to take account of the individual's views and to consult a medical practitioner as part of that assessment. This process must be completed before the local authority can offer a direct payment or indeed any other method of support. Direct payments may only be offered to eligible adults who under section 12A of the 1968 Act, have been assessed as needing community care services
- **Section 12AA and 12AB** covers the right of carers to a carer's assessment. Section 12AA provides a right to carers to ask the local authority to undertake the carer's assessment. The carer's assessment is an assessment of the carer's ability to provide or continue to provide care. Although not formally stated in the legislation this may be where the carer feels that they are unable to cope. Once this has been requested, the local authority must comply with the request and undertake the assessment. Thereafter, if an assessment of the cared for person's needs is required, the local authority must take account of the carer's assessment when conducting the cared for person's assessment. Section 12AB covers situations where a carer provides or intends to provide a substantial amount of care on a regular basis. Under these situations the local authority has a duty to notify the carer that he may be entitled to request a carer's assessment
- **Section 12B** is the main section which deals with the rights and obligations related to direct payments and the process by which the local authority provides the direct payments. This section was not part of the Act when it was first introduced. Instead, it was inserted into the 1968 Act by Section 4 of the Community Care (Direct Payments) Act 1996. Section 12B sets out in detail the duties on local authorities and laws/procedures in relation to
 - the circumstances under which a local authority can offer to provide a direct payment for community care services;

- contributions to and repayment of, direct payments by the cared for person;
- the rules on when and how consent can be granted for a direct payment by or on behalf of the cared for person;
- who can provide a community care service under a direct payment arrangement
- the levels of financial contributions permitted to be made by the cared for person in order to contribute to services where the bulk of the service is provided by the direct payment
- the scope for subsequent regulations. In particular, the 1968 Act allows further regulations to set down the categories of people who can and cannot be employed to provide a social care service under the direct payment, the circumstances where the local authority can terminate the direct payment and circumstances where payments can be made on behalf of the cared for person. It specifically prevents regulations to allow direct payments which would provide for residential accommodation.
- modifications to the definition of community care services in order to widen it to include services for children.

Children (Scotland) Act 1995

81. Section 22 (1) of the Act contains local authorities' duties to promote the welfare of children in need. Section 12B (1) of the 1968 Act provides that where a local authority have a duty to provide a service under section 22 (1) of the 1995 Act, the authority shall make to that person a direct payment in order to secure provision of that service.

The Community Care (Direct Payments) Act 1996 ("the 1996 Act")

82. This Act amended and updated the 1968 Act, adding the key sections 12B and 12C, which are summarised above.

Adults with Incapacity (Scotland) Act 2000

83. This sets out the arrangements under which a person can become a guardian or can have power of attorney for another person, make decisions and manage affairs on behalf of the cared for person. The requirement under the direct payments laws is that a person can only become a guardian by virtue of an order made under section 58 of the 2000 Act, or by virtue of section 88(1) of, and paragraph 1 of Schedule 4 to, the 2000 Act, and who has power to deal with a direct payment on behalf of the beneficiary. One of the legislative proposals put forward in this consultation is where a direct payment or other form of self-directed support is involved, to replace this link with an alternative arrangement.

Regulation of Care (Scotland) Act 2001 ("the 2001 Act")

84. Like the 1996 Act, this Act updated and amended the existing legislation contained in the 1968 Act. Section 70 made some amendments to Section 12B of the 1968 Act. The purpose of these amendments was to widen the eligibility to direct

payments to particular groups of children as defined under section 22(1) of the Children (Scotland) Act 1995.

Community Care and Health (Scotland) Act 2002 ("the 2002 Act")

85. Section 7 in this Act introduced a number of provisions, which amend section 12B of the 1968 Act. These provisions have helped make direct payments more widely available and increased take up amongst people with a disability and older people who require community care and children's services.

86. In addition to being able to recruit staff and purchase support from private agencies or voluntary sector providers, the 2002 Act made it possible for direct payments to be used to purchase services from any local authority. Where direct payments are made on a 'gross' basis local authorities have been given a legal mechanism for recovering any amount an individual was assessed as being able to contribute.

87. Part 2 of the 2002 Act allows delivery of health services and some continuing health needs by direct payments if the local authority and NHS Board have arrangements to allow this to happen.

The Community Care (Direct Payments) (Scotland) Regulations 2003

88. From 1 June 2003 local authorities have been under a statutory duty, in terms of the Community Care (Direct Payments) (Scotland) Regulations 2003, as amended² ('the 2003 Regulations'), to offer direct payments to all who are potentially eligible, as defined by these Regulations.

89. The 2003 Regulations provided a number of follow-up regulations to the 1968 Act. The main purpose of the regulations is to clarify the groups which are not eligible to receive direct payments. The proposals to widen eligibility found later in this consultation would result in changes to these regulations.

90. The 2003 Regulations provided the detailed list of all of the people excluded from eligibility to direct payments. Examples include people who the local authority deem as being incapable of managing a direct payment, various categories of patients and various categories of people subject to court orders or released from prison. Where a person is over 18 and clearly unable to give consent, or is under the age of 18, Regulation 3 of The Community Care (Direct Payments) (Scotland) Regulations 2003 ('the 2003 Regulations') specifies certain categories of people who are able to give consent on behalf of the service user, namely those with parental responsibility, attorneys and guardians who have powers to manage direct payments on the user's behalf.

91. The Regulations define a 'person in need' by referring to the definition in Section 94(1) (b) of the 1968 Act. This might include people (adults or children) with

² SSI 2003/243 as amended by the Mental Health (Care & Treatment) (Scotland) Act 2003 (Modification of Subordinate Legislation) Order 2005 SSI 2005/445.

any kind of disability (see below). The following groups of people are eligible to receive direct payments:

- Disabled adults to purchase community care services
- Disabled people aged 16 and 17 to purchase children's services
- Disabled people with parental responsibility to purchase the children's services their children have been assessed as needing
- Parents and people with parental responsibility for a disabled child to purchase the services the disabled child has been assessed as needing
- Children in need
- Disabled adults and 16 and 17 year olds to purchase housing support services
- Older people aged 65 years and over who are assessed as needing community care services due to infirmity or age, and
- Attorneys and guardians, with the relevant powers can receive direct payments on behalf of people who are unable to give consent to arranging their own services.

92. The 2003 Regulations, (made under Section 12B (1) (b) of the 1968 Act) also specify that direct payments may not be offered to certain people who are restricted by certain mental health or criminal justice legislation. People in these groups are required to receive specific community care services. Offering them direct payments in order to pay for those services would not give a sufficient guarantee that the person would receive the services required.

93. The following is an extract from the Regulations and provides the full list of individuals currently excluded from a direct payment by means of Regulations:

"Description of persons specified for the purposes of section 12B(1) of the Act

The description of persons specified for the purposes of subsection (1) of section 12B of the Act (persons who are not eligible for any direct payment) is-

(a) a person who does not fall within paragraph (b), of the definition of 'persons in need' in section 94(1) of the Act (interpretation);

(b) a person who appears to a local authority to be incapable of managing a direct payment, with or without assistance;

(c) a person who, in the case of a service under section 22(1) (promotion of welfare of children in need) of the Children (Scotland) Act 1995[7], is-

(i) a child in need aged less than 16 years; or

(ii) entitled to such a service in respect of a child in need, otherwise than as a parent of, or person having parental responsibility for that child;

(d) revoked

(e) a person who is subject to-

(i) a compulsory treatment order made under section 64(4) (a) (powers of the Tribunal on application under section 63: compulsory treatment order) of the 2003 Act that authorises the measure mentioned in section 66(1) (a) (measures that may be authorised) and in respect of which a certificate has been granted under section 127(1) (suspension of measure authorising detention); or

(ii) a compulsion order made under section 57A(2) (compulsion order) of the 1995³ Act that authorises the measure mentioned in section 57A(8)(a) of that Act and in respect of which a certificate has been granted under section 127(1) (suspension of measure authorising detention) of the 2003 Act as applied by section 179(1) (suspension of measures) of that Act;

(iii) an emergency detention certificate granted under section 36(1) of the 2003 Act in respect of which a certificate has been granted under section 41(1) of that Act; or

(iv) a short-term detention certificate granted under section 44(1) of the 2003 Act in respect of which a certificate has been granted under section 53(1);

(f) a person who is subject to a compulsion order made under section 57A(2) (compulsion order) of the 1995 Act and a restriction order made under section 59 (restriction order) of that Act who has been conditionally discharged in accordance with section 193(7) (powers of the Tribunal on reference under section 185(1), 187(2) or 189(2) on application under section 191 or 192(2)) of the 2003 Act;

(g) a person who is subject to an order of a court under sections 57(2)(a), (b), (c) or (d)[12], 57A(2) or 57A(2) and 59 of the 1995 Act or who is required to submit to treatment for that person's drug or alcohol dependency or mental condition by virtue of a requirement of a probation order in terms of sections 228 to 230[13] of the 1995 Act;

(h) a person who is subject to a drug treatment and testing order imposed under section 234B of the 1995 Act[14];

(i) a person who is released on licence under section 22 of the Prisons (Scotland) Act 1989[15] or under section 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993[16] and in either case is subject to a condition to submit to treatment for his mental condition or for drug or alcohol dependency;

(j) a person who is released on licence under section 37(1) of the Criminal Justice Act 1991[17] subject to a condition that he submits to treatment for his mental condition or for his drug or alcohol dependency;

(k) a person who is required to submit to treatment for his mental condition or drug or alcohol dependency by virtue of a community rehabilitation order within the meaning of section 41 of the Powers of Criminal Courts (Sentencing) Act 2000[18] or a community punishment and rehabilitation order within the meaning of section 51 of that Act[19];

³ Criminal Procedure (Scotland) Act 1995, as amended by the Mental Health (Care & Treatment) (Scotland) Act 2003

(l) a person subject to a drug treatment and testing order imposed under section 52 of the Powers of Criminal Courts (Sentencing) Act 2000;

(m) a person who is absent from hospital with leave given in accordance with section 17 (leave of absence from hospital) of the 1983 Act;

(n) a person who is subject to after care under supervision (which expressions shall be construed in accordance with section 25A (application for supervision) of the 1983 Act[20]);

(o) a person in respect of whom there is in force a condition imposed in accordance with section 42(2) (powers of Secretary of State in respect of patients subject to restriction orders) or 73(4) (power to discharge restricted patients) (including such a condition which has been varied in accordance with section 73(5) or 75(3)) of the 1983 Act[21]; or

(p) a person in respect of whom there is in force a supervision and treatment order within the meaning given by Part I of Schedule 2 to the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991[22]."

The Mental Health (Care and Treatment) (Scotland) Act 2003

94. This Act was introduced after a comprehensive review of mental health legislation in Scotland. The purpose was to place the delivery of mental health services within a rights-based and patient-centred environment. The main link to direct payments is Part 7 which defines the procedures for compulsory treatment orders. Currently, people who are subject to certain compulsory treatment orders cannot receive a direct payment.

95. Regulation 45(13) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (Modification of Subordinate Legislation) Order 2005 (SSI 2005 no. 445) which amends regulation 2 of the 2003 Regulations

96. One of the government's proposals in this consultation is to remove the current exclusion which prevents people who with mental health problems who are subject to certain compulsory treatment orders, from directing their own support under a DP or SDS arrangement.

National Health Service Reform (Scotland) Act 2004 "the 2004 Act"

97. Under this Local Government act, Community Health Partnerships (CHPs) were established as committees or sub-committees of a Health Board.

The Community Care (Direct Payments) (Scotland) Amendment Regulations 2005

98. These regulations made a relatively small amendment to the 2003 Regulations to make all persons aged 65 or over assessed as needing community care services

because of infirmity or old age subject to the other exclusions specified in regulation 2(b) to (p) of the 2003 Regulations (regulation 2(2)).

Disability Equality Duty (2006)

99. The Disability Equality Duty came into force on 4 December 2006. This legal duty requires all public bodies to actively look at ways of ensuring that disabled people are treated equally. All of those covered by the specific duties must also have produced a Disability Equality Scheme.

Adult Support and Protection (Scotland) Act 2007

100. Section 63 of this Act amends direct payments legislation. The Act empowers local authorities to offer increased flexibility in tailoring individualised packages of support. The 2007 amendment regulations change the rules on employing close relatives for self-directed support under the 2003 regulations.

The Community Care (Direct Payments) (Scotland) Amendment Regulations 2007

101. From 12 November 2007, unless a local authority is satisfied that securing a service from such a person is necessary to meet the beneficiary's need for a service, or that securing the service from such a person is necessary to safeguard or promote the welfare of the child in need, a local authority may not allow certain close relatives to be employed to provide support services (the precise services to which this applies are specified in regulation 4 of the 2003 regulations as amended by the 2007 regulations). The 2007 regulations expand the list of close relatives of the beneficiary from which services may not normally be purchased. This is in order to reflect modern family set-ups and applies irrespective of where they live.

ANNEX B: STATISTICS

Table 1: Number of clients receiving Self-directed Support (Direct Payment) packages by Local Authority, 2001-2009

	Number of clients								
	2001	2002	2003	2004	2005	2006	2007	2008	2009
Aberdeen City	4	4	11	40	46	56	101	113	101
Aberdeenshire	8	6	11	19	43	64	101	132	187
Angus	4	23	30	32	31	37	40	47	48
Argyll and Bute	0	0	0	29	62	79	89	104	129
Clackmannanshire	1	4	18	23	30	31	32	22	34
Dumfries and Galloway	7	25	27	39	74	116	141	163	170
Dundee City	0	0	0	9	20	33	38	44	47
East Ayrshire	0	0	17	25	36	36	51	64	67
East Dunbartonshire	0	0	0	1	13	21	23	36	63
East Lothian	5	7	7	13	19	28	31	46	60
East Renfrewshire	0	0	0	2	11	15	15	37	37
Edinburgh	67	49	89	120	142	152	209	273	377
Eilean Siar	0	3	5	4	7	5	8	11	18
Falkirk	0	0	0	19	40	58	61	52	53
Fife	30	64	120	190	213	262	309	334	318
Glasgow	17	16	15	26	102	124	193	208	223
Highland	14	23	43	55	126	194	225	176	172
Inverclyde	0	0	0	0	3	6	9	16	22
Midlothian	0	0	0	4	20	25	29	33	51
Moray	0	5	7	17	28	32	43	46	43
North Ayrshire	0	0	0	19	23	32	47	48	52
North Lanarkshire	3	10	11	18	24	24	37	43	60
Orkney	0	0	1	16	40	46	45	30	32
Perth and Kinross	4	4	19	20	25	31	40	67	53
Renfrewshire	3	3	3	7	14	23	32	45	59
Scottish Borders	12	20	50	87	103	105	117	142	154
Shetland Islands	0	0	0	4	5	10	11	12	16
South Ayrshire	22	18	31	32	34	41	39	39	46

	Number of clients								
	2001	2002	2003	2004	2005	2006	2007	2008	2009
South Lanarkshire	0	0	0	4	18	30	46	58	169
Stirling	0	0	0	8	25	37	37	59	50
West Dunbartonshire	0	0	0	13	27	29	31	41	38
West Lothian	6	8	19	17	34	47	61	64	68
Scotland	207	292	534	912	1,438	1,829	2,291	2,605	3,017

Source: Self-directed Support (Direct Payments) Survey, Scottish Government

Chart 1: Number of people who received direct payments by client group, 2009

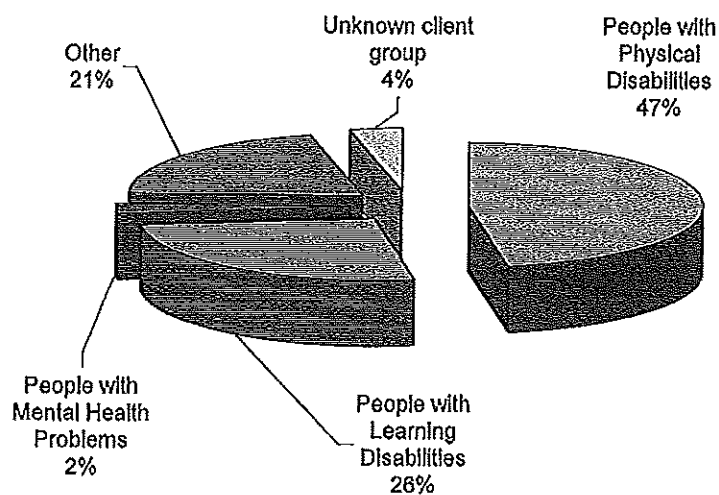
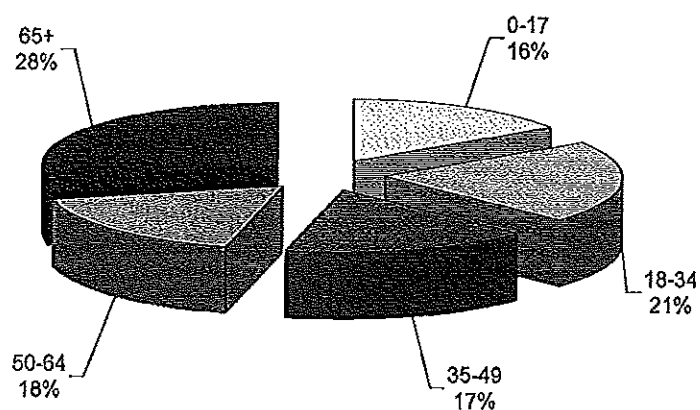


Chart 2: Proportion of clients who received direct payments (2009) by age group



ANNEX C: GLOSSARY AND ABBREVIATIONS

- **Social care and support:** This term is not used in the existing legislation but it is commonly used by policy makers, social care providers and service users. Social care support covers a wide range of services provided by local authorities and the independent sector to people assessed as in need. It covers services such as day centres which help people with daily living, support with certain types of personal care, such as help with washing, dressing, feeding or assistance in going to the toilet, as well as home-help. However, it covers a much wider range of support to enable people to live a full life. This includes training and employment and services that promote inclusion in communities.
- **Community care services** is a term used in legislation to describe the services which we sometimes call "social care". In terms of the legislation community care services means services, other than services for children, which a local authority are under a duty or have a power to provide, or to secure the provision of, under the 1968 Act.
- **Private carer** is a term used quite often in legislation. It means a person who is not employed to provide the care in question by any body in the exercise of its functions under any enactment.
- **Self-directed support** is a term that describes the ways in which individuals and families can have informed choice about the way that support is provided to them. It has generally been used to describe the delivery of social care but it can cover a much wider range of services such as health care and education.
- **Direct payments** are payments in lieu of services provided directly to individuals assessed as being in need of community care services.
- **Individual budgets** are an allocation of funding given to users after an assessment for support. The assessment of the budget should be through a transparent process that demonstrates compliance with community care and other legislation. Where there has been a joint assessment, the budget may include money for health and educational/training needs.

ANNEX D: CONSULTATION LIST

Scottish Government

Carers (SG)
Changing Lives (SG)
Improving Delivery (SG)
Independent Living (SG)
Joint Improvement Team (SG)
Joint Outcomes Unity (SG)
Shifting the Balance of Care (SG)

Voluntary Organisations and Private Care Providers

Action for Children
Advocating Together Dundee
Age Concern and Help the Aged Scotland
Ayrshire Independent Living Network
Alzheimer Scotland
Arc Scotland
Audit Scotland
BEMIS
Borders Direct Payment Agency
Camphill Scotland
Capability Scotland
Carers Scotland
Carr Gomm Scotland
Coalition of Carers In Scotland
Community Care Providers Scotland
Cornerstone
Crossroads Scotland
D P Caledonia
Deafblind Scotland
Direct Payments Caledonia
Down's Syndrome Scotland
Dundee Direct Payment Centre
ELCAP Ltd
ENABLE Scotland
Equal Futures
Glasgow Centre for Inclusive Living
Glasgow Social Care Providers
ILiS (Aberdeen)
In Control Scotland
Inclusion Scotland
Key Housing Association
Learning Disability Alliance, Scotland
Lothian Centre for Inclusive Living
Margaret Blackwood Housing Association
Midlothian Community Care Providers Forum
Mochridhe
Momentum
National Autistic Society

North Lanarkshire Disability Forum
PAMIS
Partners in Advocacy
Penumbra
People First
Positive Steps Partnership
Princess Royal Trust for Carers
Quarriers
Richmond Fellowship Scotland
RNIB
RNID
SAMH
SCAH
SCOD
Scottish Association for Mental Health
Scottish Care
Scottish Care at Home
Scottish Consortium for Learning Difficulties
Scottish Development Centre for Mental Health
Scottish Recovery Network
Scottish Society for Autism
South Lanarkshire Disability Forum
SPAEN
Shared Care Scotland
Thistle Foundation
Values into Action

Local Authorities

Aberdeen City
Aberdeenshire
Angus
Argyll and Bute
City of Edinburgh
Clackmannanshire
Comhairle nan Eilean Siar
Dumfries and Galloway
Dundee City Council
East Ayrshire
East Dunbartonshire
East Lothian
East Renfrewshire
Falkirk
Fife
Glasgow
Highland
Inverclyde
Midlothian
Moray
North Ayrshire
North Lanarkshire
Orkney
Perth and Kinross

Renfrewshire
Scottish Borders
Shetland
South Ayrshire
South Lanarkshire
Stirling
West Dunbartonshire
West Lothian

Health Boards

NHS Ayrshire & Arran
NHS Borders
NHS Dumfries & Galloway
NHS Fife
NHS Forth Valley
NHS Grampian
NHS Greater Glasgow & Clyde
NHS Highland
NHS Lanarkshire
NHS Lothian
NHS Orkney
NHS Shetland
NHS Tayside
NHS Western isles

Other Key Interests

Association of Directors of Social Work
Convenor of Health and Sport Committee
CoSLA
Equality and Human Rights Commission
Mental Welfare Commission
MEPs
Scottish Commission for the Regulation of Care
Scottish Social Services Council
SG Legal Deposit Library
Social Work Inspection Agency
SPICE

ANNEX E: THE SCOTTISH GOVERNMENT CONSULTATION PROCESS

Consultation is an essential and important aspect of Scottish Government working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. However, in general, Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

The Scottish Government encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors, and no two exercises are likely to be the same.

Typically Scottish Government consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Government web site enabling a wider audience to access the paper and submit their responses⁴. Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Government library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD, telephone 0131 244 4565).

All Scottish Government consultation papers and related publications (eg, analysis of response reports) can be accessed at: [Scottish Government consultations](http://www.scotland.gov.uk/consultations) (<http://www.scotland.gov.uk/consultations>)

The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

⁴ <http://www.scotland.gov.uk/consultations>



RESPONDENT INFORMATION FORM

CONSULTATION on PROPOSALS FOR A SELF-DIRECTED SUPPORT (SCOTLAND)
BILL - Please Note That This Form Must Be Returned With Your Response To Ensure That We Handle Your Response Appropriately

1. Name/Organisation

Organisation Name

Title Mr ☐ Ms ☐ Mrs ☐ Miss ☐ Dr ☐ Please tick as appropriate

Surname

Forename

2. Postal Address

Postcode:

Phone:

Email:

3. Permissions

I am responding as...

Individual

☐

/ Group/Organisation

☐

Please tick as appropriate

- (a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate ☐ Yes ☐ No

- (b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available ☐

or

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

or

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

- (c) The name and address of your organisation will be made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your response to be made available?

Please tick as appropriate ☐ Yes ☐ No

- (d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

