

# 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?*

Whilst the text of the guidance is easy enough to understand, we are unclear as to whether Section 2 has been headed 'Values and Principles' in error or whether Sections 2 and 3 have been inversely inserted into the guidance. Section 2 actually details the supported person's pathway and sets out roles and responsibilities whilst values and principles fall under Section 3. We would strongly recommend that values and principles are placed in Section 2 as it is the values and principles that underpin everything else which follows in the guidance – including roles and responsibilities.

We also have comments in relation to roles and responsibilities which we will address in response to this question, given that it is roles and responsibilities which currently sit within Section 2. Within Table 1 at step 1, which outlines the supported person's pathway, we believe that there could be more clarity regarding what might be considered 'community mental health services'. For example, could this refer to NHS services and mean that the NHS might have responsibility for assessing a person's eligibility for care and support?

We believe that step 3, detailing eligibility and assessment, could also be strengthened. The Social Work (Scotland) Act means that local authorities can provide support based on what they believe to be suitable and adequate. The guidance should set out an expectation that local authorities will recognise the value of the social, practical and emotional supports which can empower individuals, aid their recovery and prevent mental health problems. The guidance

must be clear - as it relates to eligibility for and provision of social care services - that local authorities and any other providers do not only provide support where a person has already reached crisis point. Furthermore, it is unclear how consistency will be maintained between local authority areas.

Table 2 is very useful and we are pleased to see a clear demarcation and explanation of the various roles and responsibilities. However, the section outlining the responsibilities of the provider should be strengthened. Rather than saying that the provider 'can' play an important role in the assessment and support planning process, it may be more accurate to say that they 'should' play an important role; unless there are particular reasons for this not being the case. This is especially true where a provider has an existing relationship with and knowledge of the supported person.

## **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 are pleased that the guidance sets out the core values and principles of care and support, and also highlights the statutory principles which the professional must consider when conducting an assessment.

At paragraph 12 (Involvement (Section 1 in SDS Act)) we believe that the guidance should detail how this should be recorded and monitored, as without robust recording and monitoring it is unclear how meaningful involvement will be assured. It may also be useful to include a minimum expectation of what might be expected in terms of 'involvement' or further explanation of what 'involvement' might mean. Similarly, at paragraph 13 (informed choice) it would be sensible to include a minimum expectation of what would be 'reasonable' in terms of providing assistance, and to set out the types of consideration which would be relevant to this decision.

As a general point, the fundamental human rights principle of equality seems very relevant to the provision of care and support and the assessment process e.g. equality of opportunity to access to services and equality in terms of service provision. It should be considered how this might also be reflected in this section of the 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 checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

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

*Some advice to help you to answer this question – Please provide your suggestions for improvements or additions to this section. Are there any further topics that you*

*would like to see included, any changes that should be made or any other comments you'd like to make?*

Firstly, we wish to reiterate the critical importance that the guidance makes clear that eligibility for and provision of social care services must not only relate to situations where a person has already reached crisis point. We do not believe that this point is currently clear within the guidance, with particular reference to paragraph 22.

In the current economic climate, we are already seeing services becoming ever more narrowly focused and available only to those with severe and enduring mental illness. This is a false economy. Short-sighted cuts to early intervention and promotion will lead to less understanding of mental health, fewer people receiving the support they need, and consequently greater expenditure on acute healthcare and other areas. We are also aware that some people receiving lower levels of support have withdrawn from that support due to charging policies, resulting in a significant deterioration in their mental health and wellbeing. This underlines the importance of the guidance being clear about what is expected and what should be provided in this regard.

At paragraph 19 (determining a person's eligibility for support) we would like greater clarity as to what may be considered as a 'relevant authority' e.g. NHS, local authorities or an integrated body.

We are pleased that paragraph 23 explicitly highlights the importance of a well-rounded approach; one which recognises that the risks to participation in society are valid alongside risks to dignity and "life and limb" support. In our experience, the focus of Care Managers can often be on "life and limb" support (e.g. risks associated with particular medication changes etc) and a more well-rounded approach is greatly required.

At paragraph 24 (the local authorities role), we welcome recognition that once local authorities decide that an individual's needs are such that that they call for the provision of services (i.e. are 'eligible needs') they cannot then refuse to meet those needs because of budgetary constraints. Given that the same paragraph also states that a local authority can take into account its overall resources when determining eligibility criteria, there appears to be a real risk that eligibility criteria will become too restrictive and narrowly focused on crisis services and high level needs. Again, there is a risk that eligibility criteria will vary greatly between areas creating a 'postcode lottery' and limiting the portability of care. There needs to be more explanation of how local authorities will be expected to make these decisions and how transparency and accountability is to be assured.

Local authorities should also be reminded of their obligations under Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which refers to the right to the highest attainable standard of physical and mental health. This recognises that this right is difficult in practice to achieve in a short period of time, and that states may be subject to resource constraints. The ICESCR therefore imposes a continuing obligation on states to work towards the progressive realisation of this right, as best they can within their means. It also

rules out deliberately regressive measures which impede that goal.

Paragraph 24 also states that if a person does not meet a particular eligibility threshold, the authority should take steps to ensure that the appropriate arrangements are in place to direct that person to suitable alternative sources of support. It would be useful to clarify what may be considered suitable in this context.

We greatly welcome the assertion at paragraph 26, that the supported person and the professional should work together in order to consider creative means by which to meet the person's eligible needs. People too often tell us that they feel things are 'done to them' rather than 'with them' and we hope that this guidance will help to create a shift in this regard. Training will be key to ensuring that Care Managers are able to think creatively and fully understand what this entails. This section could also be strengthened by using the word 'conversations' (plural) rather than 'conversation' (singular) when describing the process through which needs and outcomes will be explored.

We strongly support the inclusion of paragraphs 27-30 and fully agree that the assessment itself is of crucial importance. In particular, we welcome recognition that an assessment may also support a person to maintain the "status quo", slow the rate of deterioration or ensure that any decline in a person's situation is well managed. This relates strongly to the recovery concept in mental health. It is good that the guidance also highlights that crisis situations are rarely conducive to an effective assessment and that after the initial crisis has stabilised the professional should seek to develop a comprehensive assessment. We feel that the inclusion of mental health based examples/case studies here could go far to help illustrate these points (for example, situations where a person may be using drugs/alcohol or where there is a change in a person's mental health or medication). It should be made clear that local authorities must be quick to not only decrease but also to increase support/funding as appropriate in these types of situations.

At paragraph 37, the guidance needs to go much further in defining what is meant by 'outcomes' and whose outcomes it is that are being referred to. We are aware that some local authorities are developing their own outcomes frameworks despite the production of the Talking Points: Personal Outcomes Approach, which is an integral part of the Community Care Outcomes approach. We would like to see much greater consistency in the way in which different areas approach outcomes. Given that outcomes must be the starting point not just for assessment, but for the commissioning, planning, monitoring and evaluation of services, training on outcomes for all staff involved will be key.

At paragraph 38, a maximum period should be stated for the time which may elapse between an initial self-assessment and a full assessment, involving social care or health professionals. SAMH would suggest this should be a maximum of 4 weeks.

At paragraph 39, we are unclear as to why the word 'eligible' appears twice and seek further explanation on this point: "...*the support plan (where the person is eligible for support) – this should articulate the eligible needs, outcomes and plans*

*for the individual....”*

## **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?*

In relation to paragraphs 42-43, we support the idea of a support plan being a 'living document' and would stress the importance that the plan has meaning for the person it relates to. This highlights the need for support plans to be communicated in a way appropriate to a persons needs and in a way that they understand.

At paragraph 45, the principles of involvement, informed choice and collaboration should be positioned as more than just 'helpful aids' to the consideration of risk. This is especially so when considering the human rights principles and standards which underpin the 2013 Act. Indeed, involvement, informed choice and collaboration can be fundamental to identifying and managing risk, although clearly there may be occasions where a person does not have insight into the risks which are posed. There should also be an explanation of who the 'others' are that a professional should seek to involve in risk assessment; presumably this could include family and friends or others who might know the person well, or agencies like the police if appropriate. We would also like the guidance to be more specific about how it might be determined whether a person is lacking insight and about what should happen when this occurs.

Paragraph 49 includes reference to an 'equivalence model' but does not outline what exactly this model comprises of or how decisions regarding 'equivalence' are reached within this model. The fact that decisions about budgets may be made by professional judgement alone or on a case-by-case basis again highlights the importance that robust training is in place for the key professional groups involved.

Paragraph 50 would benefit from an explanation of what type of 'steps' could and should be taken to involve user and carer groups in the development of any methodology used to define or determine budgets for individuals. Without this it is likely that significant inconsistencies will result, and participation could become tokenistic in some areas.

The table at paragraph 53 – whilst presenting the options as contained in the 2013

Act – appears complex in the context of the guidance. We would suggest that the description of the options which is used in the Draft Guidance on Care and Support Easy-Read Summary is used instead of (or alongside) the current table.

Paragraph 55 makes reference to the possibility of person choosing to become an employer under the direct payment option. In our experience, people’s awareness and understanding of employer’s duties and the risks in not adopting safe employment practices is extremely low. As such, it would be useful to include a recommendation that people are referred to appropriate sources of information and support when opting to employ their own staff at; this recommendation would fit particularly well within section 5.5 (information and support).

Paragraph 69 outlines the types of information which the authority must provide to individuals to help them to make an informed choice. Whilst we agree that the guidance outlines the right type of information as contained in the 2013 Act, it does not explain the level of detail which is required or the delivery method. There remains a real risk that information provision will vary greatly between areas and that some people will not receive information about all the options available to them.

Table 7, at paragraph 74, gives examples of information and support including brokerage. We feel that this would benefit from more explanation as to what comprises ‘specialist support’ and who may provide this.

## **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?*

It is stated that a change to a supported person’s needs or a request for a further



assessment should prompt a review, whilst professionals should actively seek reviews with those they support. However, the guidance also asserts that authorities should 'aim to conduct reviews on an annual basis'. SAMH does not believe that aiming for an annual review goes far enough – reviews should be strongly linked to outcomes and risks and be a positive element of a person support. As such, we would expect reviews to occur more regularly than on an annual basis, with 12 months being the maximum period which might elapse between reviews. Furthermore, the guidance does not set out an expectation of how quickly a review should occur after being requested by the supported person.

## **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?*

No comments

## **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?

There are a number of uncertainties over how the integration of health and social care may impact on the implementation of self-directed support. The guidance does little to provide greater clarity as to how these two approaches can or will be progressed together.

Under the proposals for health and social care integration, health boards and local authorities will be required to integrate resources for adult services. The new, integrated budget will then be managed by the Jointly Accountable Officer who will have authority to make decisions about resource prioritisation, without needing to refer back up the individual lines of accountability in the partner organisations. The integrated resource would lose its identity in the integrated budget – so that where money comes from, be it “health” or “social care”, is no longer of consequence. This is a significant change which may help to prevent issues such as ‘cost-shunting’ between the NHS and Local Authorities.

However, we do not know that proper consideration has been given as to how this may impact on the implementation of personalisation and self-directed support. Elsewhere in the UK, where health and social care services have been well integrated with pooled budgets, there have been resultant difficulties in providing direct payments to people experiencing mental health problems. This is largely due to difficulties disentangling pooled NHS or social care funds into separate personal social care budgets and funding for NHS services. Currently, while all services provided by the NHS are free at the point of access, some social care services are charged for on an individual basis. It is unclear from the guidance whether the NHS in some instances would be responsible for providing what could be considered as social care services, and if so whether they would charge for this. Conversely, it is unclear whether local authorities may provide services with a health component and whether people may be also charged for this.

If health and social care services are to be seen as contributing to joint outcomes, it may be an appropriate time to reconsider and clarify what exactly constitutes ‘health’ and ‘social’ care and what services people should be expected to pay for. We do not believe that health and social care integration is incompatible with self-directed support but we would like to see more open discussion about what the changes may mean, and greater clarity as to how things will work in practice.

**Draft Statutory Guidance on Care and Support**

**Consultation Questions**

**Section 9.1 : Children and Families**

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

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

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

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

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

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

No comments

## **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?*

Paragraph 106 describes the assistance which should be provided to promote good understanding and decision making. It states that the professional must take 'reasonable steps' to enable the supported person to make the relevant decisions. Where they decide that additional assistance is required they must also take 'reasonable steps' to identify a person or persons who can provide some extra assistance to the supported person. We would like greater explanation as to what might be considered as 'reasonable' or not, and the factors which would help determine this.

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

### **Consultation Questions**

#### Section 9.3: Carers

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

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

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

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

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

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

No comments

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

Whilst this section was easy to understand there are a number of serious omissions. Firstly, there should be much more emphasis placed on the importance of explaining responsibilities to a supported person. It is not enough to simply state that doing so represents good practice; it is essential that every effort is made to ensure that people understand the responsibilities that come with a direct payment but the guidance does little to convey this.

Furthermore, there is no guidance in relation to recovery where a person may have been found to have been overpaid or to have misused a direct payment. Some mental health problems can - at times - affect a person's judgment and mean that they spend money excessively or inappropriately as a result. SAMH is concerned that harsh sanctions could be wrongly applied to people in such situations and the guidance does not address this. We also have concerns that some people may not fully understand what would be regarded as an inappropriate/appropriate use of their direct payment and then risk being pushed into poverty (and left unsupported) as a result. The guidance should outline how and when payments might be recovered and over how long a period. This also links to the above point about ensuring people are aware of their responsibilities and the purpose of a direct payment.

At paragraph 138, it should also be detailed what should happen where a person enters hospital who has purchased a service from a provider. For example, steps should be taken to ensure that the direct payment continues to pay the provider's costs as appropriate e.g. where the provider continues to work with the supported person towards their desired outcomes.

## **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?*

It is unclear within paragraph 146, which contains information relating to residential care, what type of services would fall within this category.

## **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?*

The terminology used within legislation can at times be extremely subjective and so open to interpretation. For example, words such as 'reasonable' are particularly vague. For these terms to have any effect, they need to be accompanied by robust guidance along with adequate scrutiny and transparency. We do not believe that the guidance goes far enough to provide an explanation of how the wording within the 2013 Act should be interpreted e.g. by setting out minimum standards or expectations. The guidance should be strengthened in this regard throughout, to ensure that people really are placed at the centre of the decision-making process.

#### 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.*

No comments

The equality and human rights impacts of the guidance

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

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

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

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

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

We believe that the guidance could stand to have a significant impact on people who experience mental ill-health, who may access a broad range of health and social care services.

**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 provided comment on potential human rights impacts throughout this response but would again draw particular attention to obligations under Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

## **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)?

In relation to Regulation 3(2), within part 2, we believe that it would be beneficial to set out the maximum timescale within which authorities should carry out a means test after a direct payment has been made. It is critical that an assessment of a person's ability to contribute is made at the earliest possible opportunity as if a person is found to have been overpaid they may be required to repay the amount of the reduction. This presents a real risk that some people could be pushed into financial hardship if their assessment does not take place promptly. If it is decided not to clarify this within the regulations then it must be clearly addressed by the guidance, which is not presently the case. SAMH is also concerned that in some areas repayments may be clawed back using means such as debt collection agencies, which can be extremely distressing and damaging to the individual concerned.

At Regulation 4(1), it would be useful to outline the circumstances and way in which the direct payment user may elect to receive the payment gross of any contribution required under 3(3).

At Regulation 5, the frequency at which a local authority may choose to pay a direct payment in instalments should be stipulated. Again, if this is not outlined in the regulations it must be made explicit in the guidance.

It is unclear at Regulation 7(1)(a) why the direct payment user may become ineligible to receive direct payments. For example, would this relate to situations where a person's need for support lessened? At present, this regulation is too vague to have meaning within the context of Section 7.

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

Overall, Part 3 of the regulations is clear in outlining the circumstances where family members may provide support. We would seek further explanation at Regulation 9(2)(b) as to how it may be determined whether the family member is capable of meeting the direct payment user's assessed need. For example, what is the definition of capability in this context and who would be responsible for making this decision?

At Regulation 10(1)(b), it is unclear whether a family member who is a guardian/attorney would still be able to provide support where they had not used their power to direct the direct payment in question (even although they have the power to do so).

**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?

There should be equality in the law in relation to eligibility for self directed support and direct payments. Whilst there may be occasions where it is wholly appropriate to impose an exclusion as listed in Regulation 11, we believe that this should be at the discretion of local authorities depending on the particular circumstances involved. We do not support a blanket exclusion approach and would highlight that often such blanket restrictions do not comply with international human rights law and standards.

There also appears to be an error at Regulation 11(1)(e) where it states 'in accordance with Regulation 8(b) or (c)' – we assume that this in fact should refer to Regulation 7(b) or (c).

**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?**

The fact that this part of the regulations falls under the heading 'services for which direct payments are not available' suggest that people who are homeless, fleeing domestic abuse or requiring support for addiction would be exempt from receiving a direct payment, however this is not the case. It should be made clearer that - just because a local authority is not required to give a person the opportunity to choose Option 1 - people in these categories could still receive a direct payment.

We can understand the rationale behind giving local authorities the discretion to restrict access to direct payments but there must be robust guidance to accompany this provision, explicitly outlining when it is expected this power might be used. We also seek clarity as to whether people with 'co-morbidity' (i.e. drug/alcohol dependency and mental ill-health) could also be exempt from receiving a direct payment, as part of their support package may relate to their addiction/s.

**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.

As with question 4, any decision within the regulations to restrict access to direct payments must be accompanied by robust guidance. SAMH provides residential care support for people with severe and enduring mental health problems, who need high-level, specialist support on a 24 hour basis. Our care homes and supported accommodation services operate in different residential models, from traditional to closely grouped and dispersed dwellings. We are unclear about what might be considered as 'residential accommodation' based on the current regulations, and believe that this should be clarified to ensure that some of our service users are not unfairly excluded from the opportunity to direct their own support.

As a supporter of the principles of self-directed support, we believe people should be empowered to make choices about the kind of services they require to aid their recovery and maintain their well-being. However, consideration must be given as to whether the standards required of such residential services, by commissioners, by the Care Inspectorate, and by service users could all be met within the flexibility of this approach, and if this approach could actually be detrimental to vulnerable people. At present, a care home requires staffing levels and training within a level proscribed by the authority and the regulatory body, and on the grounds of the mental health assessment of the individual. Logistical challenges and unforeseen circumstances could have far-reaching implications for all service users of a residential service, regardless of whether they were receiving support and/or accommodation via direct payments or in the more traditional social care pathway.

SAMH does not believe this is a reason to support the restriction of direct payments for people in residential care, but it clearly requires consideration, from both an equality and a safeguarding perspective. The logistical challenges of offering direct payments to a service user in a care home could be great, as residential services require staff around the clock, irrespective of individuals being supported and accommodated. If, on the other hand, 'residential' relates to less intensive accommodation and support services as described above, SAMH believes that there may be circumstances where an individual may receive Option 4 i.e. a combination which would allow them to have a direct payment for a particular specialist intervention on top of their council-arranged accommodation and support.

**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?**

No comments

**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 comments

## **Draft Regulations**

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

The costs and benefits arising from these regulations

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

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

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

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

No comments

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 that the regulations could stand to have a significant impact on people who experience mental ill-health, who may access a broad range of health and social care services. We also feel that people who experience co-morbid mental ill-health and addiction issues may stand to be negatively impacted by the proposals.

**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>

We believe that the regulations have particular relevance to Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

We also do not support the blanket exclusion approach imposed by Regulation 11 and believe this may go against international human rights law and standards.