

SDS Bill Consultation Falkirk Council Response

The following is the response from Falkirk Council. We welcome the opportunity to consider the draft Bill and make the following comments:

The government proposes that a new Bill on self-directed support consolidate and update existing legislation on direct payments.

- Do you agree with the proposal to consolidate and update existing legislation on direct payments?
 - If not, why not?
 - Should a new Act be based on a set of guiding principles? If so, what are your views on the most important principles?
1. *We would agree with the proposal to consolidate and update existing legislation on direct payments.*
 2. *We would also agree that the new Act should be based on the guiding principles as detailed above. However, we would emphasise that the language used throughout should be clear and easy to understand for individuals, carers, professionals and providers.*
 3. **Choice.** *There needs to be a balance between the choices made by an individual, how these impact on their need for paid support and the unpaid support provided by others. Otherwise this can lead to conflict between individuals and unpaid carers.*
 4. **Participation.** *The principle of participation is extremely important but individuals find it difficult to participate if they don't have the right tools and this puts them off. Increasing the use of services like Third Party Banking and Pre-payment Cards would ease this, however there needs to be an increase in the capacity of such services to respond to future demand. Capacity within Support Organisations and other services needs to be built up to enable them to provide the kind of proactive support which is needed and there needs to be some discussion about how this will be paid for. For people with severe and enduring mental illness, being asked to consider SDS/DP when they are unwell could be inappropriate and so this may need to be at the discretion of the assessor. Their capacity to participate may be variable depending on how well they are.*

5. **Equality.** *We are not absolutely sure what the statement on equality is trying to say. Choices made by individuals could have an impact on their ability to access a high standard of care. If the equality statement is about lifestyle choices it needs to be more specific. The local authority has a duty to assess need, including risk assessment and risk management. For some individuals continuity of care and support is essential to their health and well being. If they have variable or fluctuating capacity, they may make choices which disrupt their care and support, to the detriment of the individual and/or their family/carers, so there needs to be a balance between choice and risk to health and well being for individual. Perhaps a rewording of this definition would be helpful.*
6. *The SDS Bill must be linked to other pieces of legislation in a constructive way e.g. Adults with Incapacity and Adult Support and protection legislation, to take account of local authority duties. There also needs to be continued consideration of employment legislation where individuals intend to employ personal assistants.*

The government proposes that the new legislation introduce the term self-directed support into statute, define this term and make it clear that self-directed support includes the choice of direct payments.

Consultation questions

- What are your views on the proposal to place legislation on direct payments in a Bill that defines the term self-directed support?
 - If you do not agree with this proposal, why not?
1. *We would agree with this proposal as long as the term Self-directed support is defined in clear and consistent terms, with direct payment being listed as one of a number of options. Clear distinction between the different options needs to be maintained with equal emphasis being placed on each of them.*
 2. *There needs to be continued LA discretion to ensure that people who don't have access to good informal support networks are supported in different ways and are not made more vulnerable and at more risk of abuse/harm.*

The new Bill on SDS should provide a legislative framework that would allow the Government to consider extending direct payments in the future.

- Do you agree that the proposed bill should set a framework that would allow the Government to consider in future extending direct payments and other forms of self-directed support?
- If not, why not?
- What are your views on the broad areas where Ministers should be permitted to bring forward further legislation? If you think it should cover other areas what should these be?

1. *We would agree that it makes sense that the legislative framework would allow the Government to consider, in future, extending all forms of self directed support. However, any proposed extension to other service provision or any significant changes should be evidence based and continue to form part of a consultation process to ensure that implementation is well organised and that appropriate services and support are in place.*
2. *Extension to areas where further legislation might be considered could include health, education, community education/participation and leisure services. This could result in better access and use within local communities of local services. It is difficult to see how this could be applied to housing services but it may be one to consider.*
3. *The impact of the individualisation/personalisation through SDS could impact on small, specialist services and there is a danger that some services could disappear if the numbers accessing these services make them less viable. For a minority of people this could have a very significant impact and make it more difficult to access appropriate services. As part of the process the impact on and viability of available services should be explored.*
4. *In the context of these different services and the various funding streams which may be involved in such changes, there should be extensive discussion on how such extension would relate to other funding streams and welfare benefits e.g. use of DLA Mobility Component instead of local authority provided transport.*

The new Bill on SDS may require for the offer of self-directed support to be provided on an opt-out as opposed to an opt-in basis.

- Do you agree with our proposal to amend the legislation so that self-directed support is the default position for the provision of social care, requiring individuals to opt out of this method as opposed to the current situation whereby they can choose to opt in?
- If a default position is introduced, should it be for the broader range of options for self-directed support, or for direct payments?
- If you do not agree, why not?

We are concerned about some areas which need to be considered and clarified before any implementation.

1. *We are concerned about the apparent emphasis on direct payment throughout the Consultation document – the implication being that people would have to opt out of taking a direct payment. There should be equal emphasis on all forms for SDS to ensure that people don't feel that direct payment is being imposed on them as the first or only option.*

2. *For people who have variable/fluctuating capacity, expecting them to opt-out could prove to be difficult e.g. people with severe and enduring mental illness who are particularly unwell at the point of assessment. If insight into their condition fluctuates it may be difficult to ensure that their needs are met. The opt-out position could damage the relationship between the individual and their key worker if the individual is unwell and has unreasonable expectations about the use of the direct payment/SDS. Advocacy may be a useful way of dealing with some of this but advocacy workers would need to be skilled up to deal with the use of SDS/DDP which will require additional funding for organisations fulfilling this role.*
3. *For some people it takes a long time to persuade them to accept support and this process could be hampered by having to discuss with them too early in the process, that they will need to opt-out of managing the support themselves. It may be better to leave it to the discretion of the assessor as to when that discussion should take place, whereas opt-out would force the discussion much earlier in the process.*
4. *Provision of support, particularly for people with a mental illness, often includes a monitoring role to identify signs of change or difficulty. Where care is commissioned by the local authority the provider will report back to the local authority if they have concerns about someone in their care. If the contract is between the provider and the individual this relationship may be lost. The same difficulty would apply to personal assistants. This could lead to deterioration in someone's health, if they stop taking medication for instance, because they have altered the pattern of their care provision. By the time a care review is carried out the individual may already be in significant difficulty.*
5. *Red tape and bureaucracy present an immediate barrier to SDS for some people. While there are reviewing and monitoring responsibilities in terms of local authority audit and ensuring that assessed needs are being met, these processes are becoming more 'light touch'. The assessment process and ensuring that an individual is 'willing and able' to manage is a statutory duty placed on the local authority, but once the assessment is complete the application process for a direct payment is fairly straightforward. Where the process becomes particularly difficult is when individuals wish to employ staff. Employing people can become very admin heavy, but this is unavoidable because the employer must comply with UK and EU employment law including contractual arrangements, health and safety, HMRC requirements etc.*
6. *In the context of all of this we would not want the process by which individuals could 'opt out' of SDS to be bureaucratic – this must be an easy process.*

7. *The timescales for implementing the proposed changes will be crucial. Local authorities will need to adjust their systems to enable them to manage service budgets on an individual basis for those who choose this model. This will lead to a different approach to commissioning where the local authority is being asked to manage the budget as directed by individuals, potentially leading to the commissioning of a large number of small packages of support in place of some of the block purchasing currently in place. This will most likely increase administrative processes for both the local authority and the provider and could increase costs.*
8. *There are concerns that this process could, at least initially, lead to a greater administrative burden and possible increased costs to the local authority with less time to carry out good assessment, particularly for personal care and support at home. We would not wish to see the assessment process damaged by this e.g. assessments carried out based on a telephone conversation when it should be done face to face.*
9. *There may be issues relating to current framework agreements with care providers and the need to honour current contracts, while individuals may not want to use the providers listed on the local authority framework.*
10. *How will this impact on the re-ablement process, which is a method of increasing independence through rehabilitation, with the assessment for continuing care being completed at the end of the re-ablement process? Would SDS apply to re-ablement or would it apply once the assessment has been completed?*
11. *Out of hours support – if a provider fails to provide a services how will this be managed within the SDS process?*

We are considering expanding the categories of persons who can receive direct payments on behalf of an adult with incapacity. This would allow other categories of persons to receive such payments, so long as a guardianship order, or power of attorney, with relevant powers was not already in place.

- Do you agree that the categories of persons who can receive direct payments on behalf of adults with incapacity should be expanded? If not, why not?
- Do you agree with the proposal to remove the current requirement for Guardianship or Power of Attorney to be in place before a direct payment can be offered?
- Do you agree that where a guardian or an attorney is not already in place, the Access to Funds scheme should be capable of being used as an alternative way of receiving Direct Payments? If not, why not?
- Do you consider that arrangements other than the Access to Funds scheme should be put in place to expand the categories of persons who can receive direct payments on behalf of adults with incapacity? If so, what arrangements?

- Do you have any other views that you would like us to consider if we proceed to bring forward legislative changes on this matter?
1. *We would agree in principle that the categories of people who can receive direct payment on behalf of adults with incapacity should be extended and that they should not necessarily need to have Power of Attorney or Guardianship as long as a suitable alternative is in place.*
 2. *We are concerned that Access to Funds can be a difficult process in itself and there would need to be clear guidance on how to navigate the system. Access to Funds is not a flexible option, so changes to the cost of the care, or the level of care itself, might necessitate changes in the powers granted to the Withdrawer.*
 3. *In terms of the application of Access to Funds we would suggest that there is some local authority discretion built in to applications in relation to direct payments as to who a suitable person might be. We are concerned that, while an application to access funds will ensure bills for care and support are paid, there is still the issue about making welfare decisions on behalf of an adult with incapacity. While current practice for direct provision of care and support, by the local authority, supports decisions by carers in relation to how the services are delivered using AWI legislation (without resorting to a legal route), there needs to be some discussion around the level of welfare choice and control afforded to carers when an Access to Funds application is made, since Access to Funds is a financial power.*
 4. *If the local authority has concerns about the Withdrawer appointed for direct payment, how will this be addressed and who has lead responsibility? The local authority duty of care and the need to monitor and review the care and support provided will remain. If there are welfare concerns, even if there are no financial concerns, how will this be managed? How will the local authority financial monitoring fit with the role of the Office of the Public Guardian?*

The new Bill on SDS may remove the restriction to direct payments and other forms of self-directed support for people with mental health problems who are subject to certain compulsory treatment orders.

- Do you agree with our proposal to amend the legislation in order to remove the restriction on providing direct payments and other forms of self-directed support to those with mental health problems who are subject to certain compulsory treatment orders?
- If not, why not?
- Do you agree with our proposal to provide local authorities with a power to provide self-directed support to these people, as opposed to a duty to use this method of support?

1. *We would agree with the proposal to amend the legislation to remove the restriction on providing direct payment and SDS to people with mental health problems who are subject to certain compulsory treatment orders, since the application for a CTO could be made for someone, who is already in receipt of a direct payment, but has become unwell. If the direct payment has to be withdrawn in these circumstances it makes it difficult to provide continuity of care and support at a time that continuity is essential to aid recovery.*
2. *We also agree that this should be a power as opposed to a duty as there may be times when use of direct payment/SDS may be inappropriate because the individual's capacity to make the best use of services is variable because of their illness.*

We are considering options to amend or remove the restriction on the use of direct payments for the purchase of residential care

- What are your views on the proposal to remove the current restriction on the use of DPs/SDS for residential care?
 - If you think the restriction should remain, please explain why
 - What are your views on the potential impact of an extension of DPs/SDS to residential care, in particular the impact on care home provision?
 - Is there any advantage to extending DPs/SDS to the free personal and or nursing care element of care purchased under Route 2 (see above)?
 - Should DPs/SDS be extended to care home places purchased under Route 3 (see above)
 - Would the advantages of DPs/SDS for Route 3 contracts be greater than the benefits currently derived from the National Care Home Contract?
1. *Individuals currently have the right to choose which residential care home they go to, as long as there is availability, so it is debateable as to whether this change would have any impact on choice for most people. While we appreciate the desire to create equity with other service provision by enabling a direct payment, there could be some unwelcome disadvantages.*
 2. *Using a direct payment means that the individual will contract directly with the home. There is therefore no guarantee that the provider won't view them as self-funding and ask for a rate which is above that agreed in the National Care Home Contract, resulting in a top-up fee.*
 3. *There could be an advantage to those who are self-funding as they could receive the free personal care element as a direct payment and pay their whole bill directly to the provider.*

4. *Care home providers may be reluctant to enter into a contract with the individual because they lose the security of receiving payment directly from the local authority and may have difficulty collecting outstanding bills. If bills are not paid providers will not be able to seek payment from the local authority. A large number of people living in residential care are unable to manage their own finances and where local authorities have difficulty collecting contributions to care home fees from those managing the finances, this would be passed on to providers.*
5. *Could direct payment lead to a fragmentation of services with people opting in or out of services and requesting that other providers be engaged to meet part of their needs? If this leads to reduced income for the care home would this destabilise provision? How would the home monitor the use of multiple providers within a care home and monitor the standard of care? What would the Care Commission's view of this be in terms of registration? How would this impact on use of equipment, employers/public liability insurance and accountability?*
6. *On the other hand this could lead to changes in registration resulting in a better variety of provision which fills the gaps in service for those who have specialist needs.*
7. *What about homes which introduce additional services over and above the direct payment rate? Could this lead to inequities in the system within individual care homes?*

A new Bill on SDS may remove the restriction placed on local authorities to provide direct payments or other forms of self-directed support to unpaid carers, where this supports carers to continue to provide care.

- Do you agree with the principle that carers should be made eligible to receive self-directed support and direct payments in certain circumstances?
 - If not, why not?
 - If so, what are your views on the detailed proposals for how this might be achieved?
1. *We would agree with the principle that, in certain circumstances, carers should be made eligible to receive direct payment and SDS.*
 2. *Clear eligibility criteria would need to be developed to establish what the circumstances for service provision might be, while at the same time enabling a level of flexibility in terms of service provision. There would need to be clear guidance leading to good assessment processes to define and establish whether a carer was a person in need of services, without being too restrictive. Otherwise access to services could be very variable from area to area.*

3. *This option could enable preventative support to become more focussed with better understanding of how some services could be targeted towards the carer/s, while benefiting both the carer and the person in need of care and support. It could lead to some respite services becoming more flexible and more effective e.g. providing practical supports to carers to free their time to enable them to take a break or spend more quality time with the person they care for. It could enhance the carer's role as a partner in care provision by not only acknowledging their input, but having an honest discussion about what that should consist of. This would enable carers to make real choices about what part of the support they are willing to provide and what type of support they would wish the local authority to provide. This may mean a move away from provision of personal care services by the local authority and the provision of more practical supports (laundry, shopping, cleaning) for carers to enable them to take on personal care tasks, if that is their preference. It could also be used to improve access to training for carers.*
4. *Focussing on outcomes for carers would enable flexibility, but there would need to be agreement with the local authority on the outcomes to be met in the same way as current provision works, ensuring that funds are used appropriately.*
5. *Expectations of service provision would need to be managed in the context of current financial climate and so this should be about exploring innovative and creative ways of better meeting the needs of carers, by acknowledging their needs as individuals, and not simply in the context of the services provided to the person they care for.*

Summary

Whilst there are many positive aspects of this proposed Bill, there remain a number of areas which require further consideration and clarity. We hope these comments will be fully considered and look forward to seeing the outcome of the consultation.

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