



## **North Lanarkshire Council Response to Scottish Government Consultation on Social Care (Self-Directed Support) (Scotland) Act 2013 – Regulations and Guidance**

### **General Comments**

North Lanarkshire Council welcomes the opportunity to comment on the Scottish Government consultation on Social Care (Self-Directed Support) (Scotland) Act 2013 – Regulations and Guidance.

The Council has chosen not to use the prescribed template(s) provided by the Scottish Government for the purpose of response as it does not easily facilitate a broader range of important points. This response therefore collectively covers:

- Draft regulations to accompany the Social Care (Self-Directed Support) (Scotland) Act 2013
- Draft statutory guidance to accompany the Social Care (Self-Directed Support) (Scotland) Act 2013
- Draft Carers (Waiving of Charges for Support) (Scotland) Regulations that will accompany the Social Care (Self-Directed Support) (Scotland) Act 2013
- Draft Directions (The Carer's Assessment (Scotland) Directions 2014) made by Scottish Ministers under section 5(1A) of the Social Work (Scotland) Act 1968 that will accompany the Social Care (Self-Directed Support) (Scotland) Act 2013

The concept of Self-Directed Support (SDS) was originally conceived in North Lanarkshire. Then, as now, it was intended to enable people with long-term, relatively stable and predictable needs to live independently. It was never designed to meet widely fluctuating or short term needs and is not a fit way of meeting such needs. It is therefore concerning that the draft regulations and guidance appears not to make this necessary and important distinction with sufficient clarity. Indeed at times it appears to imply the contrary. SDS is not, and cannot be, all things to all people.

Furthermore SDS was never conceived to consist solely of local authority social work budgets nor to facilitate employment of family members, other than in exceptional circumstances. Nonetheless, whilst the legislation and accompanying guidance and regulations may have diluted the concept of SDS, the Council remains supportive of the Government's broad intentions to increase people's choice and control over the support they may require to meet their *eligible* needs.

Confining an individual budget to local authority budgets means that the overall available resource to meet eligible need is much diminished. The failure to impose a similar duty for specified healthcare needs -such as those arising for people with long term conditions- to be met by the NHS is incoherent in the context of parallel legislation on the integration of health and social care, which requires the origins of integrated budgets to be "invisible". Similarly the proposed relaxation of the restrictions on the employment of family members (and the proposed waiving of charges to carers) to such an extent means that the focus shifts from supporting carers to paying mothers to be mothers, sons to be sons etc. It erodes a principle that people should be supported to exercise familial responsibilities rather than be paid to do so. The consequence is to challenge how local authorities are reasonably expected to finance this and to exercise their over-riding duty of care in such a context e.g. in relation to adult protection.

The proposed guidance is approximately 70 pages long. At the same time the Scottish Government has commissioned several other sets of guidance from various bodies, including professional guidance from the Association of Directors of Social Work (ADSW). Arguably, the best way of ensuring statutory guidance is not well observed is to produce something of this length and complexity. Much of it reaches deep into areas of practice that ADSW have been commissioned to produce. It is therefore strongly requested that the guidance is pared right back to focus on the necessary sequential stages of SDS.

The absence of a defining statement that reflects a core characteristic of SDS - that recipients require to know their indicative budget before starting their support planning - is puzzling, particularly when it was long ago agreed by the Bill Steering Group. If we are serious about choice and control that means people knowing the most likely parameters of their budget within which to plan. This requires to be built into the defined stages.

Finally, SDS already runs the risk of being intrinsically associated with cuts because it is being enacted at a time of major local government funding reductions. It is critical that the policy is adequately resourced and that the funding implications are fully understood. It would therefore be helpful if the material produced by the Scottish Government focussed more on how people are supported to be active, included citizens and less on detail of the mechanics of SDS (which should properly feature in other guidance such as that commissioned for staff implementing it).

## **SDS Regulations**

North Lanarkshire Council wishes to highlight the following points in relation to The Draft Regulations:

- Implementation timescales and resources:

The proposed commencement date of April 2014 is supported unless the final regulations introduce significant new duties and responsibilities that require additional preparation and/or have significant additional funding implications. The proposal not to prescribe review timetables is supported, as this is already defined in other legislation. It is essential that, when imposing new legal duties, the Scottish Government recognises that local authority Social Work services are struggling to meet increasing need associated with factors such as demographic change, welfare reform etc, at a time of sharply reducing resources associated with successive local government financial settlements.

- Exemptions:

On a day to day basis Social Work is concerned with finding the right balance between safeguarding and empowering individuals. This is demanding and highly skilled work. The regulations must not, therefore, have the unintended consequence of jeopardising local authorities statutory duties in this regard. Consequently there is a need to protect councils' ability to withhold access to certain features of SDS, in circumstances involving unacceptable risk to the individual or wider public. As drafted it is doubtful whether the regulations permit this.

- Residential Care:

The Council has consistently argued that direct payments should not be available to pay for long-term residential or nursing care. Apart from the obvious reason- that it is not self-directed support- it does not enhance choice or control (since this is enshrined in the directions on choice of accommodation), but carries considerable risk insofar as individuals could then be considered as self-funders and charged a higher rate for care. This would seem to have been accepted as the proposed regulations do not allow the use of direct payments for residential care. The regulations must make a clear statement that excludes residential care from all four SDS options (and not just the direct payment option).

- Payment Methods:

The draft regulations require councils to make a direct payment gross or net, according to individual preference. This is a view long held by some groups representing people who use services, and had some resonance when some people were offered support on a 'take it or leave it' basis, so withholding payment was perhaps the most powerful way that individuals could express dissatisfaction. However in SDS the person's budget is their own, regardless of which of the four options is drawn down. People select the support and they can simply move the budget elsewhere if unhappy with the quality of support provided. Therefore the reason to insist on councils making payments gross or net no longer applies.

The effect of doing so is (i) that authorities like North Lanarkshire that do not charge for SDS must start doing so in order to create a 'gross' figure (ii) that a proportion of money that is currently used to fund individual support must now be used for invoicing and collecting payments, so diminishing the overall resources available for support.

- Employment of Family Members:

At present, recipients of direct payments can use these funds to employ family members under 'exceptional circumstances', with local authorities having significant discretion in determining what constitutes such circumstances. The regulations set out to better define exceptional circumstances by specifying nine factors; where one or more of these apply a person would be able to employ a family member. In doing so it effectively removes any meaning to the term 'exceptional'. These are so broad, e.g. where a person has difficulty interacting with strangers, as to be effectively meaningless. The consequences are that a great number of family members who provide much valued unpaid care (and should be supported to do so) become eligible to be paid to provide such care. This would mean already slender resources being further stretched. The unintended policy consequence would be to minimise the number of people eligible for SDS, as councils would be forced to raise their thresholds as to what constitutes eligible need.

For some people there are risks involved with employing a family member – in a relatively small number of cases there may be a risk of financial or other exploitation or neglect. Although the regulations allow for a local authority to refuse this where they feel a person is under 'undue pressure', this is too narrow as there will be many occasions where a person has agreed to employ a family member willingly, but is nonetheless at risk. In short, the areas of risk are too broadly defined and the checks and controls are too narrowly defined and we believe that local authorities' current level of discretion in this area must be maintained.

### **Carers (Waiving of Charges for Support) (Scotland) Regulations**

North Lanarkshire Council fully recognises and values the critical part carers play as partners in a system of care that could not function without them. Put simply, were it not for the care friends, parents, siblings, grandparents and other family members provide, the health and social care system would be completely unsustainable. As a consequence North Lanarkshire Council invests significant funds and energy to support carers, including young carers, in their role.

North Lanarkshire Council believes that the decision as to whether to charge carers is a matter for local determination not for regulation. In our case the Council does not charge for a range of services such as day care, community alarms, equipment and adaptations etc. If a person supported by a carer receives residential care, that person (*not the carer*) is expected to make a modest financial contribution in line with their income, informed by CoSLA guidance.

If a person is awarded an individual budget arising from their need for support, the level of budget identified takes account of the role played by a carer and their need for breaks from the caring task.

Perhaps the most significant policy implication that flows from the draft regulations is in respect of replacement care. Insofar as carers can benefit from a short break away from the person they care for, the local authority has an important role in facilitating that. However, according to our reading of the draft regulations, in these circumstances the whole cost of the short break – including any replacement care - will be met by the local authority where other people such as friends, relatives, neighbours or volunteers are not available to provide replacement care without charge.

It is recognised that these proposals are well-intentioned, but they present a number of unresolved issues:

- Many carers care for a person with complex needs – in these circumstances, it is unlikely that a friend, relative, neighbour or volunteer would have the capability and confidence to assume the caring role in the absence of the main carer;
- Under these regulations, the financial circumstances of the cared for person are deemed to be irrelevant to the provision of care and support – which is inconsistent with the way a local authority would approach social care provided to a person who does not have a carer's support – thereby creating a 'fairness' or 'equity' issue;
- The regulations indicate that the whole cost of the short break provided or arranged by the local authority will be met by the local authority – but it is silent about what procedural tool the local authority would use to come to a view about what level of expenditure is appropriate.

We do not believe that that the whole cost of a short break should automatically be met by the local authority. This creates unrealistic expectations about how far the public purse can go to support carers' choices. If the Scottish Government chooses to proceed with these regulations we would expect the full costs of this new policy to be met by central government

## **SDS Guidance**

As stated in the general comments the guidance is over long and strays far into areas that have also been commissioned by the Scottish Government. This has created considerable potential for confused and muddled implementation. The level of prescription is inconsistent with the policy intention to maximise flexibility for recipients of SDS and their families. There is a pressing need to streamline the content accordingly.

Although the guidance attempts to address using SDS as an approach meeting healthcare needs, this is without the force of a duty on the NHS (as none was established in the original Bill). The same degree of compulsion around SDS should be applied to the relevant parts of the health service as to local authorities, as part of integrating health and social care.

There are a number of presenting professional issues that require to be addressed in the guidance (or else they are likely to be contradicted by at least one of four other sets of guidance on SDS commissioned by the Scottish Government). These primarily relate to:

- The need to identify an indicative budget before a support plan is agreed; there is also a fundamental misunderstanding about support planning. The support plan is described as a "product" of assessment. It is not- it is a successive stage that must demonstrate a person's assessed eligible needs and intended outcomes can be met before the individual budget is finalised. The early identification of an indicative budget helps people think in a more focussed way about how this can be achieved and better informs their choice about which of the four options they might prefer.
- The need for a robust, equitable and transparent system for allocating resources to individuals. Every legal challenge to date this Council has scrutinised (and there have been several in England) has seen a local authority's position backed in law where such a system exists. That is why a published resource allocation system that is demonstrably equitable and transparent has withstood legal challenge, and where, in its

absence, local authorities have struggled to demonstrate equitable approaches to allocating resources. The guidance states, correctly, that it is not for the Scottish Government to determine what system is adopted in a local authority. However it then goes on to say some authorities may wish to adopt an 'equivalency' model. It is difficult to see how such a model complies with the legal judgements seen to date and it seems like a very bold assertion, in that context, for the Scottish Government to make.

- The need for cognisance of local authorities' duties of care – as stated elsewhere in this response there are circumstances where allocating a direct payment to an individual or third party will compromise a local authority's overriding duty of care. The risk section of the guidance is almost non-existent and requires to recognise this fundamental issue. There are many ways local authorities can manage risk to enable access to SDS for some of the most vulnerable people in our society, and we should always seek to do so. At the same time there are some circumstances where that would be simply irresponsible and others where it would be dangerous.
- The need to acknowledge that the SDS approach will not be the right one in all circumstances (such as those alluded to in the above bullet point) and more frequently, where presenting needs are more likely to be at the point of crisis or short term. The guidance must say that professionals need to be able to exercise discretion in certain circumstances to fulfil their legal responsibilities. Many people will fall below eligibility thresholds for mandatory assistance to meet their needs – and therefore will not have access to an individual budget- but that does not mean councils should not seek to meet their lower level of needs in other ways e.g. through universal services, advice and information, peer support etc. The guidance must recognise that there are different ways to meet needs, not all of which are through SDS.