

## **Social Care (Self-Directed Support) (Scotland) Act 2013**

### **Consultation on supporting regulations and guidance COSLA response**

#### **Introduction**

1. This response relates to the consultation on *all* regulations and guidance to support the Social Care (Self-Directed Support) (Scotland) Act. The areas and topics these cover are inter-related and we have therefore chosen to submit a single response covering:
  - Draft Self-Directed Support (Direct Payments) (Scotland) Regulations 2013
  - Draft Carers (Waiving of Charges for Support) (Scotland) Regulations 2014
  - Draft Statutory Guidance on Care and Support 2013
2. Scottish local government has historically been a strong advocate of self-directed support, seeing it as the current expression of the move towards greater personalisation of services and empowerment of individuals to exercise greater choice and control over their support. Local government, and the social work profession in particular, has a long tradition of working to empower individuals and communities; this has most recently been encapsulated within our joint national Self-Directed Support Strategy published in 2010.
3. It is vital that any legislative change functions to support this policy intent. The response that follows is therefore intended to highlight any areas where we feel the proposed regulations or guidance need to be adjusted in this respect.

#### **Implementation timescales and resources**

4. Part of securing delivery of the policy intent is ensuring that key delivery bodies, including local government, are adequately resourced – both in terms of finance and time – to implement the requirements of the act and supporting regulations.
5. The draft regulations propose a date of 1st April 2014 for full commencement, which we understand equates to the duty to offer SDS options being enacted across the full range of new clients at point of initial assessment, and to all existing client groups at their next planned review. We also understand that there is currently no proposal for an overall deadline for having completed all reviews. This is welcome, as it will allow for councils to continue with the ‘natural’ review cycle, or bring forward review schedules to allow a service-area by service-area approach to roll-out – whichever will best suit local circumstances and deliver the greatest benefit with the least disruption for individuals receiving services.
6. These arrangements were discussed prior to the regulations being published and were, for the most part, thought to be reasonable given the amount of lead-in time in the form of our joint strategy on SDS (in place since 2010), and the pre-existing duties on direct payments. However, this was based on our understanding of the implications of the act, as draft regulations were not available at that time. The regulations as currently expressed could introduce new burdens not anticipated by the act. Should these issues remain in the finalised regulations we would want to review our position on the proposed implementation date.

7. Clearly there is a relationship between implementation timescales and transformation costs, insofar as longer implementation timescales help spread costs associated with assessment, supporting choices and review, but prolong dual running costs. Conversely, shorter implementation timescales may represent a more efficient approach to decommissioning, but could carry greater cost in terms of assessment, supporting choices and review.
8. During consultation on the bill, COSLA raised concerns about the potential cost of implementation, which we judged to exceed the proposed Scottish Government funding. We made strong representation to both government and parliament's health and sport committee and while the committee took note of our concerns, it did not ultimately recommend additional funding from the Scottish Government. Given the difficulties in estimating costs, and the current squeeze on available funding, it will be important to keep the timescales for implementation under revision within the context of what is possible within the resource envelope available. This should be with a view to adjusting either the funding being made available, or the timescales for implementation, as required. We would therefore wish to make clear that *COSLA's support of the proposed implementation date is conditional upon the finalised regulations being in line with the policy intent, and deliverable within the proposed timeline, and that any additional costs to councils will be met by the Scottish Government.*

### **Scope**

9. Self-directed support was originally conceived of as a means to support people with long term, relatively predictable needs to live independently. It was never intended to be applied to all people in all situations - for example, although we would wish to see the application of an SDS approach to relevant parts of the NHS, we would also argue that the more acute or short-term the health need, the less relevant SDS becomes. Similar is true of social care where the SDS approach will not be the right one in all circumstances - for example, in relation to short-term or transitory need, including crisis. Furthermore, there are certain groups where careful consideration of whether some of the SDS options are appropriate is required - for example, in relation to children who are not in care but where there are child protection concerns meaning parents' involvement in directing support of receiving a direct payment may be problematic.
10. That is not to say that we would wish to see a blanket exemption applied to these groups or circumstances, as this would be too restrictive. Rather, we would wish to see councils' ability to exercise discretion and professional judgement in these circumstances. We discuss these points in more detail and with reference to connected issues, in the sections on regulations and guidance below; however in terms of the broad scope of the regulations, *we would argue that the regulations should acknowledge that the SDS approach will not be the right one in all circumstances.*

### **Draft SDS (Direct Payments) (Scotland) Regulations**

11. Whilst it is recognised that the regulations are necessarily detailed and mechanistic, insofar as they mainly relate to provision of direct payments, it is important to ensure that they function to deliver the wider policy intent in relation to SDS. This includes ensuring that they do not carry the unintended consequence of introducing additional administrative cost in to the system, thus diverting resources away from individual service budgets. Furthermore, it is also important to ensure that regulations strike the right balance between empowerment and safeguarding, and that the statutory duties of local authorities in this area are taken in to account.

#### *Payment methods (gross vs. net)*

12. The regulations establish a right for recipients of direct payments to receive these gross – i.e. inclusive of any contribution they are due to make to the cost of the support package. This would leave councils in the position of having to recoup those contributions through charging, with the associated risks of non-payment and cost of recovering (or having to write-off) this debt. Depending on the levels of non-payment, these costs could be considerable.
13. We recognise that one argument for requiring payment gross is to allow individuals to withhold payment if they are dissatisfied with the service. However, this is not the only option available – individuals will be in control of how they spend their budget and can choose to spend it differently if dissatisfied, without introducing the risks outlined above. *We therefore wish to make the strongest case possible for councils being able to make direct payments net of any contributions due, to ensure that scarce resources are spent on care and support and not unnecessary bureaucracy.*

#### *Employment of family members*

14. At present, recipients of direct payments can use these funds to employ family members under ‘exceptional circumstances’, with local authorities having a great deal of discretion in determining what constitutes such circumstances. The regulations set out to better-define exceptional circumstances by specifying nine factors - where one or more of these apply a person would be able to employ a family member. These are very broad, for example where a person has difficulty interacting with strangers, and it is anticipated significant numbers of people would fall under this category, raising the question as to whether this still relates to ‘exceptional’ circumstances. There are risks involved with employing a family member – in a small number of cases there may be a risk of financial or other exploitation or neglect – although the regulations allow for a local authority to refuse this where they feel a person is under ‘undue pressure’, this is too narrow as there will be many occasions where a person has agreed to employ a family member quite willingly, but is nonetheless at risk. In short, the areas of risk are too broadly defined and the checks and controls are too narrowly defined and *we believe that local authorities’ current level of discretion in this area must be maintained.*

#### *Presumption towards inclusion and definition of exemptions*

15. It is acknowledged that the SDS Act is based on a presumption towards inclusion – i.e. that the provisions of the act apply to all those receiving support under the 1968 Social Work Act and this can only be altered through subsequent regulation. The regulations therefore set out individuals and circumstances that would be exempt from eligibility for direct payments. As presented they focus on individuals who are subject to certain criminal justice measures and or who are subject to compulsory treatment for alcohol or drug dependency, and services or supports provided in respect of person being homeless are also included.
16. This approach sets out to specify each person or circumstance that would be exempt and leaves little to local authority discretion. While in some cases a council may agree with the proposed restrictions, this approach could lead to local authorities having to make direct payments to individuals (or in circumstances) that carry an unacceptable level of risk, for example in respect of children where there are child protection concerns, and could mean the local authority failing in its duties in relation to protecting vulnerable groups.
17. Regulations and guidance must reflect the over-riding duty of care local authorities have, otherwise local authorities are left in the unacceptable position of having to fail in one duty in order to meet another. Regulations must also balance a presumption to entitlement and avoidance of inappropriate exemptions, with the protection of local authorities’ discretion and

professional judgements across a range of groups and circumstances. Therefore *we wish to explore the addition of a regulation enabling local authorities to withhold access to certain features of self-directed support where they consider this would entail an unacceptable level of risk to the individual or the wider public. Failure to include this will inevitably put local authorities at risk of failing in their duties of care.*

#### *Residential Care*

18. COSLA previously took the position that direct payments should not be available to pay for long-term residential care, as this did not enhance choice or control (since this is enshrined in the directions on choice of accommodation), but carried considerable risk insofar as individuals could then be considered as self-funders and charged the higher rate of care. This would seem to have been taken on board and we welcome that the regulations do not allow direct payments for residential care. However, further issues may arise if nominal costs for residential care were to be included in individual service budgets for planning purposes (even though this would never be drawn down in cash terms through a direct payment) and we will want to explore this further. Therefore *we would seek clarification of whether the intent is to exclude residential care from all four SDS options (and not just direct payments) and would welcome further joint work to explore what, if any, issues might arise under those circumstances.*

#### *Sharing risk*

19. In establishing the autonomy of recipients of SDS to directly commission their support, including by employing individuals, a situation arises whereby responsibility for recruitment and selection lies with the individual, or agency acting on their behalf. This responsibility would appear to extend to the decision on whether to require a disclosure check, and whether to proceed with employment following the result of the check.
20. It is important to acknowledge that in transferring this responsibility to the individual, local authorities are not able to fully transfer the associated risk. Councils retain their statutory duties in relation to protecting vulnerable groups and need to be able to fulfil these duties without being deemed to have failed to adhere to conflicting SDS regulations.

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

#### *Support to carers*

21. Scottish local authorities recognise and value the vital role carers play as partners in a system of care that could not function without them. Put simply, were it not for the care friends, parents, siblings, grandparents and other family members provide, the health and social care system could not be sustained.
22. Many councils provide a range of services to carers in respect of their caring role, including information and advice, training, short breaks, translation services, advocacy, and support with housework. Each council will decide on the services to be provided, and whether to require a contribution towards meeting the cost of those services, according to local circumstance and local democratic decisions. In many cases this means some services are provided free of charge. However, in other cases, and especially where the cost of provision is significant, for example short breaks, some councils have taken the decision to seek a contribution from those with income over a certain level.

#### *Requirement for regulations*

23. COSLA has not formed a position on whether carers should be required to contribute to the costs of services – that is a matter for individual councils to decide. We would, however, oppose the principle of central government directions which restrict local authorities' ability

to make those policy decisions for themselves, through local democratic processes. *In principle, we believe that the authority to charge for social care and support services should rightfully rest with the local authority – and should not be pre-determined at a national level. We therefore do not see the need for regulations.*

#### *Replacement care*

24. Beyond these broad political principles, the most significant policy implication that flows from the draft regulations is in respect of replacement care. Insofar as carers can benefit from a short break away from the person they care for, the local authority has an important role in facilitating that. However, according to our reading of the draft regulations, in these circumstances the whole cost of the short break – including any replacement care - will be met by the local authority where other people such as friends, relatives, neighbours or volunteers are not available to provide replacement care free of charge. The circumstances where the local authority would waive charges for replacement care are therefore very likely to include those of *social isolation* where there is no one known to the carer, young carer or cared-for person.

25. Our reading of the proposals is that while they are well-intentioned, there are a number of unresolved issues:

- Many carers care for a person with complex needs – in these circumstances, it is unlikely that a friend, relative, neighbour or volunteer would have the capability and confidence to assume the caring role in the absence of the main carer;
- Under these regulations, the financial circumstances of the cared for person are deemed to be irrelevant to the provision of care and support – which is inconsistent with the way a local authority would approach social care provided to a person who does not have a carer's support – thereby creating a 'fairness' or 'equity' issue;
- The regulations indicate that the whole cost of the short break provided or arranged by the local authority will be met by the local authority – but it is silent about what procedural tool the local authority would use to come to a view about what level of expenditure is appropriate.

#### *Related issues*

26. With all of these considerations in mind, COSLA would wish to highlight the following:

- We agree that supporting carers to continue in their role is hugely important and that there will be many circumstances in which it is not appropriate to levy a charge;
- We think that if the Scottish Government chooses to proceed with the regulations, they would need to be recast to provide maximum opportunity for support to be provided to carers as equal partners in care. Every caring situation is different and a blanket approach that removes the potential of a financial contribution from the carer is counter-productive and could lead to a narrowing of choice. In particular:
- We do not believe that replacement care within the context of a short break should automatically be provided free of charge. We believe that replacement care should be based on ability to pay.
- We do not believe that that the whole cost of a short break should automatically be met by the local authority. This creates unrealistic expectations about how far the public purse can go to support carers' choices and may in practice require the local authority to have a much narrower conversation about what type of short break can be supported. It would be much better to have an arrangement whereby the local authority is expected to 'contribute' to the total cost of a short break with a judgement being made relative to the length, expense and utility of that break
- If the Scottish Government chooses to proceed with regulatory proposals, we would expect the full costs of this new policy to be met by central government

27. Against these concerns, the value of supporting carers to sustain their caring role cannot be overstated, either in terms of the cash saving impact or in terms of the personal outcomes and happiness of the cared-for person.

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

28. We understand the guidance to be aimed at professionals with strategic or operational responsibility for implementing SDS and would wish, for the most part, to defer to social work colleagues and professional associations in respect of these matters. However, COSLA does have a political interest in ensuring legislation, and associated regulation and guidance, is developed within the context of an outcomes-based approach to public service re-design. Part of this includes pursuing the streamlining of guidance frameworks and avoidance of duplication, reducing unnecessary prescription, and ensuring coherence across connected policy areas. We would therefore wish to highlight three main issues in this respect:

### *Duplication*

29. The guidance needs to add value and avoid duplicating or overlapping significantly with other guidance, as this can lead to confusion and in turn a lack of direction. It is our understanding that the Scottish Government intends to commission a further 4 sets of guidance – a providers guide, a citizen guide, a commissioner guide and a practitioner guide. We are also aware that ADSW have been contracted to develop the practitioners' guide and there is some concern that the statutory guidance is too detailed and goes in to some depth on areas that the practitioners' guidance is expected to address. *We would therefore argue that the guidance needs to be rationalised to ensure a clear and appropriate distinctions in coverage across the range of guidance documentation being developed.*

### *Level of prescription*

30. As with any statutory guidance, there is a need to strike a balance between providing guidance on the intent of the law and leaving room for professional judgement in its interpretation. Where this balance should lie is often influenced by the policy intent in question. As regards SDS, it is an approach designed to give individuals and practitioners maximum flexibility in designing support packages as part of a focus on outcomes and there is some concern that the draft guidance as presented does not strike the right balance in these terms. *We would argue that further consideration of which specific areas appear to be out of balance is needed, and that the guidance should be revised to maximise the scope for professional judgement in these circumstances.*

### *SDS in integrated health and social care*

31. Our joint approach to health and social care integration is clear that resource should 'lose its organisational identity' and that services should become seamless, with distinctions between healthcare and social care no longer impacting at the individual service-user level. COSLA has previously argued that this requires duties on SDS being extended to certain parts of the health service, to avoid a situation where individuals have a right to access SDS options for one part of their support package (the social care element), but are dependent on an NHS Board's willingness for the other (the healthcare element). Although the guidance does address SDS and health, this is without the force of a duty. If we are to achieve our joint ambitions for integration and personalisation, then boundaries around access to SDS need to be governed by considerations such as managing risk and the pursuit of outcomes, and not organisational structures or increasingly arbitrary service boundaries. *We believe that the same degree of compulsion around SDS should be applied to the health service as to local authorities.*

*Professional issues with resource and/or policy implications*

32. In addition to the areas outlined above, there are a number of other issues which, although mainly professional in origin, have significant political and/or resource implications. These include:

- The need to identify an indicative budget before a support plan is agreed (irrespective of whether a person chooses a direct payment) as part of the process of empowering individuals to direct the decision-making around how resources are invested
- The need for a robust system for allocating resources to individuals, as part of a transparent process of support planning and to ensure local authorities can answer any legal challenges to individual budget levels
- The need for appropriate references to local authorities' duties of care, including in respect of any decision by a vulnerable person to employ a personal assistance without appropriate disclosure
- The need to acknowledge that the SDS approach will not be the right one in all circumstances; for example in relation to short-term or transitory need, including crisis, or in relation to children who are not in care, but there are child protection concerns meaning parents' involvement in directing support or receiving a direct payment may be problematic

**COSLA**  
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