

## **Social Care (Self Directed Support) (Scotland) Act 2013 Regulations and Guidance**

### **ADSW's Response to Scottish Government Consultation**

#### **Introduction**

- ADSW welcomes the opportunity to comment on the Scottish Government consultation on Social Care (Self Directed Support) Act 2013- Regulations and Guidance.
- ADSW is of the view that the template offered for responses does not allow for comment to be submitted on the broader range of issues which are relevant to the consultation. We have therefore chosen not to use the template for our main response but attach additional comments on specific aspects of the consultation documents as appendices.
- We are submitting a single response to cover the inter-related areas of-
  - Draft Self Directed Support (Direct Payments) (Scotland) Regulations to accompany the Social Care (Self -directed Support) (Scotland) Act 2013
  - Draft Carers (Waiving of Charges for Support) (Scotland) Regulations
  - Draft Statutory Guidance on Care and Support 2013.
  - Draft Directions (The Carer's Assessment (Scotland) Directions 2014) made by Scottish Ministers under Section 5 (1A) of the Social Work (Scotland) Act 1968 that will accompany the Social Care (Self Directed Support)(Scotland)Act 2013.
- ADSW strongly supports the principles upon which the Self Directed Support (SDS) legislation is based – namely the right of individuals to be given the opportunity to exercise power and control over the support they are eligible to receive. We have worked hard with other partners to develop national policy and strategy, driving forward progress at national and local levels.
- ADSW, along with other sectors, has been commissioned by the Scottish Government to produce national practitioner guidance to accompany the SDS legislation. We therefore have a central role in ensuring legislation and statutory guidance is translated into best practice. It is with this ambition, and within this context, that we submit our response.

#### **Executive Summary**

- In our view, the proposed guidance, at 70 pages, is too long to endear itself to the intended audience and this will impact upon its utility.
- Of more concern is that fact that the guidance extends beyond its remit and particularly into the realm of guidance for practitioners (or 'professionals' as they are referred to in the draft document). It does not, however, serve in its own right as practitioner-specific guidance. This potentially undermines plans for 'supporting guidance' aimed at different stakeholder groups

(which the Scottish Government has commissioned) and may lead to duplication, contradiction and confusion and weaken the coherence of the whole guidance structure.

- ADSW is concerned that the successful implementation of SDS may be adversely affected by rising and unmanageable costs associated with a failure to impose a duty on the NHS to contribute to individual budgets when certain long term health conditions exist. In addition, this delivers an inconsistent message to health colleagues at a time when parallel legislation on health and social care integration aims to bring 'invisibility' to the origins of integrated budgets and a parity of responsibility and esteem across the sectors. We are concerned that the unintended consequence of these factors will be a reduction in available resources for individuals and a raising of the eligibility threshold.
- The above concerns are amplified by the proposed relaxation of the restrictions on the employment of family members and waiving of charges to carers. Whilst recognising that there will be some limited circumstances where this is required relaxing the restrictions as proposed raises issues around the actual cost of implementation and whether these have been accurately anticipated during previous discussions. Furthermore, paying family members of an individual's personal network for support that was previously given out of care, love and friendship seems incoherent next to the Scottish Government's own community capacity building priorities. It delivers a message to the public that may resonate widely beyond SDS.
- ADSW is particularly concerned to ensure that statutory guidance be amended to include a statement on the need for recipients to be informed of the parameters of their indicative budget, following assessment, at the stage before support planning begins. This principle has already been agreed by the Bill Steering Group, attended by ADSW.

There requires to be a fair and transparent system for resource allocation.

- In our view, the original purpose of SDS - i.e. to support people with relatively stable, long term needs to live independently - has been changed and great care must be exercised to ensure that the result is a strengthened approach and not a diluted one. It is important that the statutory regulations emphasise that the SDS approach is not appropriate in all cases. SDS appears to be well suited to provide support for children with disabilities ; extending beyond this would require further consideration in terms of practical arrangements and safety considerations. Local discretion and professional judgement must be applied.
- The consultation documents appear to reduce professional discretion by attempting to prescribe what should happen in specific, individual situations and circumstances. The guidance must fully acknowledge the wider legislative and policy context within which SDS will be delivered –e.g. local authorities' duty of care and also the considerable professional expertise required to assess each individual situation effectively, in co-production with service users.

## **Self Directed Support Regulations**

### Implementation timescales and resources

- The proposed commencement date in the draft regulations is the 1<sup>st</sup> April 2014. This involves a duty to offer self directed support options to new presentations at the point of initial assessment and to all existing client groups at their next planned review. This date has been supported by ADSW in the past and will continue to be so unless final regulations place significant new duties upon social work services. Local authority social work services are already struggling to meet growing demands for services, partly as a result of demographic change, whilst operating in an environment characterised by significant and successive financial cuts.

- The proposal not to prescribe review timetables is supported- this requirement exists elsewhere in legislation. Local discretion in this matter will lead to best practice that is sensitive to individual need.

### Exemptions

- ADSW is concerned by the section in the draft regulations that specifies groups which will be exempt- as it fails to acknowledge the over-riding, statutory, duty of care of local authorities. The exercise of professional judgement may determine that adequate protection cannot be offered to an individual and/ or to the public in other cases not listed. Every day, social workers effectively balance the issues of individual rights and the protection of individuals and communities from harm. It is a highly skilled and complex task and not one that can be managed through application of a template.

### Residential Care

- ADSW agrees that direct payments for long term residential care or nursing care should not be allowed. Individuals already may exercise choice and control in directions on choice of accommodation. Furthermore, we would wish to avoid a situation whereby recipients of a direct payment are considered to be 'self-funding' and are charged a higher rate for care. ADSW is of the view that there are many complexities around extending Direct Payments into Care Homes and this required further consideration and more debate.

### Payment Methods

- ADSW is of the view that it is unnecessary to offer the option of 'gross' as well as 'net' direct payments. Through SDS, individuals will have the option of terminating their support arrangement if they are dissatisfied and moving the budget elsewhere- ie the power of choice will already have shifted to the individual. An audit shows that a large majority of councils offer only a 'net' option. If the 'gross' option has to be offered in addition, a proportion of the available resources would need to be shifted towards additional administrative arrangements. This is to no one's benefit.

### Employment of family members

- As previously stated, ADSW has concerns over the seeming relaxation of the rules of employment of relatives. Regardless of intention, through specifying nine, very broad factors of 'exceptional circumstance', the report has opened up the option of relative-employment to 'the many' rather than 'the few'. Our view is that family members should be supported to continue in their caring role, rather than be paid as employees, for the valuable work that they undertake. We must take care not to undermine existing, caring, informal support networks or, indeed, the work that is underway to encourage community capacity building.
- We also have some concern that the regulations do not adequately acknowledge the importance of maintaining local authority discretion in relation to determining whether there are risks associated with employing a family member. There are times, for example, when an individual does not feel under 'undue pressure' to employ a relative but professional judgement and assessment suggests that this, none the less, would present a risk.

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

- ADSW acknowledges the considerable support provided by carers and their invaluable contribution to the care system. They are of central importance in retaining the quality of life for so many people in the community and, without them, demand for formal services would be

unmanageable. It is essential that carers, themselves, are supported. The proposals, however, whilst well intentioned, raise a number of concerns for ADSW. Our members have to manage a wide presentation of need with finite resources and, therefore, have a responsibility to ensure maximum benefit from available finances.

- We are of the view that the decision on whether to charge carers is one for local determination, not regulation. Many councils provide services to carers in respect of their caring role, with the type of service provided and the arrangements for financial contribution being decided upon locally. The ability of the carer to contribute to their break is often a central factor in these decisions.
- The draft regulations seem to suggest that the local authority will cover costs of replacement care when a carer needs a break and where no other informal care arrangements exist - plus the cost of the short break for the carer. Furthermore, that the financial circumstances of the person requiring support should not be taken into account. This presents an unrealistic expectation in terms of available resources and a deviation away from the normal local authority practice of taking financial circumstances into account. This will create an equity issue and reduce the availability of wider resources. Without additional funding, we do not believe this position is realistic or sustainable.
- Clarification is needed on the definition of a 'carer' given the potential blurring of lines between informal and formal care that is currently seen within the draft statutory guidance and the consequent impact on demand for resources.
- We are concerned that the guidance focuses on a limited range of services rather than simply focusing on the issue of charges to carers. The type of support provided (a separate issue to the charging issue) should be flexible and determined through collaboration between the carer and professional in order to meet the needs and outcomes of the carer.
- The Guidance needs to revert to a more holistic view of assessment where needs are associated with a reasonable estimate of the costs of support.
- The regulations are silent in relation to appropriate level of expenditure. ADSW is of the view that it is totally unrealistic to expect local authorities to meet this proposal without additional funding from central government.

### **Draft statutory guidance on Care and Support**

- As previously stated, the guidance is, in our view, too long and requires to be rationalised so that it avoids areas that will be covered in the practitioners guidance (ADSW has been commissioned to develop this by the Scottish Government). Otherwise, duplication will lead to contradiction and confusion.
- The original Bill did not establish a duty on the NHS around SDS. Further work is required to develop and implement personalisation principles in the NHS and to clarify the continuing care responsibilities of the NHS in jointly agreed packages of care under SDS.
- There requires to be a fair and transparent system for resource allocation. ADSW acknowledges that the guidance recommends local determination in relation to the system used and agrees with this statement.
- We are of the view that it is essential that an indicative budget be identified at an early stage in the process following assessment and certainly before a support plan is agreed, making the parameters of their support package clear to the person requiring support. Without this, there cannot be a genuine shift of power and control.

- Issues around duty of care and risk need to be more comprehensively and realistically addressed within the guidance (see previous comments). Furthermore, a good balance between 'guidance' and 'direction' has not always been struck in the document and this has the potential to undermine professional skill, judgement and confidence.
- This summary contains the key general comments and principles from ADSW. However the following appendix contains more detailed comments that have been made by individual members of the Association that may be helpful to consider when revising the guidance.

July 2013

## Additional comments

### Appendix 1 :Draft Regulations

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

We would suggest that the draft regulations for employing relatives will be difficult to manage and monitor for a variety of reasons.

**Question 5: What are your views on restricting access to direct payments in relation to the provision of long-term residential care?**

There has been little or no demand for direct payment for residential care and within current models of provision it is difficult to see any real advantage.

**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?**

Professional discretion should be exercised in relation to when direct payments are appropriate. This would afford maximum flexibility to professionals to engage with families to secure support which best meets their outcomes at appropriate stages in the support.

**Question 7: Do you have any further comments on the draft Regulations?**

See previous notes.

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.

No comments

**Question 9 (b): Do you have any views on the impact of the Regulations on human rights?**

For more information about human rights please see the Scottish Human Rights Commission's website at:

<http://www.scottishhumanrights.com/abouthumanrights/whatarehumanrights>

See previous comments in relation to safeguarding.

## **Appendix 2: Carers (Waiving of Charges for Support)(Scotland) (Regulations)**

Paragraph 21 mentions the treatment of income from partners. Here and elsewhere there should be reference to the COSLA guidance on non-residential social care charging.

The Guidance also makes no reference to any interface with the Welfare Benefits system, either for carers or for people with disabilities.

The description of Line 5 in paragraph 9 of the Guidance is misleading. Regulation Line 5 does not require the carers to be "away", but simply to be temporarily unavailable to provide care because they are undertaking an activity as part of their support. In the case of carers who are co-resident with the person they care for, such support activities could well take place in the family home.

Our experience of requests for short breaks indicates that carers are usually looking for the provision of support from the local authority for the cared for person to enable the carer to take a break. The guidance would seem to suggest that there is an expectation that carers would find alternative support for the cared for person themselves and the local authority would fund the carer's break.

## **Appendix 3: Draft Statutory Guidance on Care and Support**

Supported Person's Pathway.

### **Question 1c: Do you have any further comments on this section of the guidance?**

This section is useful but we would suggest that there needs to be more focus on outcomes, including under step 7 – 'Monitoring and Review'. In Table 2 we would suggest that the supported person should be placed at the start of the table since their participation in the assessment should come before professional responsibility for the support plan.

Values & Principles

### **Question 2c: Do you have any further comments on this section of the guidance?**

Table 3

Involvement – We suggest removing the sentence '*Communities should be assisted to play an active role in the commissioning of services*'. And placing it under 'Participation'.

Eligibility & Assessment

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

We suggest the heading for this section should read Assessment and Eligibility.

There is a general sense that this part of the Guidance is too lengthy and disordered. Suggestions for improvement are as follows:

Paragraph 18, first bullet point – the purpose of assessment is to determine whether the person is a person in need. We therefore suggest that this should read '*The first purpose of assessment is to identify the person's needs with a view to determining whether the relevant authority has an obligation to meet those needs.*' Paragraph 19 could therefore be removed.

It would be helpful if this section made reference to the Supported Person's Pathway.

Paragraph 20 should be moved to the section on Eligibility Criteria.

The section on *Eligibility Criteria* requires significant amendment. Paragraph 21 currently states:

*Eligibility criteria*

21. Local authorities apply local eligibility criteria in order to determine whether the person's needs call for the provision of services (i.e. to determine if the person's needs are eligible needs). Where the person is over 65 and eligible for personal care, or where the person is eligible for nursing care, the local authority must follow the relevant joint Scottish Government and COSLA guidance on eligibility criteria.

The first problem is factual inaccuracy. The 2009 Eligibility Guidance did not confine eligibility criteria to (a) people over the ages of 65 and eligible for personal care and (b) people of any age eligible for nursing care. What it did do was make the eligibility criteria mandatory for all social care for older people and optional for social care for adults aged 18-64. ("Mandatory" in the sense of guidance that Ministers expected to be applied).

Even if this were corrected, Paragraph 21 would confine the joint Scottish Government/ COSLA guidance on eligibility criteria to *older people* whilst Paragraph 22 refers to "the eligibility framework for access to social care for *adults*" and quotes the definitions for the four risk band from the self-same guidance.

This inconsistency is rooted in the 2009 Eligibility Guidance which prescribed social care eligibility criteria for older people, but left it up to councils whether they apply this to adults aged 18-64. [New Eligibility Guidance that said this today would rightly be subject to successful challenge as discriminatory under the UK Equalities Act 2010]. The anomaly is historical but continues to cause problems, as evidenced in the draft SDS Guidance.

The solution can be found in the 2009 Eligibility Guidance which while prescriptive for older people also contains the following advice:

1.5 It is also recognised that some councils might choose to apply the eligibility framework set out within this guidance to all community care groups - the framework is generic and need not be confined solely to the management of older people's care. It has been written in such a way that it can be applied consistently across all adult care groups if individual councils choose to do so. However, this is a matter solely for individual councils and is not tied to the agreement between Scottish Government and council Leaders on Free Personal and Nursing Care.

This leaves the way open to rewriting paragraph 21 as follows:



21. Local authorities apply local eligibility criteria in order to determine whether the person's needs call for the provision of services (i.e. to determine if the person's needs are eligible needs). National eligibility criteria for social care were agreed by the Scottish Government and COSLA in 2009 and while originally developed for older people, as part of the response to Lord Sutherland's report on free personal and nursing care, the criteria were explicitly designed to apply consistently across all adult care groups. (See paragraph 1.5 of the eligibility guidance available at: <http://www.scotland.gov.uk/Topics/Health/Support-Social-Care/Support/Older-People/Free-Personal-Nursing-Care/Guidance>).

The existing Paragraph 22 can then stand, followed by a new paragraph 23:

23. In these definitions, the risks do not refer only to a reduction in an individual's current independent living, or health and wellbeing, but also to the risk that she or he may not be able to gain these outcomes without support.

This entire section appears to refer only to adults with no reference to children and families (although we realise this is covered later on). If this section is specific to adults this should be explicit.

Table 5 – we suggest this would be better displayed as a description of assessment informed by personal outcomes and the description of service led assessment (left hand column) removed.

Paragraph 38 – we suggest this is moved to the beginning of the section on assessment or to the Supported Person's Pathway. We also suggest that '*further assessment*' be replaced with '*statutory assessment*'. We suggest that 'from a provider' is removed from the first sentence since support may come from a variety of sources.

We suggest this whole section is too long and that paragraphs 26-29, 31 and 32 could be placed in the appendices and referenced in paragraphs 18/19. A shorter version demonstrating the thread linking assessment to support planning would make this more meaningful.

Paragraph 30 should be moved to the section on Assessment.

## Support Planning

### **Question 4c: Do you have any further comments on this section of the guidance?**

Paragraph 52 – we suggest the sentences 'Self-directed support is not about cutting people loose or leaving them to get by on their own. It is not simply about "the money" or providing that money to the person.' are removed as they don't add anything to this section.

Paragraph 57 – we suggest this is removed and replaced with 1 or 2 examples in a text box after Paragraph 58.

Paragraph 58 – we suggest that the sentence 'Though the authority is not obliged to make arrangements as set out in this guidance, there are very few limits to what can be done.' Is removed as it doesn't add anything to the section.

Paragraph 60 – we suggest that the first two sentences are re-worded as follows: ' Whilst individuals may continue to select their support under Option 3, the principles of choice and control, collaboration and involvement should continue to hold for individuals under this option.

Paragraphs 64/65/66 – The professional discretion described here is related only to the individual's

assessed need and the form of support chosen. There are a number of issues with this in relation to Option 1.

Local authorities have wider duties in relation to safeguarding, including community safety. We often work closely with individuals to develop support in circumstances where they present potential risk to other people but are not subject to any of the compulsory orders under Regulation 11 of Part 4 of the Act. In these circumstances our concerns about the use of Option 1 would not be related to the assessed need of the individual, but the safety of others they may recruit to assist with their support.

Equally, there are some adults who have capacity to consent to a particular option but who may have difficulty understanding and exercising their responsibilities as employers. The support may be adequate to meet their agreed outcomes but if difficulty arises in relation to their role as an employer, there will be no legal protection for them within employment law if they have not complied with legislation. This potentially leaves vulnerable adults exposed to legal issues they would have difficulty understanding. It could also mean that professionals would be criticised for agreeing to such arrangements when it was clear the individual would not be able to understand and exercise their responsibility as an employer.

The same concerns apply where parents, whose lifestyles may cause some concern, opt to take Option 1 to secure support for a child.

We suggest that professional judgement has an important role to play here and that any issues relating to compliance with Adult Support and Protection and Child Protection duties should take precedence. Clarity about this must be provided within Guidance and Regulations.

Paragraph 70 – Reference should be to Section 9 of the Act – not Section 8

Paragraph 75 – The section headed ‘The Role of user-led support and information organisations.’ We suggest this is removed as it is unnecessary. The first part of this section adequately describes user-led/independent organisations.

## Monitoring & Review

### **Question 5c: Do you have any further comments on this section of the guidance?**

Paragraph 80 – reviews may be triggered for a variety of reasons e.g. planned review, change of circumstances, change of needs/outcomes, issues around management of support including finances. It is possible that financial review may also be needed for Option 2 if the budget is not being managed well on behalf of the supported person by a third party.

## Facilitating genuine choice

### **Question 6c: Do you have any further comments on this section of the guidance?**

We would suggest that facilitating choice can also be linked to Community Planning and Economic Development of the local area.

Table 8 Part 3 – we would suggest the description here should be asset based rather than focussing on gaps or deficits.

There could be more reference to provider capacity for both statutory and independent providers.

There is also no mention of personal assistants.

Links could be made to both in-house local authority support, independent support and include references to support organisations.

## Section 8 : The role of the NHS professional

### **Question 7c: Do you have any further comments on this section of the guidance?**

More needs to be made in this section of the role of the NHS and Integration of Health and Social Care. Evidence is emerging that pooled budgets can work well – examples would be helpful.

Paragraph 84 – This needs more clarification i.e. the suggestion that health funded support could replace social care.

Some reference in this section to the agenda for personalised health care and the equality strategy would be useful.

Paragraph 85 – we would suggest that '(and senior managers)' should not be in brackets as it suggests their role is less important.

We suggest there should be reference to multi-agency assessment and NHS Continuing Care.

There are parallels with the agenda to integrate health and social care, though this is not specifically referred to in the Guidance. SDS needs to be adopted by health colleagues as part of the Integration agenda and this will require collaboration, training and a culture change within health at all levels.

## Section 9.1 : Children and Families

*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 suggest that this section of the Guidance needs more work and guidance around how SDS will work in the wider Children and Families context is required.

While the exclusions for Direct Payment seem to be broadly appropriate in the draft Regulations, we believe that professional judgement should be used to determine whether other groups, such as people fleeing domestic abuse, homeless families, kinship carers and young people in long term foster care and/or preparing to leave care would benefit from having access to direct payments.

The concept of 'children in need' is very broad and we would suggest that SDS options could be useful in a variety of circumstances e.g. to work with families to try to prevent children from being 'accommodated'.

There needs to be much more clarity within the Guidance as to the interface between SDS and child protection legislation. Some confirmation is needed that, even where it would appear that all four SDS options could be offered, child protection concerns will always take precedence over the options for SDS. Professional assessment is paramount in relation to ensuring that we adhere to safeguarding duties and responsibilities.

The capacity of a parent to manage a direct payment on behalf of a child has to be taken into consideration, particularly where there are money management issues and also problems of addiction. Again we would stress the central role of professional discretion .

Links and interface with other bodies involved in child protection need to be clear e.g. the Children' Hearing system.

We need more guidance on how self directed support can be applied to support young carers who are providing support for a parent or guardian. Some exploration is recommended of ways in which the views of young carers can be heard in relation to the four options.

#### Supported decision-making and circles of support

#### **Question 9c: Do you have any further comments on this section of the guidance?**

We would suggest that a clearer explanation of what is meant by circles of support, in the context of the Guidance, would be helpful. There are different perceptions of this i.e. is it a formal structure or a group of family and friends or both?

There needs to be recognition that people have very different levels of understanding and capacity to engage in the process of planning support and the methods used. Where there are others who can support the individual in their decision making, a clear understanding of what their role would or could be in relation to the assistance with managing the support is needed. For example some people who can make decisions, with support, on how they want their support provided may not be able to understand the complexities involved in employing staff. This is more than just the administrative responsibilities and requires some level of understanding of employment law, health and safety etc. The person in receipt of the direct payment is the employer in the legal sense and their capacity to understand and exercise their responsibilities needs to be taken into account.

The timescales for enabling this kind of support is important. Careful planning leads to a more successful outcome and the process should not be rushed.

More Guidance is needed in relation to people whose capacity to consent is in doubt. In one of the

SDS test sites, this clearly led to an increase in applications for legal guardianship.

Where the local authority has welfare guardianship and has the power to make welfare decisions there should be clarity about whether option 3 is automatically applied and that this can include, where appropriate, the provision of the local authorities own services.

## Carers

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

More clarity is required around how SDS applies to young carers – particularly around option 1, where the young carer is under 18 years.

Paragraph 120, bullet point 5 – people who provide advocacy should not be referred to as ‘supported persons’

Paragraph 125 – a third party should not be referred to as a supported person as this creates confusion.

### **Question 11c: Do you have any further comments on this section of the guidance?**

In relation to Third Party Direct Payments it is important that the roles of both the supported person and the third party are made clear and that there is evidence that all parties understand their responsibilities. It is important to stress the clarity of purpose of third party involvement and how the legal obligations attached to certain options will be fulfilled. It needs to be a broad consideration but one that can be supported through a signed mandate, for example.

There may also be a need for some professional discretion if it appears there may be undue pressure being applied in relation to financial management e.g. a family member or friend is keen to manage the finances but are known to have issues of addiction/gambling.

It should always be clear that a personal assistant employed to provide support should not be appointed to manage the finances.

Paragraph 127 – perhaps this should read as ‘eligible need’ and not ‘assessed need’,

Paragraph 127, bullet point 4 - replace the word ‘holiday’ with short break, otherwise this raises expectations about agreed use if a direct payment.

We would suggest that the bullet points are not particularly helpful here as they seem to give a narrow view of what a direct payment can be used to achieve. It might be better to leave these out.

Paragraph 124 and 130 seem to be contradictory in relation to responsibilities of being an employer. We would also assert that specialist advice is required for those who want to become an employer and that this is not the responsibility of the care manager. Their role would be to refer the supported person to an organisation or team that can provide the relevant advice or support.

Where a direct payment has been terminated by the local authority e.g. due to misuse, the local authority discretion as to whether to reinstate should be covered in the Guidance.

Paragraph 133 – we suggest that ‘independent’ is removed when describing the support organisation as some areas don’t have access to independent support and are dependent on specialist teams within the local authority.

Greater attention needs to be paid under Section 8 in relation to health’s role in the welfare monitoring of a direct payment package of support.

Paragraph 138 – this will apply equally to health input, whereas the suggestion here is that it applies to social work responsibilities.

#### Wider legal duties and strategic responsibilities

#### **Question 12c: Do you have any further comments on this section of the guidance?**

##### Adult Support and Protection

Much clearer guidance is required in relation to the interface between Self-Directed Support, particularly Direct Payments, and Adult Support and Protection legislation. Both of these confer statutory duties on local authorities which could be seen to be conflicting. ASP applies to all citizens in circumstances where they could be viewed as being vulnerable. Local authorities often support individuals whose behaviour could be perceived as presenting a risk to others and as such we would want to exercise our safeguarding duties in respect of all citizens.

The application of Self Directed Support options, and in particular direct payments, is a legal duty with only a small number of exclusions relating to compulsory orders. Local authorities work with significant numbers of people for whom access to a direct payment, especially to employ personal assistants, could be perceived as risky and ill advised. Discretion on the method of support appears to be restricted to the needs of the supported person. The proposed regulations appear to afford no discretion to professionals to restrict the option to employ staff if there is substantial evidence of potential risk of harm to staff. The supported person takes on the role of employer and the authority’s ability to share information with personal assistants and monitor that relationship is limited not only in practice but in law.

Local authorities may also refer individuals to independent support organisations to support them in their preparation to become employers. Sharing of information in these circumstances could be a difficult issue.

Professionals could not ignore the existence of substantial risk and would be in breach of wider duties in relation to safeguarding. The same concerns would also apply to child protection issues, but the draft Guidance and Regulations don’t appear to address this.

We would suggest that much clearer Guidance in relation to prioritising safeguarding duties in relation to the duties under Self-Directed Support and the legal implications of these, are necessary.

#### Re-ablement/Intermediate Care

The clarification that these are not subject to Self-Directed Support is helpful. Where a Self-Directed Support option is already in place and the supported person needs re-ablement support or intermediate care it is important that these can be provided alongside, and be complimentary to, the support already in place. This is particularly important where personal assistants are employed and the supported person has to meet employer responsibilities.

#### Equipment and adaptations

This section appears to be light in detail, particularly since it now covers housing adaptations. There is no information on how this impacts on other funding sources and obligations e.g. housing.

Current direct payment regulations and guidance includes information on ownership, repair and maintenance but this has been left out of this Guidance.

Clarity on how this will apply to owner occupiers and landlords is needed.

#### Other forms of social welfare

As previously stated it might be useful to have the option of Self-Directed Support for wider forms of support, however professional discretion as to when and how this would be appropriate would be important, particularly for direct payment where there addiction issues. SDS was intended to be for individuals with long term, fairly predictable needs.

#### **Question 14: Do you have any comments on the financial costs or benefits of the requirements set out in the guidance?**

We believe the Guidance fulfils obligations in relation to equality.

#### **Question 15 (b): Do you have any views on the impact of the guidance on human rights?**

We have listed some concerns regarding safeguarding and would suggest these could have wider implications with regards to the human rights of individuals who could potentially be placed at risk.