

# Consultation Questionnaire

## Draft Statutory Guidance on Care and Support

### Consultation Questions

Section 2 : Supported Person's Pathway

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

Yes	No
√ <input type="checkbox"/>	<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"/>	<input type="checkbox"/>	<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?*

This section is useful but we would suggest that there needs to be a more consistent focus on outcomes, including under step 4 and step 7. We consider outcomes as primarily being rooted in the 'personal' and we are conscious of the risk of conflating them with service outcomes or high level outcomes. In Table 2 we would suggest that the supported person should be placed at the start of the table since their participation in the assessment should come before professional responsibility for the support plan.

There is concern that this section views the person's pathway as starting from a point predicated on identifying a need which requires a service intervention. We need to recognise that if there is a pathway that this starts before the point where someone identifies a need – the person has a journey that starts and hopefully continues without us.

## 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
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√ <input type="checkbox"/>	<input type="checkbox"/>
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**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"/>	<input type="checkbox"/>	<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?*

This works well as a reminder of the values and principles which underpin Self-Directed Support.

**Table 3**

Collaboration – There should be transparency around the views of both the individual and the professional during the process of assessment and support planning and these should be documented.

Involvement – We need to ensure that people have more agency in their assessment or SDS is only the power to shape the consequences of decisions that have already been made.

We need a strong commitment to involve people either on a community or a more personal basis. This needs to be linked to a broader approach around personal outcomes and capturing what's important to, and for, people.

**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
√ <input type="checkbox"/> Partially	<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"/>	√ <input type="checkbox"/>	<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?*

There is a general sense that this part of the Guidance is too lengthy and a bit disordered.

Paragraph 18, first bullet point – the purpose of assessment is to determine whether the person is a person in need. We therefore suggest that this should read '*The first purpose of assessment is to identify the person's needs with a view to determining whether the relevant authority has an obligation to meet those needs.*'

This entire section appears to refer only to adults with no reference to children and families (although we realise this is covered later on). If this section is specific to adults this should be explicit. The guidance is silent on eligibility criteria for children – is the implication that children's services should follow the criteria set out for adults and what are the implications of this?

Self assessment should be explored as a realistic alternative; this may move us closer to the reality of people's lives and their expectations

A shorter version demonstrating the thread linking assessment to support planning would make this more meaningful.

## **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
√ <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"/>	<input type="checkbox"/>	<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 57 – we suggest this is removed and replaced with 1 or 2 examples in a text box after Paragraph 58.

Paragraph 60 – we suggest that the first two sentences are reworded as follows: ‘ While individuals may continue to select their support under Option 3, the principles of choice and control, collaboration and involvement should continue to hold for individuals under this option.

Paragraphs 64/65/66 – The professional discretion described here is related only to the individual’s assessed need and the form of support chosen. There are a number of issues with this in relation to Option 1.

Local authorities have wider duties in relation to safeguarding, including community safety. We often work closely with individuals to develop support in circumstances where they present potential risk to other people but are not subject to any of the compulsory orders under Regulation 11 of Part 4 of the Act. In these circumstances our concerns about the use of Option 1 would not be related to the assessed need of the individual, but the safety of others they may recruit to assist with their support.

Equally, there are some adults who have capacity to consent to a particular option but who may have difficulty understanding and exercising their responsibilities as employers. The support may be adequate to meet their agreed outcomes but if difficulty arises in relation to their role as an employer, there will be no legal protection for them within employment law if they have not complied with legislation. This potentially leaves vulnerable adults exposed to legal issues they would have difficulty understanding. It could also mean that professionals would be criticised for agreeing to such arrangements when it was clear the individual would not be able to understand and exercise their responsibility as an employer.

The same concerns apply where parents, whose lifestyles may cause some concern, opt to take Option 1 to secure support for a child.

We suggest that professional judgement has an important role to play here and that any issues relating to compliance with Adult Support and Protection and Child Protection duties should take precedence. Clarity about this must be provided within Guidance and Regulations.

Paragraph 70 – Reference should be to Section 9 of the Act – not Section 8

## **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
√ <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"/>	√ <input type="checkbox"/>	<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 – reviews may be triggered for a variety of reasons e.g. planned review, change of circumstances, change of needs/outcomes, issues around management of support including finances. It is possible that financial review may also be needed for Option 2 if the budget is not being managed well on behalf of the supported person by a third party.

## **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
√ <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"/>	<input type="checkbox"/>	<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?*

We would suggest that facilitating choice can also be linked to Community Planning and Economic Development of the local area.

Table 8 Part 3 – we would suggest the description here should be asset based rather than focussing on gaps or deficits.

There could be more reference to provider capacity for both statutory and independent providers.

There is also no mention of personal assistants in this part.

Links could be made to both in-house local authority support, independent support and include references to SPAEN/Self Directed Support Scotland

## **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
√ <input type="checkbox"/>	<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"/>	√ <input type="checkbox"/>	<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?

More needs to be made in this section of the role of the NHS and Integration of Health and Social Care. Evidence is emerging that pooled budgets can work well – examples would be helpful.

Paragraph 84 – This needs more clarification i.e. the suggestion that health funded support could replace social care.

Some reference in this section to the agenda for personalised health care agenda and the equality strategy would be useful.

Paragraph 85 – we would suggest that '(and senior managers)' should not be in brackets as it suggests their role is less important.

We suggest there should be reference to multi-agency assessment and NHS Continuing Care.

Paragraph 87 Bullet Point 2 – should read 'They can arrange for the transfer of funding from the NHS to the local authority in order to pay for aspects of health care provision'.

There are parallels with the agenda to integrate health and social care, though this is not specifically referred to in the Guidance. SDS needs to be adopted by health colleagues as part of the Integration agenda and this will require collaboration, training and a culture change within health at all levels.

## **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 type="checkbox"/>	<input type="checkbox"/>

**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"/>	<input type="checkbox"/>	<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?*

We suggest that this section of the Guidance needs more work and the Guidance around how SDS will work in the wider Children and Families context is required.

While the exclusions for Direct Payment seem to be broadly appropriate in the draft Regulations, we believe that professional judgement should be used to determine whether people fleeing domestic abuse or who are homeless would benefit from having access to direct payments. These situations are sometimes dealt with in a planned way rather than always being immediate crisis. If this is something the local authority has a power to do it may be helpful in some situations.

Could professional discretion be exercised as to whether children/young people who are in long term foster placements or living with a Shared Lives carer to enable access to direct payment? Again if professional judgement was applied this could be helpful in some circumstances. It is also worth considering the interface with Kinship care. This approach could be used at an early stage to assist young people who are preparing to leave care.

Some young people are 'looked after' on a part time basis if they attend term time residential placements. It's important that families can access SDS options during holiday periods to ensure they are appropriately supported.

The concept of 'children in need' is very broad and we would suggest that SDS options could be useful in a variety of circumstances e.g. to work with families to try to prevent children from being 'accommodated'.

The Guidance asks whether there are circumstances where Options 1 or 2 should never be offered. We would suggest that professional discretion is applied on whether these options should be offered, even where compulsory orders are in place, since there may be some useful interventions which would empower the child and the parent to improve their situation.

There needs to be much more clarity within the Guidance as to the interface between legislation for SDS and child protection legislation. Some confirmation is needed that, even where it would appear that all four SDS options could be offered, child protection concerns will always take precedence over the options for SDS. For example, if a family is being investigated due to concerns for a child, a direct payment would not be the most appropriate option until the local authority is satisfied that it would not put the child at risk. Professional assessment and the family's assessment of need could be in conflict and professional judgement should be applied in relation to safeguarding duties.

Where compulsory measures are in place e.g. a child is 'supervised' at home, there may be little room for flexibility unless professional discretion can be applied to use self directed support as a way of empowering the family to engage.

Where a Self-Directed Support arrangement is in place and compulsory measures are subsequently applied, there will be need for transitional arrangements to be agreed e.g. where there are issues of neglect and the parent is not engaging in the implementation of the child's Plan.

SDS should be used to encourage and empower both parent and child and not be used to create dependency e.g. provision of taxi because the parent is not getting the child ready for school on time. There is a recognition that often the support provided is to support the parent to parent the child appropriately rather than services directly to the child.

The capacity of the parent to manage a direct payment on behalf of a child has to be taken into consideration, particularly where there are money management issues and also problems of addiction. Again we would suggest that professional discretion is applied.

Links and interface with other bodies involved in child protection need to be clear e.g. the Children's Hearing system.

Training for family carers and personal assistants needs to be accessible and sufficient to ensure children are not put at risk. The current PVG regulations are a concern as there is no legal requirement for parents to ensure that personal assistants are members of the PVG scheme.

We need more guidance on how self directed support can be applied to support young carers who are providing support for a parent or guardian. The parent's view of needs may be in conflict with those of the child. Some exploration of how to

ensure the young carer's voice is heard in relation to the four options.

From an Adult Support and Protection perspective there is some concern about what should happen during transition to adult services where there are issues about a young person's capacity to consent when they reach 16. There needs to be more clarity about the legal framework within which decisions can be made on their behalf once they are 16.

The guidance states families should be informed about the **opportunity** to apply for Power of Attorney or Guardianship. The young person would need to have the capacity to grant a Power of Attorney – families cannot **apply**. If the young person lacks capacity then a legal framework for decision making is **necessary**.

Is it expected that in all such cases a guardianship application should be made and if so the necessary time to progress this would need to be stressed to families to minimise the risk of disruption of support and ensure that legal requirements are met.

There are significant concerns that families will feel pressured into providing support

## **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 type="checkbox"/>	<input type="checkbox"/>

**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 type="checkbox"/>	<input type="checkbox"/>	<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?*

We would suggest that a clearer explanation of what is meant by circles of support, in the context of the Guidance, would be helpful. There are different perceptions of this i.e. is it a formal structure or a group of family and friends or both?

There needs to be recognition that people have very different levels of understanding and capacity to engage in the process of planning support and the methods used. Where there are others who can support the individual in their decision making, a clear understanding of what their role would or could be in relation to the assistance with managing the support is needed. For example some people who can make decisions, with support, on how they want their support provided may not be able to understand the complexities involved in employing staff. This is more than just the administrative responsibilities and requires some level of understanding of employment law, health and safety etc. The person in receipt of the direct payment is the employer in the legal sense and their capacity to understand and exercise their responsibilities needs to be taken into account.

The timescales for enabling this kind of support is important. Careful planning leads to a more successful outcome and the process should not be rushed.

More Guidance is needed in relation to people whose capacity to consent is in doubt. In one of the SDS test sites, this clearly led to an increase in applications for legal guardianship.

Where the local authority has welfare guardianship and has the power to make welfare decisions there should be clarity about whether option 3 is automatically applied and that this can include, where appropriate, the provision of the local authorities own services.

It was felt this section over simplifies the complexities around supported decision making and assumes (rightly in most cases) that the additional people assisting with the decision making have the best interests of the person at heart and are not putting the person under undue pressure to make a particular decision.

The Guidance states that **reasonable steps** should be taken to involve the person but it was felt more clarity was required around what should happen in cases where this is suspected and the interface with Adult Support and Protection.

Para 110 is helpful - although it was felt the first sentence should be further strengthened to highlight the legal requirement to have a guardian or attorney appointed under the Adults with Incapacity (Scotland) Act 2000 and only those so appointed can legally make decisions on behalf of an adult.

Para 113 states that if a professional has questions about a person's capacity they should seek assistance from an MHO. There are concerns about the appropriateness of this at such an early stage as there is considerable potential to increase the workload for MHOs. This is a highly complex area and more clarity is sought to ensure people are not placed at increased risk of harm.

## **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 type="checkbox"/>	<input type="checkbox"/>

**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"/>	<input type="checkbox"/>	<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?*

We are generally very supportive of the power to provide support to carers to assist them in their caring role and believe this will afford flexibility to local authorities, particularly to support carers where the supported person declines support from others.

There is no mention in the Guidance of the intention to relax the rules on employing family members using a direct payment. This raises a number of issues and we would suggest that further clarification is provided within guidance as to how this is applied in practice e.g.

- How does carer assessment apply to family members who are providing both paid and unpaid support:
- How should the paid support be viewed in relation to provision of short breaks/respite?
- How should we view the circumstances where the carer is not accessing appropriate breaks from the paid support e.g. asserts that they are providing the support on an unpaid basis while on paid annual leave? This effectively means that family carers don't take the statutory breaks required under employment law and can impact on both the paid and unpaid support.
- What plans should be put in place to cover sickness, annual leave etc when the supported person and the carer decline to have any contingency/back up support built in to the support package?

These issues can make the support provision to family carers complex and there is a clear confusion of roles.

More clarity is required around how SDS applies to young carers – particularly around option 1, where the young carer is under 18 years.

Paragraph 120, bullet point 5 – people who provide advocacy should not be referred to as 'supported persons'

Paragraph 125 – a third party should not be referred to as a supported person as this creates confusion.

There are concerns about carer stress if they take on the funded support role and the resultant impact this may have on the supported person.

## **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"/>	<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"/>	√ <input type="checkbox"/>	<input type="checkbox"/>	<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?*

In relation to Third Party Direct Payments it is important that the roles of both the supported person and the third party are made clear and that there is evidence that all parties understand their responsibilities e.g. signed mandate. This can prevent problems later on. There may also be a need for some professional discretion if it appears there may be undue pressure being applied in relation to financial management e.g. a family member or friend is keen to manage the finances but are known to have issues of addiction/gambling.

It should always be clear that a personal assistant employed to provide support should not be appointed to manage the finances.

Paragraph 127, bullet point 4 - replace the word 'holiday' with short break, otherwise this raises expectations about agreed use if a direct payment.

Paragraph 124 and 130 seem to be contradictory in relation to responsibilities of being an employer. We would also assert that specialist advice is required for those who want to become an employer and that this is not the responsibility of the care manager. Their role would be to refer the supported person to an organisation or team that can provide the relevant advice or support.

Where a direct payment has been terminated by the local authority e.g. due to misuse, the local authority discretion as to whether to reinstate should be covered in the Guidance.

Greater attention needs to be paid under Section 8 in relation to health's role in the welfare monitoring of a direct payment package of support.

Paragraph 138 – this will apply equally to health input, whereas the suggestion here is that it applies to social work responsibilities.

It should be made clear that in the monitoring of direct payments if the supported person's health, welfare or financial needs are not being met then consideration should be given to whether they fall within the definition of an Adult at Risk as defined by the Adult Support and Protection (Scotland) Act 2007 and they may be at risk of harm / significant harm and Adult Support and Protection measures may be required.

## **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
√ <input type="checkbox"/>	<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
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**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?*

Adult Support and Protection

Much clearer guidance is required in relation to the interface between Self-Directed Support, particularly Direct Payments, and Adult Support and Protection legislation. Both of these confer statutory duties on local authorities which could be seen to be conflicting. ASP applies to all citizens in circumstances where they could be viewed as being vulnerable. Local authorities often support individuals whose behaviour could be perceived as presenting a risk to others and as such we would want to exercise our safeguarding duties in respect of all citizens.

The application of Self Directed Support options, and in particular direct payments, is a legal duty with only a small number of exclusions relating to compulsory orders. Local authorities work with significant numbers of people for whom access to a direct payment, especially to employ personal assistants, could be perceived as risky and ill advised. Discretion on the method of support appears to be restricted to the needs of the supported person. The proposed regulations appear

to afford no discretion to professionals to restrict the option to employ staff if there is substantial evidence of potential risk of harm to staff. The supported person takes on the role of employer and the authority's ability to share information with personal assistants and monitor that relationship is limited not only in practice but in law.

Local authorities may also refer individuals to independent support organisations to support them in their preparation to become employers. Sharing of information in these circumstances could be a difficult issue.

Professionals could not realistically ignore the existence of substantial risk and would be in breach of wider duties in relation to safeguarding. The same concerns would also apply to child protection issues, but the draft Guidance and Regulations don't appear to address this.

We would suggest that much clearer Guidance in relation to prioritising safeguarding duties in relation to the duties under Self-Directed Support and the legal implications of these, are necessary.

Other specific issues identified were:

- Information-sharing between councils and support agencies when there is known risk relating to a supported person and potential risk to staff whom they might employ and steps that might be taken to ensure safety for staff.
- People felt that the Guidance should provide clarity on whether councils should insist on a PVG check for people employed to provide funded support.

#### Re-ablement/Intermediate Care

The clarification that these are not subject to Self-Directed Support is helpful. Where a Self-Directed Support option is already in place and the supported person needs re-ablement support or intermediate care it is important that these can be provided alongside, and be complimentary to, the support already in place. This is particularly important where personal assistants are employed and the supported person has to meet employer responsibilities.

#### Equipment and adaptations

This section appears to be light in detail, particularly since it now covers housing adaptations. There is no information on how this impacts on other funding sources and obligations e.g. housing.

Current direct payment regulations and guidance includes information on ownership, repair and maintenance but this has been left out of this Guidance. Clarity on how this will apply to owner occupiers and landlords is needed.

#### Other forms of social welfare

As previously stated it might be useful to have the option of Self-Directed Support for wider forms of support, however professional discretion as to when and how this would be appropriate would be important, particularly for direct payment where there are addiction issues. It would be useful to confer a power to offer Self-Directed Support on local authorities, rather than a duty.

## **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?*

Midlothian Council welcomes the opportunity to comment on the Guidance and Regulations and is committed to the implementation of Self-Directed Support. In relation to full implementation of SDS time is needed to achieve the cultural shift across all the groups who will be eligible for SDS. This is not about slowing the process of implementation but enabling a strong and consistent approach. The final Guidance and regulations will not be published until late in the process and this should be taken into account along with evidence from the SDS test sites that it is a lengthy process for authorities.

The employment of family carers is not addressed in the Guidance despite the fact that there is a material shift in emphasis within the draft Regulations. This is a significant gap and does not seem to recognise the complex shift in dynamics that this can produce within family relationships. It also has the potential to change the dynamic of how society views family carers in relation to what support the state provides and what a family may choose to do as part of their familial role.

The process of assessment for both carers and the people they support can be complex and difficult and there are sometimes conflicting needs and views about how needs should or could be met. It is often difficult to ascertain whether pressure is being applied either to a carer or the person they support by the other party. This is even more difficult when the carer takes on a paid role. In some families this arrangement works well, but the proposed change to regulations will make it much more difficult for professionals to exercise discretion in order to protect the interests of either carer or supported person.

There is also the risk that for some individuals employing family carers could in fact reduce their level of social inclusion and networks, if they see less of other people in the context of their support. This does not sit well with an asset based approach to increasing independence, socialisation and self reliance.

If there is concern at review that the supported person's outcomes are not being met this could substantially impact on the relationships of all concerned and the family's relationship with the local authority.

#### 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.

Comments

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.

We believe the Guidance fulfils obligations in relation to equality.

**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>

We have listed some concerns regarding safeguarding and would suggest these could have wider implications with regards to the human rights of individuals who could potentially be placed at risk.

## 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)?**

The option for the direct payment user to seek gross payment involves additional administration for local authorities which increases costs unnecessarily.

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

We would suggest that the draft regulations for employing relatives will be difficult to manage and monitor for a variety of reasons.

- The needs of carers and those they provide care and support to are very different. It is difficult to establish eligible support, including short breaks/respite, within carers assessment for family members who are providing both paid and unpaid
- The proposals on waiving charges for carers will be difficult to apply where the carer is also being paid through direct payment
- The family dynamic is completely changed when family carers are paid to provide support
- It is extremely difficult to assess and monitor whether there is any undue pressure on either the supported person or the carer to agree to the employment arrangement
- There is evidence that some family carers don't access appropriate breaks from the paid support e.g. agree to provide support on an unpaid basis while on paid annual leave rather than accepting replacement care. This effectively means that family carers don't take the statutory breaks required under employment law which can impact on both the paid and unpaid support and places the employer in breach of employment regulations. It is very difficult to monitor this and, where substantial paid and unpaid support is provided by the same person, there are associated risks to the individual and the carer.
- Sickness cover, annual leave etc is often not planned appropriately and there is often over dependence on family carers without appropriate contingency/back up support built in to the support package?
- There is concern that support from other family members may reduce because of the paid role.

These issues can make the support provision to family carers complex and there is a clear confusion of roles. It is difficult for professionals to assess the level of influence placed on individuals to seek or accept these arrangements. We would therefore suggest that employment of family members is at the discretion of the local authority.

**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?

We suggest that the offer of the option of a direct payment should be discretionary where there are concerns around safeguarding both of the individual and of the person providing support. Adult Support and Protection and Child Protection duties should take precedence over the duty to offer a direct payment. Otherwise the professional assessment could be significantly compromised in relation to duties associated with all of these Acts. There are significant concerns over the legal position for professionals and local authorities.

**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?**

As previously stated it might be useful to have the option of Self-Directed Support for wider forms of support, however professional discretion as to when and how this would be appropriate would be important, particularly for direct payment where there addiction issues. It would be useful to confer a power to offer Self-Directed Support on local authorities, rather than a duty.

**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.

There are some concerns that those accessing direct payment for residential care could be subject to 'top-up' fees unless a level of protection is agreed with providers.

There has been little or no demand for direct payment for residential care and within current models of provision it is difficult to see any real advantage. However, if the model of provision changes offering more flexible options it may be something to consider.

**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?**

As previously stated it would make sense to enable professional discretion in relation to when direct payments are appropriate. This would afford maximum flexibility to professionals to engage with families to secure support which best meets their outcomes at appropriate stages in the support.

**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?

Comments

## **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.

The full cost of implementation is difficult to estimate and it is impossible to determine whether further transformation funding may be necessary after 2015. The cost implications of wider application of Self-Directed Support are unknown at this stage, particularly in relation to support/advocacy arrangements to enable people to make informed choices.

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>

See previous comments in relation to safeguarding.