

To be emailed to the following address by 5 pm on Monday 8 July.

[selfdirectedsupport@scotland.gsi.gov.uk](mailto:selfdirectedsupport@scotland.gsi.gov.uk)

Adam Milne  
Self-directed Support Team,  
Room 2ER,  
St Andrew's House,  
Regent Road,  
Edinburgh,  
EH1 3DG

Dear Mr Milne

**A public consultation on draft Regulations and Statutory Guidance to accompany the Social Care (Self-directed Support) (Scotland) Act 2013**

NHS Highland and The Highland Council welcome the opportunity to comment on the draft Regulations and Statutory Guidance that will accompany the new legislation when it comes into force in April next year.

This consultation response is made on behalf of the the Highland Health and Social Care Partnership and has been informed by six consultation events held across the Highland area with a range of stakeholders including service users, carers, staff and service providers.

Generally we find the draft Regulations and Guidance to be helpful. However, without exception all of the people we have spoken to have remarked on the length of the Guidance. Hence, there is a general view that it needs to be more concise and care needs to be taken to ensure that it is written in 'plain English' in order to ensure that it is accessible to all groups.

We would be happy to discuss any aspect of this consultation response should you wish and would ask that you address any queries in the first instance to Jennifer Campbell, SDS Team Manager at [jennifer.campbell7@nhs.net](mailto:jennifer.campbell7@nhs.net)

Yours sincerely



Elaine Mead  
Chief Executive  
NHS Highland



Bill Alexander  
Director of Health and Social Care  
The Highland Council

## 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
<input checked="" 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 checked="" 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?*

Section 2 this should read 'The Supported Person's 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
<input checked="" type="checkbox"/>	<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 checked="" 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?*

We feel that this section of the Guidance is a good reflection of the values and principles of Self-Directed Support

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

We suggest that the heading for this section should read 'Assessment and Eligibility'. As a whole, we feel that the section is overly-detailed and that it could be condensed without losing any of its meaning. In particular, we feel that this section is overly jargon-laden and fear that that there is a danger that this may result in too much manoeuvrability in interpretation. We believe that there is a particular risk around eligibility criteria, which in turn may lead to a postcode lottery.

## **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 checked="" 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 checked="" 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?*

Again this section is overly-long and detailed.  
We feel clarity is required both in the Guidance and the Regulations that Adult Protection and Child Protection duties will always take precedence i.e. that the protection of children and vulnerable people is always the primary concern.

**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 checked="" 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 checked="" 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?*

We feel that there should be greater emphasis on reviewing as a regular and robust process which forms an essential part of the overall assessment and support planning process.

**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 checked="" 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 checked="" 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?*

As it reads, we feel that there is too great a focus on formal services. We feel that there should be greater emphasis on the importance of seeing an individual within context of the family and wider community.

## **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 checked="" 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 checked="" 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?

We are disappointed that the legislation itself does not adequately reflect national intentions around integration of health and social care services. This is especially felt in Highland, where we have progressed significantly along this route. We would suggest that there is positive learning from Highland that could be used to inform integration planning. We would be keen to share examples of good practice from Highland.

**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"/>	<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 checked="" 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 feel that it may be appropriate to reconsider how best Guidance might be provided in respect of children and families. We note that the Scottish Government proposes to develop a suite of Guidance aimed at different stakeholders. We therefore wonder whether it makes sense to develop specific Guidance aimed at SDS in respect of children and families.

The reason for asserting the above is that it is felt that the draft Guidance here is heavily targeted around adult services and there is insufficient recognition of the major differences between children and adults, their respective needs and the support that they require in order to meet agreed outcomes.

Professional discretion should be able to be exercised as to whether such children/young people e.g. in long term foster placements or cared for through a shared care package can access a direct payment.

We need to ensure that SDS does enable flexible support solutions for children and young people. For example, some young people are '*looked after*' on a 'part-time basis' in as much as they are in receipt of term-time residential care provision. SDS may be helpful in enabling families to access appropriate support during holiday periods.

We make reference at several points in this response to child and adult protection and would want to stress again in this section the need to ensure that significant child protection concerns will always take precedence over the options for SDS.

In a situation where an SDS support package is in place and compulsory measures are subsequently applied, there will be need to review this as a matter of urgency and 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.

Links and interface with other bodies involved in child protection need to be clearer e.g. the Children's Hearing system, especially with the legislative changes introduced which provide a new ground which is more applicable to children with disabilities.

The importance of professional judgement and discretion is again highlighted. For example, where compulsory measures are in place e.g. where a child is '*supervised*' at home, there may be little room for flexibility unless professional discretion can be applied to use SDS as a way of empowering the family to engage.

The current regulations are concerning as there is no legal requirement for

parent/carers to ensure that personal assistants are members of the PVG scheme. This is relevant irrespective of whether the recipient is a child or adult.

The assessment and support planning process/providing choice in the wider safeguarding role: This section is not sufficiently clear that conflict can be the dominant factor with a family when intervention is not at the request of the parent/carer. This can make planning difficult/not possible until the conflict is resolved.

The involvement of the child in making and managing choices: We feel that there could be more explicit guidance around utilising SDS with young carers providing support for a parent or guardian, especially where the views of the parent may conflict with those of the young person. Throughout Scotland there is a shortage of advocacy for children and young people especially those with a disability. Hence, it should not be assumed that this is readily available. We would wish to highlight that the role of the 'appropriate person' for those under the age of 16 appears to conflict with other legislation that gives children greater influence in decision making over the age of 12.

Transition: this section of the Guidance would benefit from being strengthened considerably with regard to the interface between children's and adult services

Incapacity: there are also issues during transition to adult services when a young person lacks capacity to consent and the parent has been using a direct payment to employ staff. A guardianship application would have to be made in order that the support arrangements can continue. This process takes time and needs to be started well before the young person reaches the age of 16. Where Guardianship proceedings are in hand but not yet confirmed there needs to be greater clarity regarding parental/carer responsibility in agreeing the direct payment. Where the young person has reduced capacity and Guardianship is not deemed necessary, there may be difficulty if it is considered that the young person would not be capable of taking on the role of being the employer. This could create legal issues for both the family and the local authority in terms of who is the lawful employer. We feel that some consideration in the Guidance of the legal issues surrounding this would be helpful.

The promotion of options to children and families: with regard to promoting SDS for all children and families it is considered necessary to build on existing work and learning from direct payments provision with children and young people with disabilities with a view to a phased roll out beyond that group of children and young people. It would be useful to have clearer definitions regarding 'specialist support depending on specific need of the child or young person' as this can rest with health professionals.

## **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"/>	<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 checked="" 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 suggest the heading should just read Supported Decision Making otherwise there needs to be further explanation around 'Circles Of Support'. We would see Circles of Support as just one mechanism of Supported Decision-Making.

## **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"/>	<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 checked="" 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 feel that greater clarity is required in respect of how SDS applies to young carers.

We support the decision not to relax the rules around use of family members as paid members of staff. We would also suggest that there should be greater emphasis on the need to ensure that contingency plans are discussed and put in place in all situations.

## **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 checked="" 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 checked="" 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?*

We are concerned that parts of the Guidance around direct payments are vague, particularly around PVGs, training of PAs and good employment law practice relating to the avoidance of conflicts of interest where the PA is also undertaking the administration of the direct payment.

## **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 checked="" 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 checked="" 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?*

In respect of reablement, we feel it would be more helpful for the Guidance to state more clearly that a Direct Payment would not be available for this type of service.

## **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?*

On the whole, we like the Guidance but at 79 pages feel that the document could be shorter and use more accessible language.

We have referred elsewhere to the need to ensure that the move towards integrated health and social care services in Scotland should be better reflected. In the light of this, we feel that further recognition needs to be given to the fact that many adult care support packages include elements of both health and social care and in the case of children and families, the support packages also include resources from local authority education providers.

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.*

We welcome the Scottish Government's commitment to providing dedicated funding until 2015 to support the implementation of the new legislation and plan to make optimum use of this. We hold the view that the legislation will result in fundamental cultural change and its implementation means that our practice will need to change. Hence this process of major change, together with its consolidation, will extend well beyond 2015. In Highland we are developing a 5 year strategy for SDS and note that nationally there is a 10-year strategy for SDS.

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 would hold the view that there are no adverse equality impacts.

**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 stressed elsewhere the need to emphasise the precedence of adult and child protection.

## 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)?**

Our view is that any option whereby an individual would access a gross payment of their Direct Payment would inevitably result in additional administration time and costs for us. We feel that this is not a good use of public funds.

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

As stated in Question 10c, we support the decision not to relax the rules around use of family members as paid members of staff.

**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 believe that this is a complex area and whilst in general, we would support the position, we do feel that there are some situations - albeit exceptional – where it may be appropriate for people in the identified exclusion list to benefit from a direct payment. Subsequently, we feel that there may be merit in reviewing this section of the Regulations.

**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?**

Whilst we would generally agree that a direct payment would not be generally appropriate at times of crisis, we can see opportunities where a direct payment might be beneficial to one of the classified groups as part of a support package. Again, professional judgement would be paramount in ascertaining appropriateness.

We feel that in highlighting specific groups in this way, the Guidance may potentially be discriminatory.

**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.

Our own experience is that to date there has been little interest from people in Highland wishing to access a direct payment for the purpose of purchasing a residential service. If flexibility is issue, then we believe that the Individual Service Fund approach may be the most appropriate route to go down for a younger adult. On the whole, we see little advantage for the individual in going down the direct payment route unless they are keen to purchase a service from a provider that we do not currently contract with. We believe a move in this direction would require considerable planning both at a national and local level not least of all taking account in older people's services of the impact on the National Care Contract.

**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?**

We feel that we have addressed this in 8c of the Guidance and 3 and 4 of the Regulations where we have flagged the importance of professional judgement.

### **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?

No

## **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.

Please see our response to Question 14 of the Guidance where these comments apply similarly.

#### 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.

Similarly, we hold take the view that there are no adverse equality impacts.

**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>

No