

# Consultation Questionnaire

## Draft Statutory Guidance on Care and Support

### Consultation Questions

Section 2 : Values and Principles

**Question 1a: Was this section of the guidance clear and easy to understand?  
(please tick)**

Yes	No
X	<input type="checkbox"/>

**Question 1b: How useful did you find this section of the guidance?  
(please tick)**

Very useful	Quite Useful	Not very useful	Not at all useful
<input type="checkbox"/>	X	<input type="checkbox"/>	<input type="checkbox"/>

**Question 1c: Do you have any further comments on this section of the guidance?**

*Some advice to help you to answer this question – Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you'd like to make?*

Table 1 “The Person’s Pathway” at paragraph 7 of the Guidance sets out the steps which will be followed as part of the SDS process. It is suggested that another step should be incorporated at Step 3 “Eligibility and Assessment”. In terms of the case of *MacGregor v South Lanarkshire Council 2001 SC 502* it is submitted that after an assessment is completed a decision needs to be made about whether the needs of a service user call for the provision of services. This is alluded to later in the Guidance at paragraph 24. It would be helpful for this also to be made clear at this point.

Table 1 “The Person’s Pathway” at paragraph 7 of the guidance. It would be helpful for the pathway to include a specific step which includes resource allocation. It would also be of benefit to explicitly include a step in relation to promoting and providing information about the 4 options available for the supported person to direct their care/support. This is a legal requirement of The 2013 Act therefore it would be helpful if the guidance provided more detailed information about this in the pathway.

## Draft Statutory Guidance on Care and Support

### Consultation Questions

Section 3: Values and Principles

**Question 2a: Was this section of the guidance clear and easy to understand?  
(please tick)**

Yes	No
X	<input type="checkbox"/>

**Question 2b: How useful did you find this section of the guidance?  
(please tick)**

Very useful	Quite Useful	Not very useful	Not at all useful
<input type="checkbox"/>	X	<input type="checkbox"/>	<input type="checkbox"/>

**Question 2c: Do you have any further comments on this section of the guidance?**

*Some advice to help you to answer this question – Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you’d like to make?*

The definition of “involvement” is set out on Page 12 as part of Table 3 “The principles that underpin a good assessment and support plan”. The second paragraph states “Communities should be assisted to play an active role in the commissioning of services.” Further guidance about what this means, what the role of the local authority is to be and how they can facilitate this would be helpful.

Table 3 also includes reference to risk enablement. It would be helpful to have further information included to promote the supported person being enabled to take some risks and that ownership and responsibility should be jointly held between the individual and the professionals involved in the assessment.

## **Draft Statutory Guidance on Care and Support**

### **Consultation Questions**

Section 4: Eligibility and Assessment

**Question 3a: Was this section of the guidance clear and easy to understand?  
(please tick)**

Yes	No
X	<input type="checkbox"/>

**Question 3b: How useful did you find this section of the guidance?  
(please tick)**

Very useful	Quite Useful	Not very useful	Not at all useful
<input type="checkbox"/>	X	<input type="checkbox"/>	<input type="checkbox"/>

**Question 3c: Do you have any further comments on this section of the guidance?**

*Some advice to help you to answer this question – Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you'd like to make?*

Paragraph 30 makes reference to assessment following a crisis situation. It would be helpful to make clear that, where possible, interim arrangements are made with the supported person having as much choice and inclusion.

It would also be beneficial to include further guidance in this section or in “The Persons Pathway” that includes anticipatory planning in the event of a crisis. Similar to Advance Statements as per Mental Health (Care and Treatment) (Scotland) Act 2003 and the Anticipatory Care Planning approach used within health this would encourage the supported personal and their family carers to have more choice, control and responsibility in relation to care and support in a crisis or emergency situation.

## **Draft Statutory Guidance on Care and Support**

### **Consultation Questions**

#### Section 5 : Support Planning

This section of the guidance covered:

- general guidance on support planning
- risk
- resources
- the choices that must be made available to the supported person and
- information and support

**Question 4a: Was this section of the guidance clear and easy to understand? (please tick)**

Yes	No
x <input type="checkbox"/>	<input type="checkbox"/>

**Question 4b: How useful did you find this section of the guidance? (please tick)**

Very useful	Quite Useful	Not very useful	Not at all useful
<input type="checkbox"/>	<input type="checkbox"/>	X	<input type="checkbox"/>

**Question 4c: Do you have any further comments on this section of the guidance?**

*Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you'd like to make?*

Paragraph 47 provides further guidance in relation to all possible resources available to the supported person. It would be beneficial to include telecare/tele-health care as another resource available.

Section 4 of the 2013 Act. Paragraphs 55 – 66 set out the operation of the four options.

Paragraph 55 sets out a general overview of direct payments (Option 1) this is supplemented by Section 9 of the Guidance which provides more detailed information on direct payments and how they will operate in practice. Comments on Section 9 are provided later.

There are no equivalent sections or more detailed information relating to Option 2, 3 or 4 within Section 9.

Paragraphs 56 - 58 relate to Option 2 and indicate that the Local Authority or subsequently a Provider on their behalf may make “various administrative arrangements” on a supported person’s behalf. It would be of benefit to have further guidance about what these “various administrative arrangements” may entail or how it is envisaged this will work in practice. This section also indicates that the resource can be delegated to a provider to hold and distribute. It would be helpful for Local Authorities and Support Providers to have further guidance in relation to how contractually this could be implemented, including the mechanisms envisaged for putting this into place and the Local Authorities role once the resource has been delegated.

In paragraph 57 the example is given of an Individual Support Fund which would enable the supported person to direct the resource identified for them choosing the support that they would like. Further guidance with regards to how this operates on a practical level with a particular focus on the roles and responsibilities of the supported person, the local authority and the organisation managing the Individual Support Fund.

Paragraph 58 states the Authority is not obliged to make arrangements as set out in the guidance. Further guidance and information about suggested arrangements would be helpful. There is no recognition of the possible limitations on a Local Authority’s ability to contract or their capacity to arrange every minute detail of care and support plans.

It is not clear upon what basis the Local Authority will be contracting or responsible for arrangements under Option 2 which is likely to include a wide range of goods and services. It would be helpful to include further information relating to each Option which sets out more detailed information about how it is envisaged the Option will operate in practice.

Paragraph 65 relates to the local authority’s discretion in relation to whether a particular type of support is appropriate to meet the assessed needs/agreed outcomes. It states that a professional cannot refuse a particular option under the 2013 Act but can use the discretion available under section 12 of the Social Work

(Scotland) Act 1968 to refuse to fund a particular type of support. The local authority has the duty to secure the provision of support which they consider “suitable and adequate”. Whilst the intentions behind this section are clear in relation to offering all 4 options, in practice this might result in fewer supported people having more choice and control. It is expected that for some individuals, at some times in their lives, Option 1 may not be an appropriate option in terms of risk to the individual and in relation to holding their individual budget. It would be reasonable, subject to a collaborative assessment to support the individual’s choice and control by offering Option2 in these occasions, leading to better personal outcomes and also minimising risk to the individual/local authority.

Good outcome focused assessments and professional judgement has an important role to play and the local authority function in relation to Adult Support and Protection and Child Protection must take precedence. Local Authorities should be given the power to limit the choices over the 4 SDS options where the social work/multi-agency assessment concludes that by not doing so leaves the supported person and/or others as risk of significant harm.

Paragraph 72 of the guidance indicates that the Professional **must** provide the supported person with an explanation of the “nature and effect” of the options available to them under the law. This means they should seek to explain the basic characteristics of the options available to the supported person. In particular they should seek to describe the distinctions between the different options etc. Is it the case that if the professional follows the guidance outlined within this paragraph by seeking to do all the things therein would this be deemed sufficient to satisfy the “nature and effect” of the options.

Paragraph 73 states that the professional must provide the supported person with information about how they can manage their support after they have made their initial choice. The Guidance does not make any attempt to address the question of how “nature and effect” should be interpreted. It does not provide a great deal of information on how it is envisaged each option will work in practice after the initial choice is made. It is submitted that this makes it more difficult for the professional to comply with the duty as the guidance provides only limited information which can be referred to. There is a question about the extent of the information which can reasonably be provided by the professional.

## **Draft Statutory Guidance on Care and Support**

### **Consultation Questions**

#### Section 6: Monitoring and Review

**Question 5a: Was this section of the guidance clear and easy to understand?  
(please tick)**

Yes	No
<b>x</b> <input type="checkbox"/>	<input type="checkbox"/>

**Question 5b: How useful did you find this section of the guidance?  
(please tick)**

Very useful	Quite Useful	Not very useful	Not at all useful
<input type="checkbox"/>	x <input type="checkbox"/>		<input type="checkbox"/>

**Question 5c: Do you have any further comments on this section of the guidance?**

*Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you'd like to make?*

Paragraph 80 in the guidance addresses the issue of review of a supported person's options under the 2013 Act. It considers the differences between a review of a supported person's needs and a review of the operation of their chosen option. It indicates that a review of a person's choice under the 2013 Act can take place without a detailed review of needs. It is not clear whether this paragraph relates to the review provisions set out in section 13 of the 2013 Act. Section 13 is clear that a review should be carried out where there has been a material change of circumstances. This test is not mentioned in this section of the guidance.

There is a question about how the review mechanism will work contractually in relation to services which have been secured on a supported person's behalf by e.g. the LA. If more robust termination clauses are introduced to provided for this scenario this could potentially have the effect of creating uncertainty within the market place as to the duration of the services being contracted for, which in turn could lead to (1) the cost of these services being increased to cover the potential risk to Providers of services being terminated; and (2) limiting the number of Providers wishing to provide the services and inadvertently reducing the SP's choice of Providers.

**Draft Statutory Guidance on Care and Support**

**Consultation Questions**

Section 7 : Facilitating genuine choice for individuals

**Question 6a: Was this section of the guidance clear and easy to understand?  
(please tick)**

Yes	No
x <input type="checkbox"/>	<input type="checkbox"/>

**Question 6b: How useful did you find this section of the guidance?  
(please tick)**

Very useful	Quite Useful	Not very useful	Not at all useful
<input type="checkbox"/>	<input type="checkbox"/>	X	<input type="checkbox"/>

**Question 6c: Do you have any further comments on this section of the guidance?**

*Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you'd like to make?*

The section contains little information about how the duty placed upon the Local Authority by Section 19 is expected to work in practice. Paragraph 82 indicates that the Authority should view their role as being a facilitator of choice for individuals. It would be helpful to have further good practice guidance of ways that the local authority can fulfil this duty.

## **Draft Statutory Guidance on Care and Support**

### **Consultation Questions**

#### Section 8 : The role of the NHS professional

**Question 7a: Was this section of the guidance clear and easy to understand? (please tick)**

Yes	No
X	<input type="checkbox"/>

**Question 7b: How useful did you find this section of the guidance? (please tick)**

Very useful	Quite Useful	Not very useful	Not at all useful
<input type="checkbox"/>	X	<input type="checkbox"/>	<input type="checkbox"/>

**Question 7c: Do you have any further comments on this section of the guidance?**

*Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you'd like to make?*

that are more appropriate for statutory guidance rather than Regulations?

The principles and guidance set out in this section relate to the role of the NHS Professional and the potential for a joint approach in relation to health and social care personal outcomes. More information about the integration of health and social care, particularly in relation to pooled budgets would be helpful.

It would be beneficial for the supported person and their family carers to have information about the potential for shared/joint health and social care packages of support. As such it would be helpful for a requirement for NHS to promote and provide information about this.

## **Draft Statutory Guidance on Care and Support**

### **Consultation Questions**



Section 9.1 : Children and Families

**Question 8a: Was this section of the guidance clear and easy to understand?  
(please tick)**

Yes	No
<input checked="" type="checkbox"/> x	

**Question 8b: How useful did you find this section of the guidance?  
(please tick)**

Very useful	Quite Useful	Not very useful	Not at all useful
<input type="checkbox"/>	<input type="checkbox"/>	X	<input type="checkbox"/>

**Question 8c: Do you have any further comments on this section of the guidance?**

*Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you'd like to make?*

Paragraph 98 in Section 9.1 addresses the issue of providing choice in the context of the wider safeguarding role. However, the paragraph is slightly confusing. One concern which arises in relation to cases involving children is how it is envisaged that child protection measures and the provision of SDS will interact. There will be cases where services may be required for children whose health or development may be impaired or may fall below a reasonable standard without services from the local authority as a result of family circumstances which raise child protection issues. It is not clear whether in these circumstances there will be scope to limit the availability of Options under the 2013 Act because of concerns regarding how they may be utilised by the appropriate person. It appears that paragraph 98 tries to address this issue but it does not clearly set out the position.

Again, professional assessment and judgement are key in terms of self directed support and we would prefer the power to limit 4 SDS options on a case by case basis. The guidance asks whether there are circumstances where Option 1 or 2 is never offered. We would suggest that this is not helpful as there may be some useful interventions which could improve the outcomes for the child/family where there are also compulsory measures in place.

Paragraph 101 relates to the "Transition from children's support into adult's support. More emphasis on the potential opportunities for a joint approach between the local authority and NHS would be helpful in this section.

This section requires more detailed information around how SDS will work in the context of working with children and their families. It would be helpful to include some good practice examples in relation to the application of self directed support for children whose health or development may be impaired or may fall below a reasonable standard without services from the local authority as a result of family circumstances which raise child protection issues.



Further guidance would be beneficial in relation to the opportunities for self directed support and how this might work in practice in relation to the interface between local authorities and other child /public protection bodies i.e. children’s hearing.

Further guidance and good practice examples would be helpful in terms of the potential opportunities for elements of self directed support within foster placements, residential school placements and placements in secure accommodation and the interface with current kinship care arrangements.

## **Draft Statutory Guidance on Care and Support**

### **Consultation Questions**

#### Section 9.2 : Supported decision-making and circles of support

**Question 9a: Was this section of the guidance clear and easy to understand?  
(please tick)**

Yes	No
<input checked="" type="checkbox"/> x	

**Question 9b: How useful did you find this section of the guidance?  
(please tick)**

Very useful	Quite Useful	Not very useful	Not at all useful
<input type="checkbox"/>	<input checked="" type="checkbox"/> x		<input type="checkbox"/>

**Question 9c: Do you have any further comments on this section of the guidance?**

*Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you’d like to make?*

Paragraph 105 deals with the issue of assistance and indicates that the purpose behind Sections 6 and 17 of the 2013 Act is to encourage reasonable practicable steps to maximise the choice and control available to the supported person. It is not about imposing assistance on individuals. It is not about appointing proxy decision makers.

Sub-section (5) of Section 6 places a duty on the Local Authority to identify people who are able to assist the supported person, therefore there is a duty to try and identify someone who may be able to assist (the supporting person). The Act and the guidance give no information about who it is anticipated the supporting person will be, what their connection to the adult may be, etc. While on the one hand this is perhaps understandable it does leave a degree of uncertainty when identifying someone who could be very heavily involved in “assisting” the supported person in making important decisions. There are concerns that this could place a vulnerable supported person at a greater degree of risk depending on the nature of the relationship between the adult and the supporting person both before and after the

supporting person takes on their role. There could be issues of duress or pressure and the guidance does not consider the possibility that the supported person's agreement may be being given under pressure. Depending on the nature of the supported person's mental disorder it could be very difficult to obtain informed agreement to the involvement of a supporting person. The guidance does not address the question of how much information the supporting person requires to be given to enable them to assist the supported person to make a decision and the possible implications of this for the supported person in terms of confidentiality and data protection. The guidance does not address the situation where there could be a possible conflict of interest.

Paragraph 109 of the guidance indicates that the person providing assistance should be aware of their role and the limits of their role, however the guidance does not specify what these are or how they are to be made aware of them. It does not indicate what steps should be taken if a supporting person is involved and then questions arise as to whether they are making decisions on behalf of the supported person rather than supporting them. How is this matter to be raised and addressed with both supported and the supporting person?

## **Draft Statutory Guidance on Care and Support**

### **Consultation Questions**

#### Section 9.3: Carers

**Question 10a: Was this section of the guidance clear and easy to understand? (please tick)**

Yes	No
<input checked="" type="checkbox"/> x	

**Question 10b: How useful did you find this section of the guidance? (please tick)**

Very useful	Quite Useful	Not very useful	Not at all useful
<input type="checkbox"/>	<input type="checkbox"/>	X	<input type="checkbox"/>

**Question 10c: Do you have any further comments on this section of the guidance?**

*Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you'd like to make?*

In terms of Section 12AA of the 1968 Act, when asked to do so the Local Authority has a duty to carry out an assessment of a carer's ability to care where the person being cared for is someone who the Local Authority may or must provide community care services to. In terms of Section 12AA and Section 3 of the 2013 Act the Local Authority has a duty to consider the assessment and decide whether the carer has needs in relation to the care which they provide. If the Authority

decides that the carer has needs then the Local Authority has a duty to consider whether those needs could be satisfied by the provision of support. However, the Authority is not under a duty to provide the support, it **may** provide or secure the provision and support for the carer. The guidance currently does not reflect this or confirm whether the 2013 Act supersedes previous legislation.

Further guidance is required in terms of the widened scope available to employ family members. The current regulations allow the Local Authority the discretion to allow individuals to employ family members in exceptional circumstances and this has worked well in East Ayrshire in terms of young children with additional support need, adults with complex communication impairments and older people with dementia. It is not clear that such a change to the existing regulations takes account of the following:

- change in the dynamics and relationship between the supported person and their family members.
- the links between Carers Allowance and employing family members
- the application of a carers assessment for a carer who provides both paid and unpaid support.

## **Draft Statutory Guidance on Care and Support**

### **Consultation Questions**

#### Section 9.4: Direct payments

**Question 11a: Was this section of the guidance clear and easy to understand? (please tick)**

Yes	No
<input type="checkbox"/>	

**Question 11b: How useful did you find this section of the guidance? (please tick)**

Very useful	Quite Useful	Not very useful	Not at all useful
<input type="checkbox"/>	x		<input type="checkbox"/>

**Question 11c: Do you have any further comments on this section of the guidance?**

*Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you'd like to make?*

Circular CCD 7/2007 currently contains the Guidance (2007 Guidance) relating to Self Directed Support and Direct Payments. Said 2007 Guidance detailed information and suggestions regarding the practical application of Direct Payments. It is not clear whether CCD 7/2007 will be superseded in its entirety by this 2013 guidance or whether the 2013 guidance and new proposed regulations are to be read in conjunction with the current 2007 Guidance. It is submitted that CCD

7/2007 provides a breadth of information for professionals and service users which appears not to have been replicated within the parameters of section 9.4.

One example relates to the provision of information, CCD 7/2007 contains a section on page 40 which specifically deals with the issue of provision of information. The draft 2013 guidance is slightly confusing regarding the duty to provide information to the supported person, at paragraph 124 the guidance indicates that the professional should take steps to learn about the nature and effect of the direct payment, etc. but at paragraph 130 it states there is no specific legal requirement to explain the responsibilities which go along with having a direct payment. This creates uncertainty as to the nature and extent of the duty upon the professional. Again (see earlier comment for paragraphs 72 & 73) the words “nature and extent” are used in paragraph 124, however the 2013 guidance does not address how “nature and effect” should be interpreted in relation to direct payments.

Paragraph 125 of the guidance relates to third party direct payments and indicates the supported person can ask for their direct payment to be paid to a third party to be administered on their behalf. It’s unclear if there any limitations on who the third party can be and whether any legal mandate is required in relation to clarifying roles and responsibilities.

Paragraph 136 relates to the termination and recovery of direct payments, it states that the Local Authority can only terminate the direct payment when the circumstances laid down in the Regulations apply. It is suggested that it would help if the circumstances were set out in the guidance for ease of reference.

Paragraph 138 of the guidance indicates that in situations where, for example, the supported person may have to enter hospital for a short period the professional should take all necessary steps to ensure that the direct payment continues to pay the staff costs in line with employment legislation. There is a question about whether this duty should be placed on the professional given that the responsibility remains with the supported person as an employer. There are questions about whether this could raise difficulties for Local Authorities in terms of unreasonable expectations being placed on them by the employees of the supported person.

## **Draft Statutory Guidance on Care and Support**

### **Section 9.5: Wider legal duties and strategic responsibilities**

**Question 12a: Was this section of the guidance clear and easy to understand? (please tick)**

Yes	No
X	<input type="checkbox"/>

**Question 12b: How useful did you find this section of the guidance? (please**

Very useful	Quite Useful	Not very useful	Not at all useful
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<input type="checkbox"/>	X	<input type="checkbox"/>	<input type="checkbox"/>
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**Question 12c: Do you have any further comments on this section of the guidance?**

*Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you'd like to make?*

Paragraph 147 relates to self directed support and the provision of residential care with a particular focus on care homes. Further guidance in relation to foster placements, residential schools in relation to children would be helpful as would the potential interface with Kinship Care arrangements.

Much clearer guidance is required in relation to the potential conflict between SDS and the statutory duties to protect and safeguard vulnerable adults, children and wider public protection.

More detailed information in relation to aids, equipment and adaptations would be helpful, particularly in relation to housing adaptations, repair and maintenance.

## **Draft Statutory Guidance on Care and Support**

### **Consultation Questions – General Questions**

#### The Guidance document as a whole

**Question 13: Do you have any further general comments on the guidance?**

*For example, are there any gaps in terms of the topics covered by the guidance? Are there any major changes that you would recommend? Do you have any comments on the style and layout of the guidance, or the language used in the guidance?*

East Ayrshire Council is committed to the implementation of self directed support and has welcomed the opportunity to be included in the consultation process.

It would be helpful to see more detailed information and scenarios/examples illustrated as to how this would work on a practical level for both the supported person and / or the professional.

#### The costs and benefits arising from this guidance

**Question 14: Do you have any comments on the financial costs or benefits of the requirements set out in the guidance?**

*Can you identify any financial costs or benefits to individuals, local authorities, health boards, providers or any other person or organisation affected by the guidance. In considering the costs and benefits you may wish to consult the Business Regulatory Impact Assessment published for the Social Care (Self-directed Support) (Scotland) Act available at the following hyperlink:*

<http://www.scotland.gov.uk/Publications/2012/03/5525>

*We plan to update the BRIA in light of the comments and information from this consultation.*

Self Directed Support: A National Strategy for Scotland is a 10 year strategy for Self-directed Support in Scotland which aims to set out and drive a cultural shift around the delivery of support that views people as equal citizens with rights and responsibilities. The implementation date of April 2013 and the SDS 3 year funding streams allocated to local authorities do not adequately reflect the transformational change required and the time intensive nature of this culture shift.

The guidance makes strong reference to the principles of collaboration, co-production, informed choice and innovation without recognition of the additional pressures that this will place on the registered social worker and care manager during the initial transition period.

It is also anticipated that there will be increased MHO activity within Adults with Incapacity (Scotland) Act 2000 in relation to welfare/financial guardianship applications.

#### The equality and human rights impacts of the guidance

**Question 15 (a): Do you have any views on the impact of the guidance on any or all of the following equality categories:**

- i) age;**
- ii) disability**
- iii) gender;**
- iv) lesbian, gay, bisexual and transgender;**
- v) race, and;**
- vi) religion and belief**

*Some advice to help you to answer this question - By "equality impacts" we mean whether or not the guidance will affect certain groups in a positive or a negative way. In considering the impacts you may wish to consult the Equality Impact Assessment published for the Social Care (Self-directed Support) (Scotland) Act available at the following hyperlink:*

<http://www.scotland.gov.uk/Publications/2012/03/9876>

*We plan to update the Equality Impact Assessment in light of the comments and information from this consultation.*

Further consideration of the impact and practical application of the guidance in relation to the traveller community would be helpful.

Good Practice Examples of the positive impacts of self directed support in relation to the equality categories would be beneficial.

**Question 15 (b): Do you have any views on the impact of the guidance on human rights?**

For more information about human rights please see the Scottish Human Rights Commission's website at:

<http://www.scottishhumanrights.com/abouthumanrights/whatarehumanrights>

## **Consultation Questionnaire**

### **Draft Regulations**

#### **Consultation Questions**

**Question 1: What are your views on Part 2 of the draft Regulations (calculation, payment and termination of direct payments)?**

#### **Regulation 3**

It would be helpful to have clear information that confirms that the means testing and charging arrangements should be the same for all SDS options. The current regulation appears to suggest that this relates only to Option 1, a direct payment.

#### **Regulation 4**

The local authority would welcome the introduction of "net" payments and would suggest that payment only be made "gross" where the LA deems this appropriate or if requested to do so by the Direct Payment User (DPU). The reason being (1) once the monies have been paid in full by the LA it can sometimes prove difficult and resource intense to recover it if not paid back timeously or at all and paying "net" would avoid this occurring; and it should reduce the scope for any confusion about the level of budget available to a SP.

#### **Regulation 6**

Further guidance required in relation to decision making processes, accountability and responsibilities in relation to monitoring use of monies against agreed personal outcomes.

#### **Regulation 7**

represents a significant change regarding the termination of direct payments in comparison with the position set out in paragraphs 159 – 168 of CCD 7/2007. Regulation 7 is limited to situation where the supported person becomes ineligible to receive direct payments or has in some way used the payment in an inappropriate manner. This is much narrower than the position set out in CCD 7/2007 which allows the local authority to exercise a greater degree of discretion enabling direct payments to be terminated where it is assessed that the supported person is no longer able to manage direct payments with the available support or where the local authority is not satisfied that the DPU's needs or personal



outcomes are being met.

The list as it stands does not provide scope for direct payments to be terminated in circumstances where the Local Authority assess that the support being provided is not suitable and adequate in terms of section 12 of the 1968 Act resulting in increasing vulnerability for the supported person.

Also missing is the scope to terminate direct payments when the supported person fails to provide information relation to how the direct payment has been spent.

**Question 2: What are your views on Part 3 of the draft Regulations (appropriate/inappropriate circumstances for the employment of close relatives)?**

The terms of Part 3 of the Regulations represent a change in focus. The starting point in CCD 7/2007 relating to the employment of family member is broadly considered at the discretion of the Local Authority in exceptional circumstances.

Section 12B(3) of the 1968 Act states that a direct payment shall be subject to the condition that the recipient shall not secure the provision of the service to which it relates from a specified family member. The starting point is therefore that services cannot be secured from a specified family member. Regulation 4 of the Community Care (Direct Payments) (Scotland) Regulations 2003 (as amended) provides a caveat to that general rule. It allows a Local Authority to agree to a service being provided by a specified family member if satisfied that securing the service from them is necessary to meet the direct payment user's needs or to safeguard and promote the welfare of the child in cases involving children. The discretion afforded by the current position means that the Local Authority has the power to consider the circumstances in each individual case and make an informed decision as to whether Regulation 4 applied based on assessment.

The changes in the regulations will present challenges in a number of areas:

- Employing a family member to provide care/support changes the family dynamics and can blur the boundaries in relationships. Whilst we recognise the positive aspects of this in some circumstances, widening the scope for this could place more pressure on family carers and may reduce the natural support network available to the supported person.
- It makes the task of defining eligible support for both the supported person and the family carer (within the carers assessment) more difficult when they provide both paid and unpaid supports.
- There may be a duplication of public funding for the caring tasks / hours of care provided by a family member who is also in receipt of Carers Allowance.
- It can prove difficult to determine whether the caring arrangement has been agreed following any undue pressure by or towards the supported person or carer.

- Replaces section 12B(3) and Regulation 4 of the Community Care (Direct Payments) (Scotland) Regulations 2003 lists the specific situations where services can be secured from a family member where the service user and the family member agree to the arrangement, the family member is “capable of meeting the direct payment user’s needs” and one of the factors listed in subsection (3) applies. The list of factors is lengthy and encompasses a wide range of circumstances. The list could arguably be open to a wide interpretation with a large number of scenarios possibly falling within the terms of the subsection make it easier to argue that a direct payment should be paid where a family member is providing support. There will be circumstances where, depending on the interpretation of “capable” the tests are met but the local authority may have concerns that provision of care by a family member is not appropriate. It is submitted that replacing the local authority discretion with Regulation 9 could increase the number of challenges made against the Local Authority. The draft Guidance does not currently give any indication of how “capable” should be interpreted.

### **Regulation 10**

Likewise further guidance is required in relation to a potential area of disagreement in that whilst the supported person and family member agree that they satisfy reg. 9(2), the LA does not and in particular 9(2)(b) hasn’t been met.

### **Question 3: What are your views on Regulation 11 which deems individuals who are placed under a variety of criminal justice orders to be ineligible to receive direct payments?**

For example, is it appropriate to impose the exclusions listed in Regulation 11? Are there any persons not listed in regulation 11 to whom it would be inappropriate to offer the option of a direct payment?

Subject to careful risk assessment and planning all individuals should be eligible to receive direct payments. Equally, the Local Authority should be able to limit the four SDS options where the assessment deems that it is not in the best interests of the supported persona as it places themselves or others at risk of significant harm.

There should also be recognition that for some individuals, all or part of their care plan is determined by compulsory measures which should always take priority.

### **Question 4: What are your views on restricting access to direct payments for those who are homeless, those who are fleeing domestic abuse or those who require support in relation to drug or alcohol addiction?**

A comprehensive outcome focused assessment and careful risk assessment should be completed and each individual circumstance taken into account before a restriction should apply. Applying restrictions across broad groups of service users do not reflect the principles of personalisation and should be avoided where possible.

To facilitate this in practice, providing a “power” to the local authority to offer the 4 SDS options instead of a “duty” would be beneficial. This would allow for careful risk assessment and planning where there are more complex issues i.e. criminal behaviours, addiction, mental disorder.

**Question 5: What are your views on restricting access to direct payments in relation to the provision of long-term residential care?**

This question was raised during the initial consultations on a draft SDS Bill. The Scottish Government would like to invite detailed views before making a final decision prior to the laying of the Regulations before the Scottish Parliament. Should the restriction be removed from the final regulations, thereby allowing direct payments for residential care? Or should it be retained? Please provide reasons as to your support or opposition to requiring authorities to provide direct payments for residential care.

Restriction should be removed to allow more choice and control for the supported person. Further consideration should be given to extending the protection offered to adults and older people under the National Care Home Contract and children and young people under The National Care Contract.

Consideration would be required in respect of guidance for charging to Residential Accommodation to ensure that SDS provisions are not contradictory to Free Personal Care criteria.

**Question 6: The draft Regulations do not specify circumstances where the direct payment option should be unavailable for care and support to children/families. *Should* there be specific restrictions on choice of support in relation to children/families support (i.e. support provided under Section 22 of the Children (Scotland) Act 1995) and should these restrictions apply to the direct payment only, or to other options as well?**

One concern which arises in relation to cases involving children is how it is envisaged that child protection measures and the provision of direct payments will interact. There will be cases where in terms of section 22 of the 1995 Act services may be required for children whose health or development may be impaired or may fall below a reasonable standard without services from the local authority as a result of family circumstances which raise child protection issues. A child may be “looked after” in terms of 17 of the 1995 Act but remain within the family home (on a home supervision requirement). A child may be looked after and accommodated. The child’s parent would on the face of it remain the “appropriate person” with parental rights and responsibilities. It is not clear whether in these circumstances there will be scope to limit the availability of direct payments under the 2013 Act because of concerns regarding how they may be utilised by the appropriate

person.

It is suggested that there should be scope to limit access to direct payments (in terms of Option 1 or Option 4) in such cases with an element of discretion provided to the local authority to enable assessment of the individual circumstances of each case. It may also be necessary to provide scope to limit the role of the appropriate person in situations where the child is looked after and accommodated and there are concerns that the appropriate person is not making decisions regarding Options 2, 3 or 4 which safeguard and promote the welfare of the child.

### **Question 7: Do you have any further comments on the draft Regulations?**

For example, are there any gaps in terms of the topics covered by the Regulations? Are there any major changes that you would recommend? Are there any topics that are more appropriate for statutory guidance rather than Regulations?

The existing guidance on direct payments – CCD 7/2007 is noted to be very full, detailed and comprehensive providing a great deal of useful information to direct payment users and professionals. It is not clear whether it is intended that the existing guidance be replaced by the draft guidance on Self Directed Support.

Section 12B of Social Work (Scotland) Act 1968, and therefore the regulations made under it, will be repealed by Section 25 of the Social Care (Self Directed Support)(Scotland) Act 2013 (“the 2013 Act”) there are no equivalent provisions in the 2013 or the draft regulations proposed to be made under it.

This means that there is no explicit regulation in the 2013 Act or the draft Regulations to restrict local authorities making a direct payment to an adult who is incapable of managing a direct payment, or whether and when they can make a direct payment to an attorney or guardian.

The effect or the omission of any provision in the 2013 Act or Regulations would be to create uncertainty about an issue where there was previously certainty.

That it would provide clarity for local authorities, and those seeking to advise adults with incapacity, or those seeking to make decisions on their behalf, if provision specifying that a person who is incapable of managing a direct payment with or without support is ineligible to receive a direct payment, and the circumstances in which an attorney or guardian can chose and receive a direct payment on behalf of an adult with incapacity.

Further guidance and clarification would be helpful in relation to direct payments being paid to young carers where the parent/guardian is the supported person.

## **Draft Regulations**

### **Consultation Questions – General Questions**

#### The costs and benefits arising from these regulations

#### **Question 8 : Do you have any comments on the financial costs or benefits of the Regulations?**

Can you identify any financial costs or benefits to individuals, local authorities, health boards, providers or any other person or organisation affected by the Regulations. In considering the costs and benefits you may wish to consult the Business Regulatory Impact Assessment published for the Social Care (Self-directed Support) (Scotland) Act available at the following hyperlink:

<http://www.scotland.gov.uk/Publications/2012/03/5525>

We plan to update the BRIA in light of the comments and information from this consultation.

Self Directed Support: A National Strategy for Scotland is a 10 year strategy for Self-directed Support in Scotland which aims to set out and drive a cultural shift around the delivery of support that views people as equal citizens with rights and responsibilities. The SDS 3 year funding streams allocated to local authorities do not adequately reflect the transformational change required and the time intensive nature of this culture shift.

The guidance makes strong reference to the principles of collaboration, co-production, informed choice and innovation without recognition of the additional pressures that this will place on the registered social worker and care manager during the initial transition period.

#### The equality and human rights impacts of the regulations

#### **Question 9 (a): Do you have any views on the impact of the Regulations on any or all of the following equality categories:**

- i) age;**
- ii) disability**
- iii) gender;**
- iv) lesbian, gay, bisexual and transgender;**
- v) race, and;**
- vi) religion and belief**

By “equality impacts” we mean whether or not, and in what ways, the Regulations will affect certain groups, and whether they will impact on those groups in a positive or a negative way. In considering the impacts you may wish to consult the Equality Impact Assessment published for the Social Care (Self-directed Support) (Scotland)

Act 2013, available at the following hyperlink:

<http://www.scotland.gov.uk/Publications/2012/03/9876>

We plan to update the Equality Impact Assessment in light of this consultation.

**Question 9 (b): Do you have any views on the impact of the Regulations on human rights?**

For more information about human rights please see the Scottish Human Rights Commission's website at:

<http://www.scottishhumanrights.com/abouthumanrights/whatarehumanrights>