

Self-Directed Support: Consultation on the Draft Regulations and Statutory Guidance to Accompany the Social Care (Self-Directed Support) (Scotland) Act 2013

**The Scottish Government's response
to the consultation**

17th April 2013 – 10th July 2013

SELF-DIRECTED SUPPORT: CONSULTATION ON THE DRAFT REGULATIONS
AND STATUTORY GUIDANCE TO ACCOMPANY THE SOCIAL CARE (SELF-
DIRECTED SUPPORT) (SCOTLAND) ACT 2013
(17th April 2013- 10th July 2013)

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Background

1. The Social Care (Self-directed Support) (Scotland) Act 2013 ("the SDS Act") was passed by the Parliament on 28th November 2013 and received Royal Assent on 10th January 2013. Between April and June 2013 the Scottish Government consulted on proposals for the Regulations and Statutory Guidance to accompany the SDS Act.

2. This document provides the Scottish Government's response to the matters raised in the consultation. We also explain what will happen next.

Our Response

3. The Scottish Government would like to thank the people and organisations who responded to the consultation. A total of 144 consultation responses were received; 21 from individuals and 123 from organisations. The Government welcomes the strong agreement for the underlying principles and values of self-directed (SDS). The Government notes that there were different opinions on the matters of details in regards to the Regulations.

Next steps

4. The Scottish Government will make final amendments to the draft Regulations and will introduce a final set of Regulations to the Scottish Parliament prior to the planned commencement date for the SDS Act (April 2014). The Government will also amend the statutory guidance and will issue a final version of the guidance prior to the commencement date. Final amendments will be made in consultation with the national SDS Programme Board which includes a range of key interested partners from councils, providers and user and carer organisation's.

What we heard

5. Those who responded to the consultation welcomed the opportunity to do so and many noted their broad agreement with the underlying principles and values of self-directed support (SDS). In many cases comments were about specific issues where respondents wanted to see further detail or clarification, or on suggested changes to ordering, or to words and phrases. While some general themes emerged, these came from small numbers of respondents. Although the consultation asked separate questions about the draft Regulations and the Statutory Guidance, many of the themes which emerged were common to both.

Introduction

6. Self-directed support (SDS) is the principle that people have informed choice about the way that their care and support is provided to them by taking control of the money spent on that support. The national strategy on self-directed support, and the legislation which underpins the strategy, aims to provide greater choice and control to individuals, enabling them to better tailor their own support and to achieve positive outcomes. The Act gives people a range of options for how their social care is delivered, beyond just direct payments, empowering people to decide how much ongoing control and responsibility they want over their own support arrangements. The draft Regulations dealt with various matters of detail relating to direct payments i.e. Option 1 in the SDS Act.

Objectives for the Regulations and Statutory Guidance

What we heard

7. Comments made on both the draft Regulations and Statutory Guidance were varied, with many themes common to both. These included :

- Significant disagreement with the concept of excluding certain types of individuals from receiving a direct payment.
- The requirement to balance risk and choice.
- A need for greater focus on the relationships between all involved and the need to ensure that all **are** involved.

Our conclusions

8. In light of the consultation we would propose the following objectives for the draft Regulations and Statutory Guidance :

- To provide clear powers and duties to local authorities in regards to direct payments, ensuring a fair balance between people's freedom to design their own support and councils' duty of care.
- To underpin the general principles for self-directed support of dignity, participation, involvement, informed choice and collaboration.
- To ensure that people are provided with a range of choices in relation to their support.

REGULATIONS

Calculation, payment and termination of direct payments

What we heard

9. Comments covered a variety of topics which included:
- arrangements for means testing for direct payments
 - payment of direct payments net or gross

- direct payments by instalments
- third party direct payments
- circumstances where a direct payment may be terminated

10. There was general agreement that direct payments should be paid in instalments where necessary and that third party direct payments should be defined in law.

11. Again there was general agreement that local councils should be able to terminate direct payments but some suggestions for appropriate handling of such decisions.

12. There was no opposition to the principle that direct payments should be means tested as per any other form of social care.

13. In terms of payment net or gross of a direct payment user's contribution": most respondents to this question had a desire to withdraw the option for a service user to request payment to be made in gross. These comments were made primarily by local authorities.

Our conclusions

14. The Government plans to retain the Regulations on the means testing of direct payments, direct payments by instalments, third party direct payments and circumstances where a direct payment may be terminated, in their current form.

15. We note the strong response from local authorities on the issue of payments of direct payments net or gross. We feel that this is an administrative issue that is likely to change and evolve over time and therefore, is best dealt with within the Statutory Guidance. Never-the-less, the Statutory Guidance will recommend that local authorities are flexible and respond to individual requests for gross payments.

Provision of support by family members

What we heard

16. For the most part Carers organisations wanted to see a noticeable shift from the current "exceptional circumstances" approach in relation to the employment of family members and for the Regulations to define appropriate and inappropriate circumstances.

17. Local authorities wanted to be able to use maximum possible discretion when deciding when to allow the employment of family members. Local authorities were concerned that additional unpaid family carers would come forward requesting to be paid for support they already supply on an unpaid basis.

Our conclusions

18. It is important to strike an appropriate balance in relation to this issue. Local authorities should retain the primary decision-making role, and the statutory guidance will make it clear that the question of the employment of family members will relate only to statutory support which would otherwise be funded or delivered by the local authority.

19. However the appropriate and inappropriate circumstances should be made transparent to carers and local authorities alike.

20. The Government intends to retain the appropriate and inappropriate circumstances on the face of the Regulations, however we will make amendments to the wording to better describe the circumstances and factors where family members may be employed. We will also update the draft statutory guidance to make it clear that the local authority retains the ultimate decision-making role and can refuse to allow the employment of a family member where it would fail to meet their duty of care or where it would be to the detriment of the carer's wellbeing.

Eligible and Ineligible Groups

What we heard

21. Most consultees were of a view that Ministers should not exclude particular types of individuals from receiving direct payments by laying a Regulation which would deny the opportunity for the practitioner to offer the option.

22. Voluntary organisations in particular felt there should be no restrictions to any individual group, calling for all assessments to be based on individuals circumstances. Local authorities stated social workers should be able to use their professional judgement when assessing an individual's suitability for self-directed support options.

23. Local authorities felt that social workers should have the discretion to make a direct payment where appropriate, even with more challenging individuals. However they also felt that adult and child protection duties should enable them to say "no" in very particular circumstances.

Our conclusions

24. Taking into account the strong opinions against the blanket exclusion of certain types of individuals, the Regulations will be amended to ensure that there will be no obligation on the local authority to offer the direct payment in these more challenging circumstances, but they will have the discretion to do so.

25. A new Regulation around safeguarding will be incorporated into the Regulations to take into account local authorities' concerns that they should be able to refuse the direct payment option where it will put at risk the safety of either children or adults.

Direct Payments for Residential Care

What we heard

26. There was limited support shown for continuing to restrict access to direct payments for residential care.

27. Voluntary sector organisations showed a preference for access to direct payments for all individuals, ensuring greater choice and control for all, however some also commented that direct payments to individuals in residential care could lead to destabilising the residential care market.

28. Local authorities raised some concerns in regards to self-funders, commenting that residential care homes may charge a higher rate than previously negotiated by their local authority, or individuals could be liable to top up fees without agreement of a level of protection.

Our conclusion

29. We appreciate local authorities concerns on the impact on removing the restriction across the country on the 1st April 2014. However, we acknowledge the points made by a number of user groups and providers regarding the positive benefits of direct payments in residential care.

30. We will retain the exclusion on offering direct payments for residential care over the short-term – ie from the commencement date for the SDS Act 2013. However, the Scottish Government will explore with ADSW and COSLA the potential for a small number of local authorities to participate in a test site where the full range of self-directed support options, including the direct payment, can be monitored and evaluated in detail. This will help to inform future policy and practice in relation to self-directed support in residential care environments.

STATUTORY GUIDANCE

What we heard

31. While many respondents commented that the document was too lengthy, others requested for some sections to be extended and for additional case studies to be included. Some argued that the guidance on carers and children's services needed to be better incorporated into the main sections of the guidance, as opposed to being provided as a separate section.

32. Local authorities noted the timescale for implementation as a concern, as well as concerns over resources, increased workloads for professionals and training for local authorities, service providers and advocacy and support services.

33. A large number of consultees wanted to see additional guidance on service users and their carers' responsibilities in relation to employing personal assistants.

Our conclusion

34. The Scottish Government will amend and update the main statutory guidance document, focusing in particular on the material relating to carers, children and families, transition from children's support to adult support and links to wider legislation including adult and child protection. A request was made for additional case study examples which we will incorporate into relevant sections of the guidance. We appreciate local authorities concerns in regards to implementation timescales and aim to issue the Statutory Guidance to local authorities in January 2014.

35. In addition, we will make all partners aware of our plans to publish, in partnership with key national organisations, a range of further "best practice" guides. The best practice guide will focus more on the "how to" and practical guidance. This will include:

- A PA Employers Handbook – developed by the Scottish Government in partnership with key partner organisations
- Guidance to local authorities and practitioners – developed by ADSW
- Guidance to users and providers – developed by the Coalition of Care and Support Providers in Scotland and Self-directed Support Scotland
- Guidance to Carers – developed by Carers Trust Scotland

36. In addition, the Association of Directors of Social Work (ADSW) will develop and deliver national training modules on Self-directed Support, targeted at social work professionals and other key local authority staff.

Equality

What we heard

37. A small number of respondents commented on this question confirming they felt the Statutory Guidance fulfilled its obligations in relation to equality.

Our conclusion

38. The Scottish Government has noted these comments and will update the Self-directed Support Equality Impact Assessment.

Costs and Benefits

What we heard

39. Local authorities and service provider organisations both raised concerns over additional financial costs with the implementation of SDS. Local authorities commented on additional costs in relation to administration, staff training and changes to internal guidance, whilst service providers were concerned they would

struggle to keep up with the demand for up-to-date information or the provision of adequate services.

Our conclusion

40. The Scottish Government will carry out engagement with local authorities and key stakeholders on a draft Business Regulatory Impact Assessment (BRIA) to gain comments and adjustments in order to improve the document prior to the Regulations going through the Parliamentary process in January 2014.

Human Rights

What we heard

41. Again, a small number of respondents made comments on the impact of the SDS Regulations on human rights. Some commenting that the Statutory Guidance fulfils its obligations in relation to human rights, that SDS is a way of protecting human rights, or that in theory, SDS should increase the choice of an individual, offering more control and independence. There were also a few respondents who felt that the blanket exclusion at Regulation 11 may go against international human rights.

Our conclusion

42. The Scottish Government has made note of these comments and amendments will be made to the SDS Regulations in relation to Regulation 11 and the exclusion of certain individuals, which will open up certain circumstances in which a local authority will be under no obligation to offer the direct payment, but will have the discretion to do so.

Conclusion

43. The consultation has been helpful in raising some specific areas of concern which we have taken forward.

44. We will continue to engage with partner organisations through the SDS Programme Board, up to and following the Regulations introduction to Parliament.

45. We look forward to introducing the SDS Regulations into Scottish Parliament with Statutory Guidance being issued to local authorities in early 2014.



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The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

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