

The Social Care (Self-directed Support) (Scotland) Act, 2013

Context

The Self-directed Support (Scotland) Strategy (2010) sets out a 10 year vision and plan for increasing people's choice and control over the support they receive.

The strategy defines self-directed support as supported people, families and carers having "...an informed choice about the way support is provided [to them]¹". It notes there are a number of ways in which choice can be exercised including choice of support provider; choice and control over an individual's funding for care and support and choice about achieving aspirations and personal goals. The strategy commits to the development of relevant legislation to bring self-directed support into statute noting that

"[SDS legislation] is an opportunity to bring statute up to date with the significant developments in social care over recent years, and to meet the demands for clarity about rights and responsibilities."

There are a number of policy drivers behind the move to self-directed support. The Christie Commission² presented UK research and Scottish case studies that suggested that where they controlled their own budget (through the existing mechanism of direct payments) people's outcomes and sense of self-efficacy improved. This led to the commission recommending work to broaden participation in self-directed support. The Commission also noted that the idea of directing your own support has a natural fit with the values and practice of co-production, where support is designed, planned and delivered in

equal partnership between supported people and professionals.

Increasing participation in self-directed support contributes to National Performance Framework (NPF) Outcome 15³ in which the Scottish Government commits to work towards public services that are 'responsive to local people's needs'. While there is no conclusive evidence to say that self-directed support is less expensive than traditional models of care it is argued that it offers better value through delivering better outcomes for individuals for a similar expenditure^{4,5} and therefore contributes to 'efficient and flexible' public services.

The third driver relates to the existing mechanism for control of individual budgets- direct payments. Introduced to statute in 1996⁶, uptake of direct payments has been relatively low and focussed on people with physical disabilities⁷. Self-directed support is seen as a way of encouraging uptake and broadening access out to other client groups- particularly those who do not want the financial responsibility of fully managing their own budget.

How the Act came about

2009 Proposals for legislation were discussed by the Self-directed Support National Reference Group.

2010 The Scottish Government consulted on outline proposals for legislation. There was broad agreement on the need for legislation but significantly differing opinions on the detail. CCPS' response reflected uncertainty about the need for legislation; concerns that SDS is conflated with

direct payments and, crucially, held that supported people should not have a default SDS option as this contradicted the intention of increasing choice and control.

2010 The Scottish Government published the Self-directed Support strategy for Scotland. While CCPS members welcomed the strategy- particularly increasing choice between providers (option 2) the response cautioned against seeing choice and control as the same as controlling your own budget; allowing cost to overshadow quality; and the risks of too great a focus on the employment of Personal Assistants (PAs).

2011: The Scottish Government consulted for a second time on the draft Bill. The CCPS response welcomed the dropping of the default option debate and called for a duty to be placed on local authorities to be more flexible in their approach to direct payments.

March 2012: The Social Care (Self-directed Support) (Scotland) Bill 2012 was placed before the Scottish Parliament.

September 2012: The Health and Sport Committee hear stage 1 evidence.

October 2012: The Health and Sport Committee discuss the stage 2 amendments.

November 2012: The stage 3 amendments were debated in a meeting of the full Scottish Parliament and the Act passed.

January 2013: The Bill gains Royal Assent and becomes an Act.

April 2014 The Act commenced and the duties came into effect for all supported **people new to social work**. Local Authorities have discretion as to when and how **existing supported people are offered the four options**.

General principles

A supported person must have as much **involvement** as they want in assessment of need and provision of support (s1:2); they must also be provided with the assistance they need to express their views about the four options and make an **informed choice** between them (s1:3). This includes both good information from the local authority and the provision of advice and information services. Finally the local authority

must also **collaborate** with a person in assessing their needs and planning for their support. While the Act does not cover the detail it is intended,⁸ in line with the strategy, that assessment and care planning will focus more on a person's strengths and outcomes and aspirations. This message is reinforced by statutory guidance which accompanies the Act.

A stage 2 amendment from the Minister added the requirement for the local authority to have regard for two further principles of independent living: respect for the **dignity of the supported person** and their **right to participate in the life of their community**.⁹

In brief

- **General principles:** involvement, informed choice, and collaboration.
- -The local authority must offer **four options:** (1) direct payment to the person,(2)the person selects their own support and the local authority or provider manages the budget (3) The local authority selects, arranges and manages the budget (4) The person chooses a mixture of options one to three.
- The local authority **duty to assess** remains the same, though assessment will be made more collaborative and outcomes focussed.
- The local authority has a **duty to provide information about, and promote the four options**.
- The local authority has a duty to 'as far as is reasonably practicable' promote real choice through having a **range of providers and types of support in an area**.
- There will be **equal access for everyone with care and support needs**. This includes offering SDS options to people with mental health problems, dementia and learning disabilities.
- **Young adults (16yrs-18yrs)** will have choice and management of any of the four options.
- **Children:** the person with parental responsibility will have choice and management of any of the four options- with maximum input from the child according to their maturity.
- Where **carers** are assessed as needing support in their own right they will be also be given the choice of the four options.

The four options

The Act sets out four options which give a person differing degrees of control over their budget:

Option 1 the individual receives their budget directly and chooses and purchases their own support. A direct payment can be used to employ a PA or purchase a service from a provider or a local authority.

Option 2 the individual chooses the support they want and who provides their support, but chooses not to take the full financial responsibility of a direct payment. The individual may give the management of their budget to a provider, other third party or local authority to be distributed as the person wishes.

Option 3: the local authority chooses the support and commissions the service on behalf of the person.

Option 4: A combination of options one to three: A person may, for example choose a direct payment to employ a PA to support them to go to university but ask the local authority to arrange a homecare service on their behalf.

A 'relevant amount' must be identified against each option. This means that the supported person will know what their budget is- regardless of the option they then go on to choose.

Local authority functions

S.9-16 of the Act focus on what the local authority must do to promote the four options and ensure people are well informed about the choices they make:

Provide information (s.9) places a requirement on local authorities to promote the availability of the four options and to provide accessible information to people about the options. The Act also requires local authorities to direct people to sources of advice and information including independent sources.

Review (s.12) either the local authority or the supported person can trigger a review if they

decide they don't want to continue with a particular option and select a replacement.

Assist (s.6 and s.17) The Act articulates that there should be equal access to all groups of supported people and that only a very limited number of people and circumstances in which people are ineligible to direct their own support¹⁰.

People who have difficulty with decision making should be given assistance to make an informed choice in line with the principles of The Adults With Incapacity Act, 2000 (AWI). The Act makes no change to existing AWI legislation and where a person lacks capacity the decision about the four options reverts to their guardian or attorney.¹¹

Independent Advocacy local authorities have a duty to provide information about independent advocacy wherever the council considers it appropriate to do so.

Promote a variety of providers section 19 places a duty on local authorities that they 'must, in so far as reasonably practicable, promote:

- a) The availability of providers of support and
- b) The variety of support provided by it and other providers.'

Eligibility

As noted above the four options must be made available to almost everyone⁶ eligible for social care and support under existing legislation. The Act also makes provision for offering the choice and management of the four options to **young adults** (age 16-18) and for offering those with **parental responsibility these options for children under the age of 16**. Where the parent makes the decision about the four options this must take the views of the child (according to their maturity, not their age) into account as far as possible. **Carers** will also be offered the four options for control and management of support should they be assessed as requiring care and support in their own right.

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<http://www.legislation.gov.uk/asp/2013/1/enacted>

Direct Payments

The Act consolidates some of the existing direct payment legislation and the draft regulations set out:

- Which people, and what services are ineligible for direct payments (and therefore options 1 (and 4).
- Who is required to make a financial contribution to their direct payment.
- Assessment of a person's ability to make a financial contribution.
- Circumstances when a local authority can terminate a direct payment.
- Paying a direct payment to someone other than a supported person.
- Specifying who can/cannot provide services paid for by a direct payment.

S.16 of the Act sets out circumstances under which a direct payment must be repaid, in whole or in part, should it be misused.

Regulations & Guidance Consultation

The regulations and guidance were subject to a public consultation between mid-April and mid-July 2013.

Providers and Personalisation (P&P) responded to the consultation and worked closely with the Scottish Government and other stakeholders on the Guidance and Regulations Advisory Group to help shape the content of both.

Regulations

In April 2014 the regulations accompanying the Act came into force.

The regulations deal solely with direct payments. The final version of the Regulations no longer has a long list of groups excluded from direct payments. Working on the assumption that choice and control should be available to all local authorities can award a direct payment in all circumstances except where they consider this option to place the person at risk and/or there has been a previous termination of a direct payment due to misuse. Where a person is excluded from this option the local authority must tell them why this has been decided.

The exclusion of types of services is another area of debate. Previous discussions suggested that certain services would be destabilised by people taking a direct payment. There were particularly strong views about the appropriateness of Option 1 in residential care/residential care with nursing homes. The exclusion of these services still stands, however the Scottish Government has committed to exploring how Option 1 might work in this setting through a range of pilot projects. Should this be successful the regulations will be reviewed accordingly.

The Self-directed Support (Direct Payments) (Scotland) Regulations 2014

<http://www.legislation.gov.uk/ssi/2014/25/made>

Explanatory notes

<http://www.legislation.gov.uk/cy/ssi/2014/25/notice/made?view=plain>

Guidance

Statutory guidance to accompany the Act was published in April 2014. The guidance focuses on the duties and powers contained within the Social Care (Self-directed Support) (Scotland) Act 2013 however it addresses accompanying duties and powers in relation to assessment, support planning and review. Reflecting the key role played at each and every stage of a person's "pathway" through support from initial point of assessment to review.

Statutory guidance to accompany the Social Care (Self-directed Support) (Scotland) Act 2013

www.scotland.gov.uk/Publications/2014/04/5438

A series of best practice guides were also published in April 2014. A guide for providers will follow for providers in April 2015.

National Guides on Self-directed Support –

guidance.selfdirectedsupportscotland.org.uk

Representation

P&P are represented on a number of Scottish Government working groups convened to take SDS Strategy and Act. For more information on this please email Dee dee.fraser@ccpscotland.org

References

1. Scottish Government (2010) "Self-directed Support Strategy" (November 2010) <http://bit.ly/HU0q8G>
2. Christie Commission on the Future Delivery of Public Services" (June 2011) <http://bit.ly/IJItaw>
3. National Performance Framework "Our public services are high quality, continually improving, efficient and responsive to local people's needs" <http://bit.ly/HhWryY>
4. Rummery et al (2012) "Counting the Cost of Choice and Control: Evidence for the Cost of Self-Directed Support in Scotland" <http://bit.ly/HTZA3b>
5. Glendinning et al (2009) "National Evaluation of the Individual Budgets Pilot Projects (IBSEN)" <http://bit.ly/NUMvY>
6. SDS Act Regulations and Guidance (Draft) <http://bit.ly/HQ600u>
7. Scottish Government (2011) "National Statistics Publication for Scotland Self-directed Support (Direct Payments), Scotland" <http://bit.ly/I4RLHh> "40 percent of people receiving Direct Payments had a physical disability and 26 per cent had a learning disability. A further 3 per cent had both a physical and a learning disability (April 2010-March 2011)
8. SDS Bill Policy Memorandum Para. 18 <http://bit.ly/HjE6hx>
9. <http://www.ilis.co.uk/independent-living/>
10. The Act also does not change the existing LA power to make decisions and arrange support under s. 13ZA of the *Social Work (Scotland) Act, 1968*. <http://bit.ly/HY40IT>



About P&P

P&P is a four year policy and practice change programme supporting providers to prepare for, and showcase good practice in the journey to Self-directed Support. P&P is open to all third sector care and support providers.

More about P&P <http://www.ccpscotland.org/providers-and-personalisation>

Legal

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