

## **Draft Advocacy Guide for Commissioners**

### **Consultation questions**

1. Since the publication of the Guide for Commissioners by SIAA in 2010 there have been several developments. For example the publication of the NHS Healthcare Quality Strategy in 2010; the introduction of the Patient Rights (Scotland) Act 2011; the publication of the Patients Charter of Rights and Responsibilities in October 2012; publication of the Carers and Young Strategy in 2010, and the provision of joint Scottish Government and COSLA Guidance on Procurement of Support and Care Services in 2010.
2. The guide has been updated to incorporate these and other relevant developments.
3. Sections 5 and 6 of the Guide explain commissioner's statutory responsibilities under the Mental Health (Care and Treatment) Act 2003 which are further explained in the Code of Practice Volume 1. Based on the definition taken from the legislation the guide provides the following Principles and Standards for Independent Advocacy:

#### **Principle 3**

Independent advocacy is as free as it can be from conflicts of interest.

Standard 3.1 - Independent advocacy providers cannot be involved in the welfare, care or provision of other services to the individual for which it is providing advocacy.

Standard 3.2 - Independent advocacy should be provided by an organisation whose sole role is independent advocacy or whose other tasks either complement, or do not conflict with, the provision of independent advocacy.

Standard 3.3 – Independent advocacy looks out for and minimises conflicts of interest

Please note:

- Standards 3.1 and 3.2 associated with Principle 3 above reflect the definition of independent advocacy in the Mental Health Act (Care & Treatment) (Scotland) Act 2003 and differ from the standards used by the advocacy movement in the SIAA Principles and Standards.
- The remaining Principles and Standards i.e. Principles 1, 2 and 4 and the associated standards set out in Appendix 1 are consistent with the Principles and Standards given in the SIAA Principles and Standards.

**Question 1: Are you content with the level of detail given in relation to the statutory responsibilities and that the information is clear?**

Yes

No

**If no, what additional information do you think should be included?**

Who Cares? Scotland believes that the issue of conflict of interest has not been satisfactorily dealt with. We believe that when one individual is able to control or have influence over another, the conditions necessary for exploitation and abuse to occur are created.

Who Cares? Scotland have strong concerns about the level of avoidable risk that vulnerable individuals are subject to, where independent advocacy is not an option. We believe that any person requiring advocacy support, should be offered independent advocacy as a matter of course alongside other advocacy options. Should the individual then choose to pursue a non independent advocacy route – whether through an organisation or through a family member/friend, they will at least have had the opportunity to make their choice on the basis of accurate, impartial information about their rights.

When local authority commissioners identify conflict of interest, they are in reality identifying risk. Where risk is identified local authority commissioners should look to remove or reduce risk. The best way of doing this is through the provision of independent advocacy. Our position paper below clearly outlines Who Cares? Scotland's stance on independent advocacy.

## **Who Cares? Scotland**

### **Independent Advocacy**

#### **Position Paper**

**10<sup>th</sup> April 2013**

**Who Cares? Scotland is committed to the promotion and delivery of quality independent advocacy services for children and young people with care experience. However, we also recognise the role of non-independent advocacy and its place on the advocacy continuum, with family members at one end of the scale and independent advocates at the other. We believe that a range of advocacy provision will ensure that more children and young people are able to access advocacy support timeously. However experience has demonstrated that to safeguard vulnerable children and young people, it is of utmost importance that independent advocacy provision must remain easily accessible.**

#### **The Young People We Work With**

Looked after children and young people are some of the most marginalised, socially disempowered and stigmatised in Scotland. They are likely to have experienced an array of social disadvantage prior to coming into care, which unfortunately, can then be compounded by their care experience. Loss and change are key factors of these young people's lives. They often do not trust those around

them, and many struggle to make meaningful relationships with peers and adults alike. It is important therefore that they have a range of adults that they can go to for support when required. For some of these young people family members may be part of the reason that they have come into care, so it should not be taken for granted that such relationships are altruistic or in some cases even constructive. Other young people may have difficult and fraught relationships with carers or other professionals. Children may be violent or aggressive; they may have committed offences, and in many cases these children may be viewed as 'difficult' or hard to connect with by the services that care for them. The adults around these young people may not see them as deserving, which in itself makes these young people particularly vulnerable, and amongst those who have greatest need of independent advocacy services.

### **Conflict of Interest**

It is important to recognise that independent advocates are no better or worse at doing their jobs than non-independent advocates, however non-independent advocates may be affected by structural factors which can have an unintended impact on service users. Dictionary.com defines independence as ***“Free from the control, influence, support, aid or the like of others.”*** (Dictionary.com)

When one individual is able to control or have influence over another, the conditions necessary for exploitation and abuse to occur are created. This is the case regardless of whether or not there is intent to abuse, harm or disadvantage. This is particularly the case where agencies provide care services for young people on the one hand, and advocacy services for the same young people on the other. Both services will have been developed in line with the organisation's strategic vision, and employees of both services will have to comply with the same organisational policies and procedures. This will undoubtedly have an impact on the development and delivery of services. For example, local authorities have a duty to protect children and to act in their best interests. This may mean the Social Work Department taking a child into care, whilst a Children's Rights Officer (CRO) employed by the same organisation works on the child's behalf to achieve a return home or more contact with their family. Both departments are part of the same organisational hierarchy, policies and procedures, which means that the CRO can be in conflict with the management within their own organisation.

Given the number of times that Who Cares? Scotland is contacted by local authority workers including CROs to take up issues on behalf of young people because they have reached a ceiling within their own organisation, Who Cares? Scotland do not believe that it is possible for organisations in this situation to be:

***“..... supported to adopt the principles of independence.”***

In conclusion, Who Cares? Scotland recognises that a range of people in different roles are able to advocate positively, and with good intent for children and young people in care. However, we strongly restate our previous point on independence.

***“When one individual is able to control or have influence over another, the conditions necessary for exploitation and abuse to occur are created.”***

Who Cares? Scotland believes that by not making independent advocacy available to all children and young people in care, they are being exposed to an avoidable risk.

### **Case Study Illustration**

The following case study, informed by our direct work with children and young people demonstrates with ease our position on the need for independent advocacy, which is impartial and free from conflict of interest. This is typical of our core independent advocacy work, day in day out, with children

#### ***The Situation***

Young person living approx. 100 miles away from his local authority area in a purchased foster care placement. The young person was 19 years old and in the final year of a joinery apprenticeship. All the important relationships that he had were in the area that he was living – friends, girlfriend, sports clubs he attended as well as college and work. Despite this, the local authority took the view that he should return to his local area to live within 28 days. Foster carers and the private foster care agency were fighting hard to keep the young person in his placement where he'd been for 5 years. However, the valid arguments they were making on behalf of the boy weren't being listened to, and it was implied that there was a conflict of interest – namely that their concerns were motivated by money and not by the young person's needs. We were contacted by the private fostering agency, who recognised that any argument they made on the young person's behalf could be misconstrued as a conflict of interest because they stood to gain financially from the young person remaining in the purchased placement.

#### ***The Advocacy Task***

The advocate met with the young person. He obtained permission to speak with other relevant parties including the foster carer, a through care worker and a team leader. The through care worker advised that the decision to move the young person had been made based on a pathways assessment as part of his pathway plan. The young person had only met the worker once and neither he nor the foster carer was aware of any pathways assessment having taken place. Given the short timescales and the difference in perspective between young person and throughcare worker, the advocate wrote to the local authority seeking clarity. It transpired that the throughcare worker had made his assessment without any discussion at all with the young person, and consequently there was no pathways plan.

### ***The Outcome***

The local authority withdrew the 28 day notice on the young person's placement. It was agreed that he would remain in placement until his apprenticeship was complete. In the meantime pathways planning would be started and would reflect the young persons desire to continue living in the area he was currently living in. The advocate would remain involved as a source of independent support and guidance. Where there is financial gain for one party (purchased providers) conflict of interest is often cited by local authorities. In such instances only independent advocacy – where there is no gain for the advocacy agency - is truly able to withstand scrutiny as the advocacy organisation derives no financial benefit from the advocacy transaction.

### **Supporting findings from independent inquiries**

Each of the following independent inquiries made recommendations about the need for independent advocacy to be available to children and young people in residential care. Recommendations were made as a result of many young people experiencing physical and/or sexual abuse whilst living in residential settings, and in the case of North Wales some young people living in foster care. Whilst we recognise that these inquiries also had other significant findings, they have in common a recommendation that independent advocacy should be made available to children and young people in care.

The Edinburgh Inquiry (1999)

Lost in Care (2000)

The Kerelaw Inquiry (2009)

### **Relevant themes**

Children made allegations to various members of staff over the years.

Complaints were not followed up, or were quashed by more senior managers who had an interest in maintaining the status quo.

Collusion and secrecy were rife.

Evidence was suppressed in some instances.

Children had little and in some cases no access to independent sources of support. In this context the term independent should be understood as an individual who has no affiliation and therefore no conflict of interest with ensuring that only the child's needs are considered.

### ***Edinburgh Inquiry (1999)***

Recommendation 110:

The Director of Social Work should recognise that a full time Who Cares? post is warranted for the City of Edinburgh, given the numbers of young people in residential or foster care, and should seek to identify funding for this.

### ***Waterhouse (2000)***

Recommendation (2a)

The duties of the Commissioner should include:

(a) ensuring that children's rights are respected through the monitoring and oversight of the operation of complaints and whistleblowing procedures and the arrangements for children's advocacy;

Recommendation (4d)

(d) to ensure that recourse to an independent advocacy service is available to any complainant or affected child who wishes to have it;

***Kerelaw Inquiry (2009)***

Recommendation 19.33

“The Scottish Government should review the funding of children’s advocacy services to ensure all looked after children have access to an independent, quality service

***Independence***

An independent person can never be the child’s parent or family member, care home employees or local authority staff at any level. To be blunt, any individual who stands to gain personally or professionally in their own right or as part of an organisation is not, and can never be independent regardless of motivation or intent. The very nature of their role or connection gives them an influence over the child, or the child’s situation, as a result of which there is an increased opportunity for the child to be discriminated against, exploited or abused. The fact that most non-independent individuals choose not to exert this influence over the child is immaterial, as it does not remove either the risk of harm or the conflict of interest.

**Our concluding remarks**

As mentioned at the beginning of our submission, Who Cares? Scotland recognises that there is value for young people in having access to a continuum of advocacy services. We believe however that independent advocacy should always be offered to all children and young people when their advocacy options are being discussed.

4. Section 10 covers commissioning of independent advocacy. This is a much shorter section than in the previous guide as it refers to the Guidance on the procedures for Procurement of Care and Support Services given in the joint Scottish Government and COSLA guidance issued in 2010 and available at:

<http://www.scotland.gov.uk/Resource/Doc/324602/0104497.pdf>.

**Question 2: Are you content that the level of detail given in Section 10 on the Commissioning of Independent Advocacy is appropriate?**

Yes

No

## **If not, why not?**

Who Cares? Scotland believes that there requires to be specific clarity provided around the commissioning of independent advocacy services, as opposed to the commissioning of services more generally. We take this position because the potential for harm – physical, emotional or sexual - to be caused to the individual as a result of conflict of interest is high and must be acknowledged and managed at a range of levels.

However, we also believe that once established, independent advocacy services should not be subject to routine tendering processes. Children form strong trusting relationships with advocates. Advocates sit alongside young people through disclosure of abuse, court cases and other traumatic situations. Advocacy relationships, based on mutual respect and trust take a long time to build, and are broken by provider change through needless tendering processes. It is unacceptable to add more broken relationships to children who have already experienced significant loss and change. By replacing routine tendering with rigorous reporting, monitoring and service user evaluation commissioners would still receive detailed quality information about the effectiveness of services. Quality independent advocacy provision would not be disrupted and vulnerable young people would not suffer further emotional distress through avoidable broken relationships. Routine tendering could quite easily be negated, **unless** services did not meet the required standard.

## **Procurement of Social Care Services for young people in care.**

**Who Cares? Scotland.**

**Position paper**

**Who Cares? Scotland (WC?S) believes that services which deliver direct help and support to children in care, as well as other services for vulnerable and disadvantaged people, should not be subject to the competitively tendering process – and that with correct application of Part B of the Directive 2004/18/EC, they do not have to be.**

**WC?S believe that the distinction between the procurement of services which fall under Part A and Part B of Directive 2004/18/EC is not being fully recognised and applied – and this adds to the negative impact that the competitive tendering process is currently having on the provision of social care services for looked after children and young people in Scotland. We believe that a local authority’s interpretation of the guidance should wholly recognise the distinction that is made between Part A and Part B services, and would recommend this takes place with immediate effect.**

## **The impact of Directive 2004/18/EC**

The procurement of social services falls within Annex II, Part B of Directive 2004/18/EC. Whilst the Green Paper on the Modernisation of EU Public Procurement Policy (European Commission, 2011) stated that contracts for social services are ‘not subject to the full rigours of EU procurement rules’ and stated that contracting authorities ‘already enjoy considerable latitude with regard to the procedures to be followed’, the reality is that in practice this is not

the case. Complications in interpretation seem to arise from the requirement that EU law principles (e.g. equality) are fulfilled, alongside the criteria established in Annex II, Part B of the Directive.

The resulting outcome of this interpretation is that contracting authorities believe that they need to advertise and competitively tender for all Part B contracts, instead of considering the rationale for continuing / renewing funding for the service in question. The impact of this interpretation on the provision of social services, in our opinion, is entirely negative. **We believe that services which deliver direct help and support to children in care, as well as other services for vulnerable and disadvantaged people, should not be subject to the competitive tendering process – and that with the correct application of Part B of the Directive 2004/18/EC, they do not have to be.**

### **Redressing the negative impact of Directive 2004/18/EC**

WC?S would recommend that those local authorities which we have current contracts with, work with us in advance of contract end dates, to consider renewal and extension potential in line with Part B criteria, before undertaking the process of advertising the contract and kick-starting the competitive tendering process. We believe that this approach, which does not contravene guidelines in any way, would provide the best possible continuity of service to looked after young people across Scotland.

We also believe that the jointly produced 'Procurement of care and support services' guidance document (Scottish Government, JIT, COSLA, 2010), needs *'stronger enforcement mechanisms to be truly effective'* (CCPS, 2010) and to make full use of the practical and well-evidenced set of tools which it recommends. This would help foster a procurement environment where all services delivered to young people in care by us and the rest of the third sector are both recognised for the quality of service they are providing and the levels of need they are helping to meet. In addition, this will help ensure that we are viewed as an engaged partner and not just a contracted supplier in the delivering of these vital services.

### **Standard 3.2**

Who Cares? Scotland consider's that greater clarity should be provided in standard 3.2.

***“Independent advocacy should be provided by an organisation whose sole role is independent advocacy, or whose other tasks either complement, or do not conflict with, the provision of independent advocacy.”***

In particular we need clarity around the types of organisation and the tasks they engage in which **“complement, or do not conflict with, the provision of independent advocacy.”**

The joint Scottish Government and COSLA Guidance issued in 2010 highlights the need for engagement with service users prior to and during commissioning processes. We believe, that the involvement of service users in the commissioning, monitoring and on-going review of all advocacy services commissioned by local authorities should be a firmly embedded, core part of the commissioning process for both independent and non-independent advocacy providers.



5. Both commissioners and the advocacy groups have a responsibility to ensure that the advocacy being provided is of good quality and is effective. Section 12 of the guide covers Monitoring and Evaluation and mostly reflects the arrangements currently set out in the 2010 guidance. However we understand that the cost of independent evaluations is high and is not always undertaken. In relation to this we are currently exploring a pilot for evaluation of advocacy projects with the SIAA. This will involve the recruitment of independent sessional evaluators to undertake evaluations based on the Principles and Standards within this guide over an 18 month period. SIAA will facilitate the appointment and training of the evaluators. The report of the evaluation will be prepared by the evaluators and will go to the commissioners and the advocacy group. The SIAA will be in a position to offer support to the advocacy group in the event that improvements are required. An evaluation of the pilot will be conducted prior to any decision on whether to proceed with this model. The evaluations will not be restricted to SIAA member organisations.

**Question 3: Would you support a programme of evaluations based on the pilot model of evaluation set out at 5 above?**

Yes  No

Who Cares? Scotland welcomes the proposed pilot, for evaluation of advocacy projects. We strongly recommend the involvement of service users as lay assessors. Additionally we This is an area we would be keen to be involved in, from the perspective of working with SIAA to develop the pilot framework; identifying staff to become trained evaluators, and as an organisation who would be willing to have our advocacy services evaluated.

**If not, why not?**

6. Examples of situations that can potentially cause a conflict of interest which might impact on the person receiving the advocacy support, the advocate, the advocacy organisation or a service provider have been included at Appendix 2.

**Question 4. Do you think it is useful to highlight situations (such as those given in Appendix 2) that commissioners should be mindful of in order that consideration is given to how these would be avoided/handled/resolved?**

Yes  No

**Are there any others you would add/remove?**

The scenarios offer appropriate examples of what conflict of interest can look like. However, the examples would hold more weight if the potential impact of each scenario was stated. Not all commissioners will fully understand advocacy or the impact of conflict of interest, and may therefore not identify situations where harm could be caused.

**We would welcome your thoughts on what the impact of each of these situations would be and also your views on what action should be taken to minimise conflict. We will consider the responses and add as part of the guidance.**

We have included potential impact of scenarios as an appendix to our submission.

It is crucial that commissioners have confidence that all agencies providing advocacy are able to identify conflict of interest. This should be considered strategically, for example this should be a requirement in tendering documents. It should also be considered at the point of referral for individual advocacy. All agencies should have protocols in place for referring service users to another organisation that they are not affiliated to, where conflict of interest has been identified.

7. The layout of the guide has been changed to provide information and direct links to a list of relevant policy and guidance documents in Appendix 3.

**Question 5: Do you find the information on additional reference material/useful links in Appendix 3 helpful?**

Yes  No

**Are there any others you would add?**

**Are there any you would remove?**

## **General Comments**

**We would welcome any further general comments you may wish to offer here.**

Who Cares? Scotland recognises that advocacy exists on a continuum, with family members at one end of the scale and independent advocacy organisations at the other. We believe that a range of advocacy provision – with equality of access to independent advocacy for all service user groups - will ensure that more people are able to access advocacy support timeously. However we reiterate our concern that “conflict of interest” equates to avoidable risk. Mandatory access to independent advocacy, is the only way that avoidable risk can be minimised.

**We are grateful for your response. Thank you.**

## Appendix 1

Situation	Impact	What Action Could Be Taken to Minimise Conflict
<p>A service user approaches an advocacy organisation because they want support to make a complaint. The complaint concerns an individual who is employed by a large national organisation that hosts* the advocacy service.</p>	<p>The complaint may not be taken seriously. It may be responded to internally with no information being shared with the local authority or family members (so the service user has no external safeguard). The service user may be scapegoated, and may subsequently have a poorer service experience as a result of complaining. Abuse may be covered up.</p>	<p>An independent advocate from the outset. There should be a duty to refer on to an independent advocacy agency which is not affiliated to the referring agency.</p>
<p>A person with a learning disability has used a service from a care providing organisation in the past. That organisation now also has an advocacy project. The person needs an advocate.</p>	<p>There may be an assumption made that because the service user has had good relationships with the care providing organisation previously, that the same organisation should be approached to provide advocacy. This may, or may not be the case. If previous relationships were good and the service user is not currently receiving services from the organisation there is a significantly lower level of conflict of interest. The difference in the role should also be considered as the service user may anticipate receiving the same services as before.</p>	<p>Listen to what the service user has to say. If they don't want to receive services from the organisation don't force the issue. If they do, try to understand why, and put in independent monitoring arrangements to ensure that there is no conflict of interest.</p>

Situation	Impact	What Action Could Be Taken to Minimise Conflict
<p>An advocate is supporting a person who wants to change their home support from their current provider but doesn't know what options are open to them. The advocate works for an advocacy project hosted by an organisation that has contractual links with other home support providers in the area.</p>	<p>The risk here is that the service user is prompted by the advocate – intentionally or otherwise towards a particular provider. Prompting could take the form of gentle encouragement or direct coercion. Advocates wield a lot of power, and many service users look to their advocates to tell them what they should do. This completely oversteps the parameters of the advocacy role.</p>	<p>In this situation, the advocate may feel able to provide information to the service user about other home support provision in the area. However, this is not appropriate because of the advocate connections. The advocate should remove themselves from the advocacy role because there is a conflict of interest. This will allow the service user to receive completely independent information, from an independent advocacy provider. The advocate could declare the conflict of interest, but that would not significantly change anything.</p>
<p>A woman with dementia is getting a good home support service from a care providing organisation. The organisation also provides advocacy. The woman's son would like an advocacy worker to start working with his mother while she is still able to express her views and wishes. It turns out that the only suitable advocacy service in the area is managed by the same organisation that provides the home support service.</p>	<p>There is a direct conflict of interest here. Both services may have competing interests in providing services for this lady. There is potential for each of these services to impact on the other, and it could be very difficult for an advocacy worker to challenge the organisation they work for, if the lady has concerns about poor practice for example. This may result in collusion, avoidance by the advocate, pressure on the advocate by the organisation. Ultimately the service user is not at the heart of this situation, with all the focus and energy on responding to the conflict of interest.</p>	<p>An independent advocate would completely remove the conflict of interest here.</p>

<b>Situation</b>	<b>Impact</b>	<b>What Action Could Be Taken to Minimise Conflict</b>
<p>An organisation that supports children and young people is involved in the Multi-Disciplinary Team that assesses patients for admission to the local Child &amp; Adolescent Mental Health Service Unit. This organisation also provides advocacy.</p>	<p>There is a direct conflict here between the best interest principle and young people's right to be heard. Effectively the best interest principle overrides young peoples' right to be heard. In addition, if a health professional for example was concerned that a young person required to be detained under the mental health act (a decision usually taken by a doctor), it would be very difficult for an unqualified or less qualified colleague (advocate) to challenge. Power and hierarchy within organisations plays a significant part in conflict of interest.</p>	<p>An independent advocate from an external organisation would completely resolve the conflict of interest here.</p>
<p>The carer or the young carer is supported by their local carer organisation and is content with the support. The organisation also provides advocacy. The carer/young carer reaches a crisis/emergency situation with a potential for breakdown in the caring situation. Who should provide advocacy?</p>	<p>The potential for harm here is that the care agency knows the carer and the person being cared for, and they may feel that together with an internal advocate, they can patch this situation up – thereby not taking the carer / young carer seriously. The impact may be placement breakdown. However, at the other end of the scale it could be self-harm or even attempted suicide. When considering conflict of interest you need to consider risk, and when you consider risk you need to consider what form risk might take. Risk is on a spectrum, but the worst type of potential harm must always be factored into any decision taken around risk created by conflict of interest.</p>	<p>Is it advocacy that's required here or support? It may be a combination of both. In which case the young person should continue to receive support from the care organisation should they require it, but the advocacy element of the provision should be outsourced to an independent provider.</p>

<b>Situation</b>	<b>Impact</b>	<b>What Action Could Be Taken to Minimise Conflict</b>
<p>A collective advocacy group is supported by an advocacy worker who is employed by an advocacy project, which is linked to a large organisation which also provides care services. The collective advocacy group is campaigning for changes to local services that may impact on contracts held by the parent organisation*. The parent organisation has a consortium agreement with a number of other agencies in other areas. The proposed changes to local services may have impact on others</p>	<p>The most significant impact here is that the views of service users are never heard. In addition service users may experience negative feedback from employees of the organisation which provides services for them, and other connected organisations. This can be as basic as staff being short with them, rude, challenging or actively trying to make them change their minds or back down from the action they're taking.</p> <p>The impact for the advocate may be that they are put under pressure – intentionally or otherwise by the organisation that employs them or colleagues / friends who work for the employing organisation or some of the other organisations that may be affected by the collective advocacy campaign.</p>	<p>The quickest, easiest and most respectful way to resolve this situation is to ensure that an independent advocate is sourced to support those involved in the campaign.</p>