

Dear Sir/Madam

SELF-DIRECTED SUPPORT: CONSULTATION ON DRAFT STATUTORY GUIDANCE ON CARE AND SUPPORT

Responding to this consultation paper

We are inviting written responses to this consultation paper by **10 July 2013**.
Please send your response with the completed Respondent Information Form
(see "Handling your Response" below) to:

E-mail to: selfdirectedsupport@scotland.gsi.gov.uk

or

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

If you have any queries please contact Adam Milne on 0131 244 5455

We would be grateful if you would use the consultation questionnaire provided as part of the Respondent Information Form or could clearly indicate in your response which questions or parts of the consultation paper you are responding to as this will aid our analysis of the responses received.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at <http://www.scotland.gov.uk/consultations>.

The Scottish Government has an email alert system for consultations, <http://register.scotland.gov.uk>. This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). It complements, but in no way replaces SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the Respondent Information Form attached to this letter as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly. All

respondents should be aware that the Scottish Government are subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public and after we have checked that they contain no potentially defamatory material, responses will be made available to the public in the Scottish Government Library, and on the Scottish Government consultation web pages by **7 August 2013**. You can make arrangements to view responses by contacting the SG Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us consider any amendments or additions to the guidance. We aim to issue a report on this consultation process along with our response to it during Autumn 2013.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the address given above.

Yours sincerely

Adam Milne
Scottish Government
Self-directed Support Team

A public consultation on draft regulations and statutory guidance to accompany the Social Care (Self-directed Support) (Scotland) Act 2013



RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

Renfrewshire Council

Title Mr Ms Mrs Miss Dr **Please tick as appropriate**

Surname

Dykes

Forename

Geraldine

2. Postal Address

Renfrewshire House

Floor 3

Cotton Street

Paisley

Postcode PA1 1TZ

Phone 0141 618 6545

Email gerry.dykes@renfrewshire.gov.uk

3. Permissions - I am responding as...

Individual

/

Group/Organisation

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate

Yes No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate

Yes No

Yes, make my response, name and address all available	<input type="checkbox"/>	or
Yes, make my response available, but not my name and address	<input type="checkbox"/>	
Yes, make my response and name available, but not my address	<input type="checkbox"/>	

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate Yes No

4. Additional information – I am responding as:

Please tick as appropriate

1. Member of the public	<input type="checkbox"/>
2. Individual health/social care professional	<input type="checkbox"/>
3. Central government	<input type="checkbox"/>
4. Local authority	<input checked="" type="checkbox"/>
5. Community Health Partnership	<input type="checkbox"/>
6. Health Board	<input type="checkbox"/>
7. Support & information or advocacy organisation	<input type="checkbox"/>
8. Voluntary sector organisation	<input type="checkbox"/>
9. Private Sector organisation (e.g. private social care and support provider)	<input type="checkbox"/>
10. Professional or regulatory body	<input type="checkbox"/>
11. Academic institution	<input type="checkbox"/>
12. Other – please specify	

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

We felt that this section was quite useful and welcomed the concept of a pathway as a structured guide through the process. However we felt that there needs to be more focus on outcomes particularly at steps 2, 4, 5 & 7

Roles & Responsibilities:

The professional:

This section should also include Education professionals

The provider:

The second sentence needs to be clarified as it appears to infer that the PA is employed by the informal carer.

We felt that there should be a general 'glossary' or central definitions section

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"/> partially	<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
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<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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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 section states the intent to draw out the principles and we agree that clear principles are important however, the section was quite vague and repetitive. We felt that this section should explain the 4 principles established by the Act and their meaning and that Table 3 is not required here. The section would also benefit from clearer links between legislation and guidance.

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 type="checkbox"/>	<input checked="" 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 felt that this part of the guidance contained some helpful information but was too lengthy, had too much detail and is better placed in the practitioners guide. We felt that this section should clarify what needs to be done and by whom to meet the requirements and obligations under the Act.

The section on eligibility appears to refer only to adults as no mention of children and families and this should be clarified earlier at point 19 or 20. The regulations make no mention of any of the provisions of the mental health act but do include Criminal Justice legislation which may be used in situations where adults have mental health issues and therefore this seems an oversight or a gap.

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 checked="" 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 checked="" 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?

Section 5.1: SHANARRI principles for children and person centre plan for people with learning disabilities should be referenced here.

Point 52: the view from the SW professional would be better placed in the practitioner's guide and not the implementation guidance.

Point 56: We felt that more information is required here re: legal responsibilities and procurement legislation with regard to the possible use of some type of framework. We also note that although Option 2 is the most innovative of the options and potentially the most difficult for local authorities to implement, the guidance is quite light in respect of how this option can be introduced and managed. Further guidance required around who the customer is from providers perspective – user or Local Authority - and also where POA/Guardianship sits within this option.

Points 64, 65: are all of these statements reflected in the relevant Acts? We feel that further clarity is required here regarding interface and compliance with Child Protection and Adult Support & Protection and this should be reflected within the guidance.

Point 73. Need to be clear that it is not appropriate nor is within the expertise of the professional to be giving detailed employment advice to a user considering employing a PA – should be clarified that the professional can signpost to employment specialists.

Point 74. There needs to be a definition of 'wider authority'

Table 7 – we felt that the training section of this table raised issues related to providing training to external/3rd parties - in particular, linked to liability for the failure, actions or omissions of external parties.

Additionally, Table 7 lists examples of information and support, but by referring to these in

the paragraph above as "key forms of information and support", we think it would result in an expectation that local authorities would provide these as a minimum, when in fact we may prefer, for reasons of practicality or appropriateness, not to offer particular forms of support (e.g. as a large provider in this area, is it appropriate for us to offer brokerage?) We think the table is fine as an example of what we might provide, but the wording should not suggest we are obliged to offer all these.

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 agree that regular reviews are key to the successful implementation of Self Directed Support and that they can be triggered by a change in circumstances or capacity of the individual or their carers. We also acknowledge that a review timetable can be designed around an individual depending on their situation and the arrangements for their support and which is proportionate to the level of risk involved.

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?

We support the intent of this section around partnership working and developing real choice for service users while acknowledging that a full range of options will take some time to grow. The development work for provider organisations in partnership with Local Authorities is already underway through Community Planning and Economic Development forums.

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 checked="" 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 checked="" 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?

This section needs to be stronger regarding the responsibilities on health particularly with a view to the imminent integration of Health & Social Care.

Point 84/87: clarification required re: NHS funded support in place of social care provision.
Point 85: We appreciate that there are limited real life examples of joint funding but felt that the case study was not a good example of a joint funded care package.
Point 88 – Act referred to is 1968 Act

Our view of this section was that some of the practice outlined is happening already and this section does not add to current practice. More prominence needs to be given to joint partnerships and joint funding local arrangements.

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?

Current practice with Direct Payments has demonstrated the value of choice and control for families with children with disabilities and there is no doubt that inclusion of the other options will further enhance these choices. However, what is less clear is the application of SDS for children who do not have a disability but may have other support needs. Some of these services will be statutory requirements and others may not always be provided by the local authority. There needs to be greater clarity in the guidance regarding the interface between the duties imposed by SDS and Child protection legislation.

Paragraph 93 makes reference to the Children & Young Persons Bill and the fact that it is proposed that every child in Scotland have a Named Person. The matter of the named person is the subject of much discussion amongst practitioners who have numerous concerns about how this will work in practice. The guidance will require to be amended to reflect the final provisions of the bill.

Paragraph 103 makes a statement about the law on Incapacity which is quite simply incorrect -

"They should inform the child and their family about the opportunity to apply for Power of Attorney and Guardianship". Firstly, a Power of Attorney is not something that is "Applied For". An Adult (i.e. someone over 16) can grant a Power of Attorney, authorising a specified person to carry out certain specified functions on their behalf. If the Power of Attorney is a continuing Power of Attorney, i.e. relating to property or financial matters, it can take effect from when the granter signs the document or from the date of the specified event, e.g. the Granter losing capacity. A Welfare Power of Attorney will only take effect when the Granter loses capacity. However, only an Adult who has capacity can grant a Power of Attorney, therefore a child cannot grant a Power of Attorney. A family cannot 'apply for' a Power of Attorney on someone's behalf.

It is possible for family members or anyone else claiming an interest to make an application to Court to be appointed as a Welfare or Financial Guardian in respect of an Adult who lacks capacity. Where a child is known to lack capacity, it is possible for an application to be made three months before the child attains the age of 16 although it

cannot come into effect until the child attains the age of 16.
The sentence in Paragraph 103 is inaccurate and should be expanded to properly reflect the law.

Further guidance on the application of SDS for young carers and how that is managed in the context of the needs of both the cared for and caring person particularly where there is conflict regarding outcomes.

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 agree broadly with this section and the recommendations around supported decision making but would seek further clarification on what constitutes a 'circle of support' – does this refer to family and friends, a more formal arrangement or both.

The heading in section 9.2 makes reference to "Circles of Support", - we understand that this is a national scheme to support Sex Offenders by providing assistance from the local community. I wonder if another phrase should be used.

We would have concerns re: Option 1 being managed by this framework as it could be unclear who instructs the employee and the supported person, as an employer, needs to have a full understanding of their responsibilities in terms of contracts, training, health and safety etc.

Paragraph 110 states -"Only guardians or Attorneys appointed under the AWI Act have the power to make decisions on another supported person's behalf". This sentence should be clarified to confirm that only Attorneys have the power where the person lacks capacity. It should also be specified that Guardians or Attorneys only have power to make specific decisions where that is clearly specified in either a Power of Attorney granted by the Adult or in the Court Order. A person may be a Guardian or an Attorney but may not have the specific power to make decisions on support.

The second sentence of Paragraph 110 is again inaccurate- "The professional should therefore take steps to make the supported person and their family aware of the option to apply for Power of Attorney". This does not make sense. If the person already lacks capacity then a Power of Attorney is not appropriate. Family members should be advised of the possibility of going to court to seek to be appointed as Welfare and/or Financial Guardians for the person who lacks capacity. If the Adult has capacity at the time, and it is possible that he or she may lose capacity at some point in the future, the Adult can grant a Power of Attorney authorising a named person to carry out certain specified functions on their behalf. As indicated, this could take effect from when the Adult signs the Power of Attorney or when a specific event takes place, e.g. when the Adult loses capacity. As indicated previously, if it is in relation to welfare powers, this will only take effect when the Adult loses capacity.

The final sentence of Paragraph 110 is also inaccurate - "Where this is the case, the professional should consider the benefits of an advanced statement under the Mental Health Care & Treatment Act 2003". Firstly, the correct name of the Act is The Mental Health (Care & Treatment) (Scotland) Act 2003. An advance statement under this Act only refers to the Adult making a statement indicating the way he wishes to be treated for mental disorder or the way he wishes not to be so treated. It is not a general advance statement of future wishes. If a person has capacity and wishes to make decisions about their future then this should be done by way of Power of Attorney.

At Paragraph 113, we think the final sentence should be clarified. At present it states - "The Local Authority can apply to the Court for Guardianship Order over an individual". I think it should be made clear that the Local Authority has a duty to do so where it is necessary to protect the property, financial affairs or welfare of the Adult and no application has been made or is likely to be made.

The implementation of SDS will undoubtedly create an increase in applications for both Power Of Attorneys and guardianship and all involved professionals need to ensue that the correct advice and information is given to applicants to enable them to appropriately instruct a solicitor e.g. ensuring that their powers include the ability to employ a carer on behalf of the supported person.

Draft Statutory Guidance on Care and Support

Consultation Questions

Section 9.3: Carers

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

Yes	No
<input checked="" type="checkbox"/>	<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 agree with the broad principles in this section of supporting carers in their caring role and also recognition of the benefits of early and preventative supports for carers. We acknowledge that SDS will offer greater choice and control for carers to arrange supports individual to their circumstances.

However, no mention is made in this section regarding the proposal to amend the regulations to employ family members using a direct payment. We think that this may create confusion between formal and informal carers and 'muddies the waters' regarding entitlement to assessment and services particularly if a family member is both a paid and unpaid carer. The Social Work (Scotland) Act 1968 and the Children (Scotland) Act 1995 prevent a carer's assessment where those providing care do so under a contract of employment or other contract. As noted in our response to the Waiver of Fees for Carers, we feel this highlights the need for a definition of 'carer', particularly whether 'paid' includes welfare benefits, etc. This also supports our previous suggestion for a central definitions/glossary section.

We would welcome further guidance to clarify these issues.

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?

Much of the information in this section is already embedded in practice and we felt that this section should focus on and offer guidance relating to the new regulations.

Point 125: Clarity re: the role, responsibilities and selection of the third party and guidance re; contracts, mandates etc. and the role of professional judgement and discretion.

Point 130: We would repeat our previous point re: information that is given to supported person regarding employment – this should be very broad and details given re: signposting to more professional employment expertise.

We also felt that there is an issue around the practical inability of the arrangements operating as set out in Paragraph 138, in particular where payment would be unlikely to be dictated by 'employment legislation' , rather it would be determined by the terms of the employment contract agreed between the direct payment recipient and their employee, a contract the Council would not be a party to. TUPE issues would also have to be considered in such a circumstance between employee and employer. The Council would not be the employer and could not act as though it were.

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 checked="" 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 checked="" 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?

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

There are issues re: duty of care, sharing of information and general safeguarding of the individual, any employees and the general public. 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.

We agree that reablement /intermediate care are not subject to SDS and this clarification is helpful.

This section does not seem to refer to existing DP guidance and practice re: equipment and adaptations and further clarification is needed re: impact on adaptations, equipment

and grants provided by housing.

In respect of other forms of social welfare support it would be advantageous to Local Authorities to have the discretion to use DPs and individual service funds for homelessness, addiction or for those fleeing domestic abuse but we feel it would be difficult to manage and monitor re: safeguarding and duty of care if there was a requirement by law to offer this option to this particular set of social care needs.

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?

Renfrewshire welcomes the opportunity to comment on the Guidance and Regulations and is committed to the implementation of Self-Directed Support.

We felt overall that although there was useful information in the guidance, it is not easy to use as a working document and that some of the information particularly around assessment, would be better placed in the planned individual guides for users, carers professions, etc. The document is too lengthy to be a practical working guide and some sections would be better placed in the other guidance framework documents. However, there are areas, as outlined in the comments boxes, where a greater detail of guidance is required and with this information, the document will be a better reference tool.

The introductory pages make no reference to GIRFEC and the statement of intent should not focus too much on disabled people as this appears exclusive of other client groups.

We also felt that the Supported person's pathway is not referenced and referred to in other sections and feel that this should be the thread connecting all the sections.

Planning and roll out arrangements will be problematic without clear implementation timescales. We feel consideration should be given to an element of phasing-in of the obligations under legislation. Councils may have to adjust existing policies and procedures and even budgets, possibly requiring express board authority in some cases, before some of the proposed arrangements could be put in place. Laying regulations within a matter of days, weeks or even a month or so before the proposed implementation date may well not afford sufficient time for Councils to implement the requirements of the Act.

SDS approach will not be suitable or appropriate in all circumstances

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.

As stated in the response to Waiver of Fees for Carers, we have grave concerns regarding the sustainability of this model without a considerable input of additional resources. We also believe as detailed in response to Direct Payment Regulations that the impact of Part 3 could carry a potential significant cost implication for local authorities.

Also it is difficult to predict anticipated costs in relation to the equality impact assessments likely to be needed before the local authority could implement the proposed changes to procedures, systems, etc

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)?

Regulation 4 – Our concern is that the regulations contain no guidance about the circumstances under which a service user would elect to receive a gross direct payment. Gross payments are costly for local authorities to administer and contain the inherent problem of having to invoice/collect in arrears a service user's contribution where one is payable. We appreciate that permitting gross payments at the request of a service user is a good fit with the 'ideology' of DP in terms of giving individuals more control etc, however, it will also add additional tasks, responsibilities and complexities for the direct payment user. Our view is that for local authorities who currently do not use this method, there will be increased administrative costs.

Regulation 5 – Renfrewshire Council agree with the regulation that Direct Payments may be paid in instalments as this also allows flexibility for a single payment to be made, where reasonable and practical, to buy something that would meet a service user's assessed outcomes e.g. gym membership. However, further guidance is required re: when payments would not be made by instalments, e.g. where the payment was not to be made toward a single item. We also felt that regulations should allow Councils to impose a limit if required in the amount that can be paid out in one payment.

Regulation 6 – We felt that there is insufficient detail about what is and what is not envisaged under this regulation. It is not clear what or whom a third party is and also what factors should a local authority take into account to be 'satisfied' that the direct payment user 'retains total control' over the use of the DP, etc. Guidance is also required regarding a Local Authority having powers to refuse a third party direct payment and under what circumstances this may be considered.

Regulation 7 - The regulations set out an exhaustive list of circumstances permitting termination by the Local Authority (termination by the individual or the provider is not covered in the regulations). However, if the real life situation does not fit into the 4 circumstances listed, it appears that the local authority cannot take action to terminate the arrangement. We felt that there should be an additional a category e.g. 'where there is a breach of the direct payment agreement' or the insertion of some other more general provision given that by their nature, direct payments will reflect very individual circumstances, and so local authorities may need the right to exercise some discretion in this area. The regulation also refers to a direct payment user becoming 'ineligible' but no definition or cross reference to Part 4 section 11 – this needs to be clarified.

We also had concerns about regulation 7(3) as the effects and extent of this regulation are unclear e.g. the local authority must take account of "any" contractual obligations entered into by the direct payment user when effecting termination. Further clarity regarding the scope and extent of this regulation is required as a Council could be responsible for meeting costly commitments if a direct payment is terminated for the reasons listed in 7(1) or simply the service user chooses to terminate the direct payment.

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

Regulation 8 - This regulation expands the ability to offer direct payments to family members. Renfrewshire Council has used discretionary powers in exceptional circumstances to enable a family member to be employed using a direct payment. Our concerns relate to the unrestrained employment of family members and the impact on the relationship between the 'supported person' needing the care and the family member providing it, as well as the impact on existing 'unpaid carers'. We believe the change in the family dynamic could be difficult for both cared for and carer and that this arrangement introduces a lack of clarity around formal and informal care and the dual roles possible for many family members. There are safeguarding issues as undue pressure is difficult to assess and monitor and also concerns relating to employment conditions for a family member re: breaks, holidays and contingency arrangements.

We also have concerns regarding the costs which may be incurred if family carers are employed using a direct payment. The Social Care (Self-directed Support) Bill: Final Business and Regulatory Impact Assessment (BRIA) states in Annex A that 'the ability to employ a close relative in certain circumstances simply replaces costs that would otherwise be incurred through the provision of services.' However, later in the same annex when referring to the proposal to create a duty to an entitlement to support, it acknowledges the impact of a 'woodwork effect' as carers who do not currently receive any support come forward and that approximately 1 in 8 of the Scottish population is a carer and therefore potentially eligible. We believe that the impact of Part 3 would be very similar and could carry a potential significant cost implication for local authorities.

Taking into consideration the perceived difficulties with supporting and monitoring this arrangement for both cared for and carer and the possible extensive costs, we would suggest that the availability of a direct payment to employ a family member 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 assume that the argument for this is due to the compulsion element i.e. that the decision as to what service criminal justice clients have is one for professionals involved in the case who are best placed to consider the range of risk/needs issues. Thus the supervising social work staff should choose the appropriate monitoring service, which also allows for the potential risks clients present to services to be disclosed. A conflict of interest could arise if the service user purchased a service with a direct payment, as the provider may not be prepared to supply information to monitor or breach the client who would be their employer.

Services for criminal justice clients are approved prior to the client's order being imposed, or their being released from custody and are then monitored. Should such individuals have the capacity to access and employ services then the capacity to assess such services to ensure they meet the appropriate risk/needs, often within limited timescales

would certainly be highly complex, plus the employer/employee relationship would be more difficult.

Within Renfrewshire, the DTTO and the Forensic Community Mental Health team are both funded directly through the criminal justice grant, however the vast majority of criminal justice clients on community orders access local addiction or mental health services which have no specific criminal justice funding. What requires to be noted however is that clients subject to these orders may also have a whole range of needs wider than those limited to addiction or mental health issues i.e. health and social care needs, which still require to be assessed, provided for and monitored, and may not be subject to compulsion - is it not discriminatory to prevent equal access to wider services if compulsion is not a part of the service provision?

Since 1/2/11 all offences committed after this date in Scotland resulting in community disposals are legislated for within the Criminal Justice and Licensing (Scotland) Act 2010, this legislation created Community Payback Orders which includes a mental health treatment requirement and a drug or alcohol treatment requirement, and may require to be mentioned specifically.

We note that the list does not include those subject to compulsory treatment orders, many of these are restricted patients.

Clients subject to mental health orders of any kind may have a whole range of needs; their compulsory measures may relate to only a small part of their assessed care needs and which they may dispute. This may be only in relation to medical treatment but may be about accepting care services. These orders are Compulsory treatment orders (CTOs) – the definition of treatment in the act is more than medication and includes supervision, support habilitation and rehabilitation. CTOs can require detention in hospital but can also be community based orders.

The Mental Health (Care & Treatment)(Scotland) act 2003 is founded on a set of principles which must be considered in any use of the act. One of these is reciprocity - as follows:

(g) the need to ensure that, unless it can be shown that it is justified in the circumstances, the patient is not treated in a way that is less favourable than the way in which a person who is not a patient might be treated in a comparable situation;

On this basis I would think it would not be appropriate to say a person subject to a CTO should not per se be eligible for SDS but possibly something on the lines that SDS should not be available for any service which is provided under a compulsory measure. The most likely situation would be a community based CTO which can have a number of powers, some of which relate to medical treatment. However it may include powers as follows:

(d) the imposition of a requirement on the patient to attend-

(i) on specified or directed dates; or

(ii) at specified or directed intervals,

specified or directed places with a view to receiving community care services, relevant services or any treatment, care or service;

(e) the imposition of a requirement on the patient to reside at a specified place;

(f) the imposition of a requirement on the patient to allow-

(i) the mental health officer;

(ii) the patient's responsible medical officer; or

(iii) any person responsible for providing medical treatment, community care services, relevant services or any treatment, care or service to the patient who

is authorised for the purposes of this paragraph by the patient's responsible medical officer,

to visit the patient in the place where the patient resides;

(g) the imposition of a requirement on the patient to obtain the approval of the mental health officer to any proposed change of address; and

(h) the imposition of a requirement on the patient to inform the mental health officer of any change of address before the change takes effect.

We felt SDS would not be appropriate for delivering any of these if these powers are included in the order but not all orders will include all these powers and therefore these would be my reasons for suggesting that it would not be correct to have a "blanket" rule that someone on a CTO should not be eligible for SDS. These are civil orders and it would be discriminatory to include these.

Mentally disordered offenders

The legislation is complex but The MHC&T act inserts sections into the Criminal Procedures act as follows:

- **Mental Health (Care & Treatment)(Scotland) Act s133 Mentally disordered offenders: compulsion order - S57A Criminal Procedures (Scotland) Act 1995**
- **Mental Health (Care & Treatment)(Scotland) Act s133 Mentally disordered offenders: restriction order - S59 Criminal Procedures (Scotland) Act 1995**

Provisions

The MHC&T act includes a number of provisions for offenders who have mental health issues and these are disposals of the court following conviction. Many are hospital based orders but 2 can be community based – these are a Compulsion order (CO) or Compulsion Order with a Restriction Order (CORO). COROs in particular are granted only in situations where it can be demonstrated that there is significant risk to the adult or to other people. They are monitored closely by Scottish ministers and decisions about transfer are made by them or at tribunal. They are also subject to MAPPA and managed by enhanced CPA. If it is agreed they should be discharged from hospital this is on a conditional discharge basis and quite stringent conditions can be placed on them and services provided to monitor. These can be quite extensive and it would not be appropriate for these to be delivered via SDS as it would remove the ability of the clinical team to monitor, manage and supervise the person and be directive on services. This would be similar to the view that the professionals must be able to choose and direct the services being delivered. The care plan and services are approved by Scottish ministers and tribunal after much scrutiny and it would be inappropriate for the adult to make decisions on this – they are frequently unhappy with the level of intervention. Services provided which are not health services are provided and funded by the Local Authority adult services budgets and not CJ budgets.

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?

We felt that it 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 a 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 but if the model of provision changes, offering more flexible options, it may be something to consider.

However, we need to consider the impact if a client in residential care could get SDS for their service - would the care provider allow external providers of services into their establishment to provide the specific service the client wants rather than using either their own staff or their own contractors? We are unsure if there has been any consultation on these aspects with the various private organisations providing residential care services to individuals and with the related regulators. There could also be an impact on those local authorities who currently have their own residential care facilities.

We also need clear guidance on the issue of a private, unregulated PA arrangement in a Care Home and how this may impact on the service provider e.g. the requirement to become a member of the PVG Scheme under the Protection of Vulnerable Groups legislation?

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?

Our general view was that, given the questions raised in Renfrewshire mainly related to the practical interpretation of the regulations, we felt there is a strong likelihood that other

Councils would have similar questions. This would indicate a need for guidance specifically to accompany these DP regulations, along with the guidance issued for Care & Support which does not have the express purpose of assisting in interpretation of the DP regulations but covers more general ground related to placement, assessment, etc.

We felt that the regulations talk about the "DP user" throughout but when this is a child, it doesn't really equate as the child has a different place in law and has different responsibilities towards their care and ability to exercise choice etc. Therefore where do parent(s) fit or other carers with Parental responsibilities and rights (PRR). We feel that the needs of children have not been addressed in these regulations - LA Services are set up to support children under the Children's Act and fulfil the relevant duties and we feel that these regulations and guidance need to better reflect the needs, duties and responsibilities affecting children and their families.

Without further clarification, it would appear likely that there will be significant inconsistency in implementing the regulations across the different local authority areas in Scotland.

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.

Please see response to Question 14 in Statutory Guidance on Care & Support Response - we have grave concerns regarding the sustainability of this model without a considerable input of additional resources. We also believe as detailed in response to Direct Payment Regulations that the impact of Part 3 could carry a potential significant cost implication for local authorities.

Also it is difficult to predict anticipated costs in relation to the equality impact assessments likely to be needed before the local authority could implement the proposed changes to procedures, systems, etc

Also Question 7 in Waiving of Charges for Support Response - without a considerable

input of additional resources, the local authority would struggle to meet the needs of carers. The implementation of these regulations would result in reduced budgets and the unintended consequence that preventative services will be low priority.

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.

We believe the regulations meet obligations in relation to Equality

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 Adult Support & Protection and Child Protection