

Waiving of Charges for Support to Carers: Response to the Scottish Government consultation

Social Work Scotland welcomes the opportunity to respond to the Scottish Government consultation on two options to clarify the current 2014 Regulations¹ waiving charges for support for carers. Social Work Scotland (formerly the Association of Directors of Social Work - ADSW) is the leadership organisation for the social work profession in Scotland.

We acknowledge that the consultation is not formal, that “the aim is to ‘sense-check’ the options, and that the timescale is tight: being issued on 21 August to be returned by 10 September 2015. We also note that the consultation paper is not available on the Scottish Government’s website; in order to assist readers of Social Work Scotland’s response on our website we have therefore attached the consultation paper as an Annex, for ease of reference.

Executive Summary

In summary our position is that:

- (i) We are very concerned about the **delay in funding** the legislation waiving charges for support to carers, which has been implemented since April 2014.
- (ii) **Option 1** – charges are to be waived for all direct and indirect support to carers, following a carer’s assessment – is preferable, **but only if this policy is fully funded**. Option 1 best meets the Scottish Government’s three-point criteria for “success” (Para 16, page 3), and gives the clearest expression to the Ministerial commitment to waive charges for carers. It is the option likely to be supported by an overwhelming majority of carers, and probably is also easier to implement.
- (iii) **Option 2** is a significant roll-back of the 2014 Regulations and a dilution of Scottish Ministers’ policy stance of waiving charges for carers. It seeks to amend the Regulations to separate out “indirect support to the carer”, which would include replacement care for the cared-for person who could then be charged. In a small number of cases it may also prove difficult to define the distinction between direct and indirect support to carers where both carer and cared-for person have assessed needs which would be met by temporary replacement care. Social Work Scotland would support this option **only if Option 1 was not fully funded, but Option 2 was funded in full**.
- (iv) We are concerned that the **funding intentions remain ambiguous** and that any funding appears to be tied to the implementation of the Carers Bill, probably from 1 April 2017. This would mean that local authorities will have had to carry the additional costs of the current unfunded 2014 Regulations for 2014/15, 2015/16, and 2016/17 during a period of ever increasing financial austerity for council services. With COSLA and Social Work Scotland, we estimate full implementation costs at around £16 million per year, at 2013/14 levels of demand, and believe that **funding should now be made available from 2016/17**, as part of the Scottish Government’s response to the Spending Review.

¹ The Carers (Waiving of Charges for Support) (Scotland) Regulations 2014, SSI 2014 No.65.
http://www.legislation.gov.uk/ssi/2014/65/pdfs/ssi_20140065_en.pdf

More detailed comments

Our comments further consider this central issue of funding before considering the two options in more detail.

General comments: Lack of funding

Social Work Scotland is concerned about the delay in funding the legislation waiving charges for support to carers, which has been implemented since April 2014. Our response (as ADSW), and that of COSLA and many local authorities to the Scottish Government's original consultation in draft regulation and guidance in 2013 stressed the need to fully fund this policy:

ADSW acknowledges the considerable support provided by carers and their invaluable contribution to the care system. They are of central importance in retaining the quality of life for so many people in the community and, without them, demand for formal services would be unmanageable. It is essential that carers, themselves, are supported. The proposals, however, whilst well intentioned, raise a number of concerns for ADSW. Our members have to manage a wide presentation of need with finite resources and, therefore, have a responsibility to ensure maximum benefit from available finances. [...]

Without additional funding, we do not believe [that waiving charges] is realistic or sustainable.

In March 2014, the Scottish Government's response to the consultation acknowledged that "Many respondents commented on the financial viability of the proposals". However the 2014 Regulations were laid before the Scottish Parliament on 3.3.14 and approved under negative procedure, with no implementation funding. Instead, the accompanying Policy Note² summarised the results of the consultation and ended with this paragraph:

Financial Effects

12. Presently, most local authorities support carers as a consequence of services put in place for cared-for persons. For those that do support carers directly, information gathered indicates that some do not charge them at all and others seek a minimal contribution. The Scottish Government appreciates that waiving charges for support to carers could result in future income foregone. It will be important for local authorities with the Scottish Government to evaluate the impact of the Regulations.

Social Work Scotland remains concerned about the lack of funding which has led to budget pressures in some local authorities in 2014/15 and 2015/16, and, we understand, in some councils to reductions in respite care provision. Ambiguities in the Scottish Government guidance have also allowed some charges for respite to continue, creating a confusing charging landscape for carers.

Social Work Scotland is also concerned that the policy intentions of the Scottish Government about funding the waiving of charges for carers still remain unclear in both the Financial Memorandum to the Carers Bill, and in the current consultation paper. In the latter, the Scottish Government states:

9. The Scottish Government appreciates that respondents might want to know if the Scottish Government will resource the waiving of charges for support (replacement care) provided to carers. As paragraph 96 of the Financial Memorandum accompanying the Carers Bill makes clear, "*any cost implications of changes to the waiving of charges regulations would be considered by the Scottish Government.*" This remains the case and the Scottish Government would plan to consider estimated costs and funding with COSLA further to the consultation. Funding is subject to Spending Review outcomes. The estimated cost implications of other forms of support are covered in the Financial Memorandum accompanying the Carers Bill. (Page 2).

The quotation in italics from the Financial Memorandum is from paragraph 96: this could be interpreted to mean that only *changes* to the 2014 Regulations will be funded: if so, no change would mean no funding. In paragraph 98 the Financial Memorandum goes on to state:

² Policy Note, available at: <http://www.legislation.gov.uk/ssi/2014/65/policy-note/contents>.

98. It is fully expected that regulations will be made to waive charges for support to carers. It is further expected that the regulations would be different from the present regulations given the current challenges experienced by local authorities. If there are cost implications to the Scottish Government arising from the regulations, the Scottish Government would present these in a revised Financial Memorandum.

This does not resolve the ambiguity in the Scottish Government's commitment.

The consultation paper contains three criteria for "success" intended to apply to both options:

- carers should be provided with support which sustains them in their caring role;
- no direct charges should be made to carers for support which they receive; and
- the system should not result in a reduction in services to either the carer or the cared-for person. (Para 16, page 3).

Social Work Scotland is clear that the first and third objectives will not be achieved without full funding.

Social Work Scotland is further concerned that no funding is made available until the implementation of the Carers Bill, which if the Bill passes through Parliament is not likely until April 2017. That would mean local authorities will have been expected to implement the 2014 regulations for three financial years without any funding to compensate for the loss of charging income. Social Work Scotland Resources Committee has worked with COSLA and the Scottish Government to estimate the pre-Regulations charging income from respite care to support carers (the main cost) at around £16 million per year, prior to any increase in demand from the Carers Bill.

General comments: legislation required to give effect to either Option

The implementation date for changes to the 2014 Regulations and any funding is linked to the question of what would be required to give effect to either of the two options. Paragraph 17 on page 3 of the consultation paper states:

Implementation of either option may require an amendment to section 23 of the Carers Bill about the provision of support to carers by way of a break from caring. This section confers a power on the Scottish Ministers to make regulations about the forms of support that may be provided as a break from caring, the process to apply when making decisions about such support, and whether it is to be regarded as support to the carer or cared-for person.

However, this appears to be contradicted by the statement under para 1 of Option 1 on page 5:

Option 1 makes minimal amendments to the regulations, but looks to improve the statutory guidance to local authorities on carrying out carers assessments (adult carer support plan and young carer statement under the Bill) and attributing replacement care to carers or the people they care for according to particular circumstances.

What is to stop the Scottish Government amending the Statutory Guidance issued in 2014 to support the 2014 Regulations, and/or amending the 2014 Regulations themselves, which were issued under the 1968 and 2003 Acts and therefore do not require passage of the Carers Bill for revised directions or guidance to be made? The answer appears to be that the Scottish Government believes that both options require clarification as to "whether the carer's or cared-for person's assessed needs are being met by the provision of replacement care and therefore whether charges for the support should be waived or not" (para 2, page 5); and that such clarification will be delivered via the Bill's account of the content of the new Adult Carer's Support Plan (ACSP) and Young Carer's Statement (YCS).

However, there is no obstacle to providing that clarification now in relation to the existing legislation and guidance on carers assessment and assessments for cared for people. Much is made in the consultation paper of the fact that "The structure of the current legislation is such that some forms of support might quite validly be viewed as meeting either the needs of the carer or the needs of the cared-for person or both":

This is because section 12A(1)(b)(i) of the 1968 Act requires a local authority to take account of the care being provided by a carer when deciding whether the assessed needs of the person

call for the provision of services. Therefore, if a local authority recognises that a carer will not be providing care for X hours a week because they are having a break, but the needs of the cared-for person are such that they cannot be left alone for that period, then that is likely to result in a decision that the person's needs do call for the provision of community care services (ie alternative personal care) during that period, and the resulting support would be provided to the cared-for person under section 12 of the 1968 Act. (Option 1, para 3, page 5).

Some details in this paragraph require amendment³ but the central point seems overstated. The central concept is assessing “what the carer is willing and able to do”:

This in turn makes it possible to identify whether particular periods of care provided by the paid workforce are replacement care (i.e. done so that the carer can have a break from the generally agreed caring role and so support to the carer for which charges are waived) or simply care which the cared-for person needs in addition to that provided by the unpaid carer which it has been agreed the carer is normally able and willing to provide (i.e. nothing to do with giving the carer a break from their agreed caring role and so properly chargeable to the cared-for person). (Option 1, Para 8, page 6).

If it is possible to make these distinctions within the description of recording the caring role in the future ACSP and CYS it must be possible to provide the same guidance for existing carers assessments within the context of revised Statutory Guidance for the 2014 Regulations. **In other words, there is nothing preventing Option 1 from being implemented under current legislation without waiting for the Carers Bill to be passed and enacted.**

A similar argument is likely to apply to the distinction between direct and indirect support to carers under Option 2, although it is difficult to be sure as so little is said about the distinction, other than that it will require “comprehensive guidance on replacement care being indirect support to the carer where the carers cannot be charged” (page 11).

General comments: other issues

The structure of the consultation paper is misleading in that important issues that apply to both options are discussed under Option 2:

- the consent of the cared for person to replacement care
- identifying the responsible local authority where carer and cared-for person live in different local authority areas.

The requirement for the cared-for person to agree to the replacement care already applies currently, but would benefit from further guidance, eg in relation to mental capacity.

There is also current guidance in *The Carer's Assessment (Scotland) Directions 2014*⁴ on “caring at a distance” where a carer is “caring for someone who uses or could use services in a different local authority area from the carers’ own area”. The guidance emphasises a partnership between the local authorities and recommends “local agreements for handling such cases (usually the authority where the cared-for person lives should take the lead in assessing the carer)” with the implication that any replacement care required is provided or arranged by the local authority in which the eligible cared for person lives.

Responses to questions on the options

Our understanding of the differences between the two options has been developed in relation to the following “paradigm case”:

³ Reference to carers providing care for “X hours a week” may be uncomfortable for many carers who provide varying hours of care per week; local authority provided or purchased personal care is only chargeable if for people aged under 65 years.

⁴ Available at: <http://www.gov.scot/Resource/0045/00459110.pdf>

A carer provides care for a person who has eligible care needs such that without the care provided by the carer they would require care or additional care provided or arranged by the local authority. The carer's need for support has been assessed and he or she requires support in the form of a short break to continue to provide care. The person receiving care is, or has already been, assessed and has eligible needs that the carers normally meets in part or in full, and requires replacement care while the carer has a break from caring. No other family member or other third party is able or willing to provide the replacement care.

In this example, the person receiving care has been assessed under the 1968 or 1995 Acts and has at least some needs that, were it not for the care provided by the unpaid carer (very often a family member), would call for the provision of services and hence a duty for the local authority to provide or arrange services that may or may not be chargeable. Replacement care is a necessary condition of meeting the carer's support needs.

Under **Option 1** charges would be waived for this replacement care; **under Option 2** charges would not be waived but if applicable (eg not free personal care) would be applied to the cared-for person following a means test of ability to pay.

Question 1

Do you support option 1 or option 2? Please tick the box below:

Option 1 only if subject to full funding (see below)

Option 2

Please set out your reasons below:

Social Work Scotland supports Option 1 **if and only if it is fully funded**. Social Work Scotland would support Option 2 only if Option 1 was not fully funded, but Option 2 was funded in full.

If funded, **Option 1** best meets the Scottish Government's three-point criteria for "success", quoted above, and gives the clearest expression to the Ministerial commitment to waive charges for carers. It is the option likely to be supported by an overwhelming majority of carers, and probably is also easier to implement.

By contrast, **Option 2** presents as a partial roll-back of the 2014 Regulations and a dilution of Scottish Minister's policy stance of waving charges for carers. It is likely to be less popular with carers. Most carers are co-resident with the loved one they care for and any charge to that person is likely to be experienced as a charge on the household income. The requirement for the cared-for person to agree to the replacement care already applies: there may be less agreement if the cared-for person is charged, which will make it difficult for the carer to have the break they need. For these reasons Option 2 does not meet the three-point criteria for "success", quoted earlier. The definitional task also appears to be greater for Option 2, than for Option 1, and possibly it is less easily implemented earlier than the Carers Bill enactment, unlike Option 1.

Question 2

If you support Option 1, please provide any further comments below:

Some definitional work will be required for guidance, in addition to that already recognised in the consultation paper, or discussed above. Some forms of day care, for example, are provided to cared for people on the basis of their assessed needs, but also benefit carers – for example, where the day care is not short term, it may allow the carers of working age to work part-time. The policy on replacement care may need to be framed as short-term care unless the Scottish Government is prepared to fund the cessation of charges for day care above a fixed limit of days per year where the benefit to the carer is identified as meeting a key need to support the caring role in a carer's assessment.

Question 3

If you support Option 2, please provide any further comments below:

No further comments.

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APPENDIX

SCOTTISH GOVERNMENT CONSULTATION PAPER

The text of the paper issued by the Scottish Government on 21 August is copied below to assist readers of this submission who have not seen the original. The Consultation Questions are not repeated, being embedded in our response.

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Social Care (Self-directed Support) (Scotland) Act 2013 and Carers Bill

Waiving of Charges

Purpose

1. The purpose of this communication is for the Scottish Government to seek views on two options for the way forward on the waiving of charges for support⁵ provided to carers and to seek comments from interested stakeholders.
2. This is not a formal Scottish Government consultation. The aim is to 'sense check' the options.
3. The circulation for this paper is COSLA, Social Work Scotland, all local authorities, NHS Boards and the National Carers Organisations.
4. The Scottish Government requires comments by **Thursday 10 September** in order to make any necessary amendments to the Carers Bill. Responses before this deadline if possible would be helpful. The Scottish Government acknowledges that this is a tight deadline.
5. Please reply to:

carersandyoungcarers@scotland.gsi.gov.uk
6. Alternatively, or in tandem with a written response, comments and views can be provided by telephone to:

⁵ For the purposes of this consultation, 'support' means replacement care which allows the carer to look after their own health and wellbeing by taking a break and which meets the assessed needs of adult and young carers. The waiving of charges will also apply to the types of support for carers set out in paragraph 6.2 of the [statutory guidance to accompany section 3 of the Social Care \(Self-directed Support\) Act 2013](#) and the [Carers \(Waiving of Charges for Support\) \(Scotland\) Regulations 2014](#).

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7. Returns will be treated in confidence and all responses will be analysed and considered to help inform the way forward.
8. Local authority responses will be submitted directly to COSLA where appropriate.
9. The Scottish Government appreciates that respondents might want to know if the Scottish Government will resource the waiving of charges for support (replacement care) provided to carers. As paragraph 96 of the Financial Memorandum accompanying the Carers Bill makes clear, *“any cost implications of changes to the waiving of charges regulations would be considered by the Scottish Government.”* This remains the case and the Scottish Government would plan to consider estimated costs and funding with COSLA further to the consultation. Funding is subject to Spending Review outcomes. The estimated cost implications of other forms of support are covered in the Financial Memorandum accompanying the Carers Bill.

Background

10. Under section 3 of the Social Care (Self-directed Support) (Scotland) Act 2013 (“the SDS Act”), local authorities have a power to provide support to adult carers following an assessment completed under section 12AA of the Social Work (Scotland) Act 1968 (“the 1968 Act”) and under section 24 of the Children (Scotland) Act 1995 (“the 1995 Act”). There is also a power to support young carers under section 22 of the 1995 Act.
11. Section 18 of the SDS Act brings support to carers within the scope of section 87 in the 1968 Act which covers the circumstances where local authorities can charge for the services they provide. Since carers and young carers are not to be charged for the support they receive, regulations made under section 87(5) of the 1968 Act⁶ require local authorities to waive charges for the support provided to carers under section 3 of the SDS Act and for support provided to young carers under section 22 of the 1995 Act.
12. Implementation of the regulations was to ensure consistency of approach between local authorities by obliging local authorities not to charge carers for support services provided to them under section 3(4) of the SDS Act or section 22 of the 1995 Act.

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⁶ Carers (Waiving of Charges for Support) (Scotland) Regulations 2014, SSI 2014/65 – <http://www.legislation.gov.uk/ssi/2014/65/contents/made>

13. The Scottish Government issued statutory guidance⁷ to accompany the regulations. Paragraph 8.8 of this guidance states that “local authorities might decide to arrange replacement care for a cared-for person as part of the support which they provide to a carer under section 3 of the SDS Act in order to give a break from caring. Where replacement care is provided as support under section 3 in order to meet the carer’s needs, the local authority must waive charges for the cost of the replacement care.”
14. The main challenge in implementing the regulations appears to be the categorisation of replacement care provided to a cared-for person at the point when a carer takes a break. It is not always clear if replacement care is provided to the carer following a carer’s assessment in order to meet the needs of the carer (where charges would be waived) or provided to the cared-for person in order to meet their assessed needs (and therefore chargeable).
15. In order to deal with the challenges, which may be having an impact on the extent to which some local authorities are able to exercise the power to support carers, the Scottish Government has considered two options for the way forward.
16. It is important that the way forward is successful in that:
- carers should be provided with support which sustains them in their caring role;
 - no direct charges should be made to carers for support which they receive; and
 - the system should not result in a reduction in services to either the carer or the cared-for person.
17. The system should be as straightforward as possible to navigate and implement. It should not take up too much resource in attempting to categorise different forms of service but nevertheless should be responsive to the needs of both carers and cared-for people. Implementation of either option may require an amendment to section 23 of the Carers Bill about the provision of support to carers by way of a break from caring. This section confers a power on the Scottish Ministers to make regulations about the forms of support that may be provided as a break from caring, the process to apply when making decisions about such support, and whether it is to be regarded as support to the carer or cared-for person.

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18. Following the commencement of the Bill, the Regulations regarding the waiving of charges would apply to support services which the local authority has a duty to provide (subject, to local eligibility criteria), whereas they currently apply to support services which the local authority simply has a power to provide. Therefore, the requirement to waive charges if the Carers Bill is commenced will apply to more cases and the local authority will not have a choice about whether it provides support (free of charge) or not as at present.
19. Option 1 is set out in Annex A.
20. Option 2 is set out in Annex B.
21. Please submit your answers to the questions set out in Annex C.

⁷ Statutory Guidance to accompany section 3 of the Social Care (Self-directed Support) (Scotland) Act 2013 and the Carers (Waiving of Charges for Support) (Scotland) Regulations 2014
<http://www.gov.scot/Publications/2014/04/1342/0>

Social Care (Self-directed Support) (Scotland) Act 2013 and Carers Bill

Waiving of Charges

Option 1 – No amendments to regulations, improved guidance on attribution of replacement care

1. Option 1 makes minimal amendments to the regulations, but looks to improve the statutory guidance to local authorities on carrying out carers assessments (adult carer support plan and young carer statement under the Bill) and attributing replacement care to carers or the people they care for according to particular circumstances.
2. Both the carer and cared-for person can benefit from replacement care and the needs of the carer and cared-for person can be so closely bound together that it may be difficult to say whether a particular form of support is being provided to one or other person. Nevertheless, it should be possible to determine whether the carer's or cared-for person's assessed needs are being met by the provision of replacement care and therefore whether charges for the support should be waived or not. The Scottish Government considers that the changes being made to the assessment and support processes through the Carers Bill – in particular, the requirement to identify and set out the nature of the 'caring role' being sustained through the support – reinforce this.
3. The structure of the current legislation is such that some forms of support might quite validly be viewed as meeting either the needs of the carer or the needs of the cared-for person or both. This is because section 12A(1)(b)(i) of the 1968 Act requires a local authority to take account of the care being provided by a carer when deciding whether the assessed needs of the person call for the provision of services. Therefore, if a local authority recognises that a carer will not be providing care for X hours a week because they are having a break, but the needs of the cared-for person are such that they cannot be left alone for that period, then that is likely to result in a decision that the person's needs do call for the provision of community care services (ie alternative personal care) during that period, and the resulting support would be provided to the cared-for person under section 12 of the 1968 Act.
4. If however the alternative personal care is of greater significance to the carer than the cared-for person because it allows the carer to have a break which will help the carer to provide, or continue to provide, care for the cared-for person, this then falls within the definition of 'support' in section 3 of the SDS Act.

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5. Under the existing legislation, however, some local authorities report that it is difficult to make decisions about whether the alternative personal care is meeting primarily the needs of the carer or the needs of the cared-for person, and whether the decision is being made in the context of the carer's assessment or the community care assessment of the cared-for person.
6. The Carers Bill will make the decision-making process more transparent and straightforward.
7. This is because the Carers Bill requires ACSPs / YCSs to provide a clear record of the 'caring role' which the carer is to undertake. The record of the 'caring role' is provided for in section 8

(content of adult carer support plan) and section 13 (content of young carer statement) of the Bill. These sections state that the ACSP and YCS must contain information about the nature and extent of the care provided or to be provided, the impact of the caring on the carer's wellbeing and day-to-day life and about the extent to which the carer is able and willing to provide care for the cared-for person. With regard to young carers, section 13 further sets out that a YCS must contain information about the extent to which the responsible authority⁸ considers that the nature and extent of the care provided by the young carer is appropriate.

8. The establishment of this caring role is fundamental to the structure of the ACSP and YCS and the support which is provided to the carer under it. It identifies what the carer is willing and able to do. This in turn makes it possible to identify whether particular periods of care provided by the paid workforce are replacement care (i.e. done so that the carer can have a break from the generally agreed caring role and so support to the carer for which charges are waived) or simply care which the cared-for person needs in addition to that provided by the unpaid carer which it has been agreed the carer is normally able and willing to provide (i.e. nothing to do with giving the carer a break from their agreed caring role and so properly chargeable to the cared-for person).
9. Chapter 9 of the Scottish Government response to the consultation on the Carers Bill⁹ sets out information about the links between the ACSP/YCS and the cared-for person's assessment. This makes clear that there should be a consistent understanding between the ACSP/YCS and the cared-for person's assessment about the care that is to be provided by the carer. The local authority should have regard to the part of the ACSP/YCS which records [**Page 7**] the nature of the 'caring role' which is being or is to be undertaken by the carer. Chapter 9 also sets out that it is quite possible that the caring role which is agreed during the course of the ACSP/YCS process may be different from the extent of the care which the carer is currently providing because the nature and extent of the care administered by a carer under an ACSP/YCS must reflect the level of care that the carer is willing and able and can appropriately provide to the cared for person. Where such a disparity exists, what is relevant is the amount of care which it has been agreed the carer is willing and able to provide going forward. It is that level of care that the ACSP/YCS is designed to support.
10. This option acknowledges the benefit and value of the carer's role to the cared-for person in that the carer's absence on his or her break may result in the need for temporary replacement by a paid worker.
11. As with Option 2 set out in Annex B, adult cared-for persons would require to have a role in consenting to the replacement care being provided which meets the carer's needs.
12. Also, as with Option 2, where the carer and the cared-for person live in different local authority areas, there are a number of practical difficulties in the carer's local authority administering replacement care for a person living in a different local authority area. The way forward in relation to both issues is the same as for Option 2.

Option 1 – Proposed Way Forward

⁸ [http://www.scottish.parliament.uk/S4_Bills/Carers%20\(Scotland\)%20Bill/b61s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Carers%20(Scotland)%20Bill/b61s4-introd.pdf)

⁹ <http://www.gov.scot/Publications/2015/03/2211/12>

13. Under Option 1 the Scottish Government would:

- Issue revised guidance in due course about determination of the ‘caring role’ under the Carers Bill; the identification of personal outcomes designed to sustain the carer in carrying out that caring role and the process for identifying need for support in order to meet those outcomes. Ensure that the revised guidance provides examples of the circumstances where the replacement care meets the assessed needs of the carer or meets the assessed needs of the cared-for person
- Work with COSLA, local authorities, NHS Boards and the NCOs in the period between the Bill receiving Parliamentary approval, if that should be the case, and being commenced in order to examine the caring role to help inform the guidance and for implementation

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- Prepare draft regulations under section 23(2) of the Bill which will set out the role of the cared-for person in relation to how the care or services or assistance are provided.
- Update the existing regulations on the waiving of charges to reflect the new assessment processes. However, the underlying principle behind these regulations would remain the same: if the support is delivered to meet the carer’s eligible needs identified in the course of the ACSP/YCS, the local authority will be required to waive the charges.

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Annex B

Social Care (Self-directed Support) (Scotland) Act 2013 and Carers Bill

Waiving of Charges

Option 2 – Indirect support to the carer

1. Option 2, would make clear in the Carers Bill that any support (replacement care) delivered to the cared-for person must be agreed following a specific process involving the cared-for person, regardless of whether the need for that support had been identified in the context of the ACSP/YCS or the cared-for person’s community care assessment. This process would apply in recognition of the close personal interest that the cared-for person would have in the delivery of the support.
2. If the need for such support (replacement care) is identified in the context of the ACSP/YCS, it would be categorised as ‘indirect support’ to the carer. The carer would not be charged for indirect support which is delivered through providing care to the cared-for person. However, the cared-for person may be charged for such care (whether the need for the care had been identified in the course of an ACSP/YCS or community care assessment), providing that it is generally chargeable, any relevant means testing exercise has been carried out and the cared-for person has agreed to the care being provided.
3. Where support to the carer is to be provided by way of care to the cared-for person (indirect support) the cared-for person would have to be asked for their consent to the carer’s needs

being met in this way, subject to local charging policies and means-testing. The Carers Bill would contain provisions about consent.

4. In order to proceed with this option, the Scottish Government will consider what would happen in circumstances where the cared-for person (with capacity) withholds their consent to replacement care.
5. A reasonable approach is to explore with the carer whether there are other forms of support which would meet the carer's personal outcomes/needs but which either do not require the consent of the cared-for person or to which the cared for person would be willing to consent. This approach is applied now in some local authority areas. However, the Scottish Government would also consider how to tackle a situation where there is not alternative form of support available to meet the personal outcomes/eligible needs of the carer.

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6. There are also likely to be cases where the cared-for person does not have the capacity to provide consent to indirect support to the carer. Where a cared-for person does not have capacity to make decisions regarding their own care, finances, welfare etc, a carer, relative neighbour or other person with an interest may already have a welfare power of attorney, and if not, can apply for an intervention or guardianship order under the Adults with Incapacity Act 2000, as can a local authority. There are also powers in the Social Work (Scotland) Act 1968 which allow the local authority to take such steps as they consider appropriate to benefit someone who is not capable of making decisions. Therefore, there is an existing framework which can be employed in these circumstances.
7. In situations where the cared-for person is a child, then the consent of the child would not be required for the replacement care. The local authority would need to work with the parents, and take into account any views of the child, to determine whether replacement care was a reasonable way forward in order to meet the carer's assessed needs. In doing so, the expectation would be that the local authority would act in accordance with the Getting it Right for Every Child (GIRFEC) approach¹⁰.
8. With regard to the situation where the carer and the cared-for person live in *different* local authority areas, there are a number of practical difficulties in the carer's local authority administering replacement care for a person in a different local authority area:
 - Who obtains consent from the cared for person that the support to the carer can be made by the provision of services to the cared-for person;
 - Which local charging policy is applied – that of the local authority where the carer lives or where the cared-for person lives;
 - Who arranges for the replacement care for the cared-for-person.
 - Who undertakes the means test/financial assessment and determines affordability;
 - Which local authority pays for the replacement care to the extent that the costs involved exceed any charges made to the cared-for person;

¹⁰ <http://www.gov.scot/Topics/People/Young-People/gettingitright>

9. The Scottish Government would work with COSLA and other interests to establish the way forward where the carer and cared-for person live in different local authority areas.

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Option 2 – Proposed Way Forward

10. Under Option 2, the Scottish Government would:

- Prepare legislative provision which sets out the process to apply for agreeing this kind of indirect support with the cared-for person, and to specify that charges can be made to the cared-for person but not to the carer. (This legislative provision might be an amendment to the Carers Bill or regulations under the power in section 23(2) of the Bill. There may also need to be amendments to the provisions of the SDS Act which relate to how the different self-directed support options may be chosen in such circumstances.)
- Work with COSLA and other interests to establish the position where the carer and cared-for person live in different local authority areas
- Work with COSLA and other interests to establish the position where the cared-for person has capacity but does not consent to the replacement care being provided
- Produce comprehensive guidance on replacement care being indirect support to the carer where the carer cannot be charged

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Annex C

CONSULTATION QUESTIONS