

Scottish Government proposal for a Self Directed Support (Scotland) Bill

A response by the Association of Directors of Social Work

ADSW welcomes the opportunity to respond to this consultation document on the proposal for a Self Directed Support (Scotland) Bill. As an association, we have stated our commitment to progressing more personalised services across Scotland in our paper –

'Personalisation; Principles, Challenges and a New Approach; a statement by the Association of Directors of Social Work' 2009.

The challenges we face in delivering quality services to the most vulnerable in society, whilst supporting increasing numbers of individuals and communities to self-care and retain independence cannot be underestimated in the current financial climate. Yet we remain committed to this agenda.

ADSW's response to the consultation document focuses on the questions posed around the purpose and advantages of legislation- the stated aim of consolidating legislation and clarifying terminology and task & also the unstated goal of increasing the use of Direct Payments as a method of driving forward Self Directed Support.

ADSW sees merit in getting the concept of SDS on statute but only if it seen as the broader framework within which a Direct Payment is an option (and often a good one for some people). ADSW is also of the view that other issues that have impacted negatively upon wider implementation of Direct Payments need to be addressed in order that any legislative change has a positive impact. These challenges are detailed in the above report and include financial support during the transition period of changing from traditional to more personalised service delivery. Additional costs associated with administrative changes and staff support, for example, cannot be ignored. For, winning the hearts and minds of professionals across services and sectors is essential to ensuring that Self Directed Support and Direct Payments are presented as a positive option to people requiring support.

No amount of legislative change can hope to achieve the progress that increased aspirations of staff, supported by organisational change, can make.

1) The Government proposes that a new Bill in self-directed support consolidates and updates existing legislation on direct payments.

Do you agree with the proposal to consolidate and update legislation on direct payments?

Should the Act be based on a set of guiding principles? If so what are your views on the most important principles?

Response

a) ADSW agrees that the existing legislation relating to Direct Payments is unhelpfully spread across a range of primary legislation and guidance documents and rationalisation is required. Furthermore, it

does not adequately support the wider goals of Self Directed Support or adequately define terminology currently in common use.

ADSW is of the opinion, however, that any resulting clarity in the arena of Self – Directed Support may be undermined by a presumption that essential elements of this work are clearly defined and universally understood. In answer to the posed question, ADSW agrees that legislation will consolidate and update legislation on Direct Payments. We are less convinced that legislation will resolve the underlying tensions between the ambitions of the agenda and the legislative, policy and financial context in which it is to be delivered. It is the resolution of these issues, as well as the weight that legislation will undoubtedly give to the agenda, that will lead to real progression.

b) ADSW is of the view that the Act should be based upon a set of guiding principles. We recommend that the word 'care' be replaced with 'support' to reflect the principle of self-determination that underpins the Self –Directed Support agenda. The statement about 'equity' is unclear in terms of choice, the impact of availability of resources and methods and requires qualification. In relation to 'participation', it must be acknowledged that a minority of adults will lack the capacity to make informed choices and exercise choice and control over their care. Clarification is required on the role of local authorities when no family member can assist in the process.

2) The Government proposes that the new legislation introduced the new term self-directed support into statute, defines this term and makes it clear that self-directed support includes the choice of direct payments.

Question

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?

Response

ADSW agrees that if legislation is introduced , it is appropriate to introduce and define the term 'self directed support' into statute but is concerned that there is discrepancy in the definition in this document (Annex C) and that given in the draft National Strategy document (20; Glossary). In addition, there is a failure throughout the document to make the distinction between 'self directed support' and 'Direct Payments' (one method that people can use to direct their own support). It is essential that there is clarity on what the Bill actually concerns. CIPFA guidance should reflect the spirit of new legislation.

3) 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?

Response

In principle, ADSW believes that it is not possible for social work alone to provide the range of services, both formal and informal, that people require to make choices on their support needs and therefore considering the extension of Direct Payments in the future is appropriate. There is merit in the development of further and higher education budgets for people with additional support needs. In relation to joint council, Health and DWP funding streams for Individual Budgets, ADSW agrees that it

is entirely reasonable, indeed essential, that social security benefits awarded to meet the specific needs identified (e.g. Attendance Allowance) should be included within the Individual Budget. Charging policies will need to be reconciled to reflect this inclusion. The entitlement of local authorities to act in this respect should be made clear within the documents.

In particular, there is a need for a resolution to the difficulty in disaggregating health budgets to contribute to individual support packages. However, these difficulties arise to some extent from the different organisational systems in operation in health and social care services and an extension of the scope of the legislation will not provide all the answers.

ADSW would expect Scottish Government to consult on specific proposals before Ministerial powers were used to make directions within the proposed consolidated legislation.

4) 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 SDS 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 SDS, or for Direct Payments? If you do not agree, why not?

Response

ADSW agrees with the aspirations underpinning the draft National Strategy of achieving a whole system approach across Scotland to achieving Self Directed Support, underpinned by a transparent, service-wide resource allocation system that supports the allocation of monies to individuals according to their support needs. The question of 'opting out', therefore, is not a legitimate one, as, when a Self Directed Support system exists for all individuals, they will have knowledge of their individual budget. Direct Payments are one means of deploying that budget allocation. The challenge for local authorities and their partners to move to such a system is highly complex and should not be under-estimated. At a time when social work services face rising demand and significantly reduced budgets, there is a danger that the aspirations of the approach described become discredited as a way of cutting budgets. If the scale and nature of the challenge is not recognised then the aspirations will not become a reality across Scotland. The principles underpinning self directed support concern 'choice' and 'control' for people who need support. Promoting Direct Payments above other choices is to presume that professionals and organisations know best. This will be to the detriment of our better intentions to relinquish power and enable choice and control.

5) 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 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?

Response

ADSW agrees that Guardianship should not be the only route for managing a Direct Payment. Expanding the categories of persons who can receive Direct Payments on behalf of adults with incapacity would be consistent with local authority duties under Section 13ZA of the Social Work (Scotland) Act 1968, an amendment introduced to the Act to cover adults without capacity, who require a community care service and are compliant, and allow the local authority to 'take any steps which they consider would help the adult to benefit from the service'. This acknowledges that the best interests of adults without capacity may be met without redress to formal court process. (There is the option of expanding the categories of persons who can receive Direct Payments through amendments to Section 13ZA.)

Action taken to avoid formal court processes unless required is also consistent with the principle of minimum intervention as detailed within the Adults with Incapacity legislation and ADSW supports this proposal. However, it would not be in keeping with the principle of minimum intervention to invoke the Adults With Incapacity (Scotland) Act 2000 for the sole purpose of making a Direct Payment available.

ADSW agrees with this proposal for the reason of minimum intervention, as stated previously. Individual councils will follow safeguards, including the assessment processes and care management procedures detailed within the Guidance on the Provision of Community Care Services to reduce likelihood of mismanagement and risk. The local authorities' responsibility for this decision making on the appropriateness of another person receiving Direct Payments on behalf of an adult without capacity must be clear and ratified within any legislation.

We are of the view that the questions here should refer to 'Self Directed Support' rather than just to 'Direct Payments'.

6) The new Bill may remove the restriction to Direct Payments and other forms of SDS for people with mental health problems who are subject to certain compulsory treatment orders.

Do you agree with the proposal to amend the legislation in order to remove the restriction on providing Direct Payments and other forms of SDS to those with mental health problems who are subject to certain compulsory treatment orders? If not, why not?

Do you agree with the proposal to provide local authorities with a power to provide SDS to these people, as opposed to a duty to use this method of support?

Response

ADSW agrees that amendments are required to legislation in order that people with mental health problems have equal opportunity to be considered for Direct Payments and controlling their own support. In addition, this will promote continuity of care for people who become unwell whilst

receiving a Direct Payment and become subject to a Compulsory Treatment Order. ADSW holds with the principle that no group of people should be automatically excluded from directing their own support. 'Advanced Statements', drawn up with people prior to period(s) of deterioration in their mental health, have a role here. Social work knowledge, judgement and skill should be applied to balance all relevant issues, including risk to the person and others in all cases. We agree that a 'power' to provide SDS, rather than a 'duty' is appropriate.

7) 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?

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 Direct Payments/ SDS to the free personal and or nursing care element of care purchased under Route 2 &3?

Response

ADSW currently sees no real advantage to giving people the National Care Home rate as a Direct Payment then being possibly subjected to higher fees as they negotiate their own placement. We would also be concerned that some people purchasing their own residential care may not have the same level of care offered to them as others due to additional costs that result from the administrative burdens that will be placed on care home providers. People may be more vulnerable to mismanagement of funds by family members who, in many cases, would take responsibility for this task on behalf of the individual. We are unclear how this would lead to a substantial increase in choice, there are issues in particular for more rural areas and this change may result in extended waiting time for places in residential care for other people who may have greater need. Whilst there is the potential for a small group of people 'pooling' resources in order to live together, we would anticipate a small uptake of this opportunity and also that such developments can be progressed through the usual self directed support practices.

We view that the same considerations noted above also apply to people who are eligible for free personal and nursing care.

ADSW sees no advantage to extending Direct Payments/ SDS to the free personal and or nursing care element of care purchased under Routes 2 & 3. Collective negotiation underpinned the progress made through the development of the National Care Home Contracts and individual consumers will not have the same ability to influence inflation of fees or quality of care provision.

ADSW would, however, welcome more discussion on the possible ways that people in residential care can benefit from the principles and practices underpinning the SDS approach.

8) 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?

Response

ADSW recognises the significant role that unpaid carers have in providing quality of life for many people within the community. Without their dedication, the health and social care systems could not cope. It is right and proper that families and communities care for their own as far as possible. Such work, often described as 'labours of love', is a demonstration of the nurturing and selflessness that is core to our humanity. In some cases, however, the task has become unmanageable and to the significant detriment of the carer and the individual requiring support. It is right and proper that the carer is relieved of some of their burden in these cases. It is less clear where the needs of the carers, as individuals with a right to quality of life, and those directly related to the support needs of the person they are caring for, begin and end. ADSW would welcome the opportunity to discuss this complex agenda more fully -in particular the issue of avoiding the situation where, under current arrangements, carers become eligible for self directed support in their own right as a result of their own health and wellbeing deteriorating. In summary, the principle of support is agreed, and this may be in the form of financial payment, but further discussion is required before this proposal is included in legislative changes. A discretionary capacity for the authorisation of such payments may be a preferred option.