

## Local area example of the tensions between competitive tendering and Self-directed Support

July 2019

This briefing sets out a local area example of **the tensions between procurement and competitive tendering, and Self-directed Support (SDS)** and enabling choice for individuals about the provision of their care and support. This local area example involved a legal challenge about the procurement process and individuals being denied choice under SDS.

### Background

#### **Competitive Tender for Supported Living Service Framework**

A local authority decided to hold a competitive tender for a new 'Supported Living Services Agreement ('the Framework)' which included provision of support at home for people with learning disabilities and complex needs. The tender was issued and providers were invited to bid.

Those providers who were successful in the tender were appointed to the council's Framework and would be allowed to deliver care and support in the local area. Several of the existing providers were informed that they were unsuccessful and that they had lost their contract to provide support in the area.

### The Provider

Provider A had been providing personalised support to people with learning disabilities and complex needs in the local area for many years. The provider bases its values on SDS saying *'We fully believe and are committed to the principles of SDS. We have a long history of taking a person centred approach. We will*

*work in partnership with you to achieve the best outcomes in your life.'*

### The council cancelled the contract with Provider A

The council wrote to Provider A advising them that they have been unsuccessful in the tender and that the council would immediately begin transferring the people they support to another provider on the Framework.

Review Officers from the council began visiting the individuals who were receiving support from Provider A and telling them that they were being moved to a new provider.

The Review Officers told the individuals that they had no choice about who provided their support and that they had to move to a new provider on the council's Framework.

### The issues for individuals and families

- There was no consultation or involvement with individuals and their families prior to the competitive tender. There was no consultation in relation to the procurement process and none as a result of the outcome of the process.
- Many of the people affected by the change of provider were people with learning disabilities and complex needs and experienced anxiety because they had difficulty coping with change.
- The people receiving support were not able to access to independent advocacy or to have a representative

or family member present when the Review Officers visited them.

- The council failed to advise the supported people of their right to choose a different SDS option, either Option 1 or Option 2, which would have allowed them to stay with their existing provider.
- Individuals were told that they could not choose a provider that was not on the council's Framework. This goes against the principles of SDS and the person's right to choose who provides their support. Under Option 2 of SDS, a supported person can choose to purchase 'off framework'. This is something a number of councils are now allowing to accommodate people's choices more effectively.
- Individuals were told by the council that Option 2 would be 'too much hassle' and that the supported person or their family would have to sign off monthly invoices and manage a lot of paperwork. This is not usual practice and the statutory guidance for SDS is clear that under Option 2 the supported person does not have to manage their Individual Budget or any of the finances.

### Guardianship and Capacity Issues

The council held welfare guardianship<sup>1</sup> for some of the individuals because they were assessed as having difficulty understanding decisions affecting their care and support. Although appointment of the council social worker as a guardian (in the absence of a relative, friend or carer) is allowed under incapacity legislation, questions arise about potential conflict of interest. A welfare guardian is required to make decisions in the person's best interest but the council could be dealing with two contradictory pressures - making support decisions in the person's interest and at the same time making financial decisions requiring them to implement the Framework.

Some of the staff at the council believed that anyone with a learning disability (regardless of their assessed capacity.) would need Financial Guardianship to access Option 2 of SDS. As the Option 2 budget is not directly managed by the person, but rather by an organisation, it is not clear why this was required by the council. As a result of the council's policy on guardianship, many people affected by the procurement were refused Option 2 or any choice about staying with their current provider.

### What happened next

The families and individuals began speaking to independent advocacy organisations, the Mental Welfare Commission and some national SDS organisations to get advice about their right to SDS.

The provider approached the council and tried to get them to change their mind about allowing the affected individuals a choice of provider. Many meetings were held over many months but the council still refused to allow the individuals to stay with their support provider under Option 2.

Meanwhile the provider had to put a number of their support workers on redundancy notices whilst challenging the process. The provider spent a lot of time dealing with stress and upset of both the individuals they support and the support workers trying to reassure them. The process disrupted service provision and the individual's relationships with support workers.

### The legal challenge

The provider engaged a solicitor to write to the council. A solicitor's letter was sent highlighting the provider's grave concerns about the impact of the transfer to a new provider on the people they support and asking the council whether they had fully met their legal obligations under the self-directed support legislation.

The solicitor challenged the council on the following legal duties:

**Under the Social Care (Self-directed Support) Scotland Act 2013 (“SDS Act”) the council has various statutory responsibilities including:**

- Under s.5 (2) of the Act a duty to offer supported people a choice of the 4 Options for SDS.<sup>2</sup>
- Under s.9(2) the council must give the individual:
  - a) An explanation of the nature and effect of each of the Options.
  - b) Information about how to manage support.
  - c) Information about persons who can give assistance about making decisions about the options and information about managing the support.<sup>3</sup>
- Under s. 19 of the Act:  
For the purpose of making available to supported persons a wide range of support when choosing options for self-directed support, a local authority must, in so far as is reasonably practicable, promote—
  - a) A variety of providers of support and;
  - b) the variety of support provided by it, and other, providers.<sup>4</sup>

The solicitor asked whether the council had fully explained the options to individuals under SDS and whether the council had also made it clear that the individuals could continue to receive support from their existing provider as permitted by the SDS Act. The council was also asked what training it had provided to its staff on the SDS legislation and duties and what records it had kept to demonstrate that it had offered the individuals an informed choice under SDS.

**The Public Contracts (Scotland) Regulations**

Regulation 76<sup>5</sup> states that when public bodies are procuring health and social care services,

they should take into account **continuity of service and the needs of specific service users.**

The solicitor asked whether the council had applied this duty during its procurement process.

**The Framework Terms**

The council was reminded that under its own terms for the Framework it had stated that **‘The Provider acknowledges that... the Council is at all times entitled to enter into other contracts and agreements with other contractors for the provision of any or all services which are the same as or similar to the services’** This wording implies that the council could allow individuals to receive support from providers who are not on the council’s framework.

**Statutory Guidance on the Procurement of Care and Support Services 2016**

The statutory guidance states that consultation and sharing of information with service users is of paramount importance when public bodies are procuring care and support services. The regulations state:

‘If procurement activity may result in a change of service provider, or change to service provision, information about the procurement process should be provided to people who use services and their carers who may be affected. Where relevant they should also receive information on the choices available to them and the availability of SDS.’

The solicitor questioned the council about whether it had informed individuals and their families about the procurement process and whether it has considered the importance of continuity of support provision.

It was highlighted that there were no concerns about the quality or cost of the provider’s support provision to the individuals and that the support had always been rated excellent by the Care Inspectorate. The council was asked how it could therefore

guarantee that a change of provider was in the best interest of the individuals.

### **The homes of the supported people**

The provider also held tenancy agreements with some of the people affected by the tender and there were questions about whether the council had made it clear to those people that a change of support provider could also affect the terms of their tenancy agreement.

Finally, the solicitor reminded the council that a 'change of provider of the kind being proposed by the council could have a significant impact on the lives of the individuals and their families' and the council should fully consider its legal obligations to the people affected.

### **The council changes its decision**

The council decided to reverse its decision and allow the supported people who wished to stay with their current provider to do so. The council is reviewing its own policies and procedures on SDS, Option 2 and in relation to Guardianship. The council continues to purchase support from Provider A but now out with the framework.<sup>6</sup>

This happened as a result of several meetings between the management team from the provider, the commissioner, the legal team from the council and the solicitor acting on behalf of the provider. It took considerable collaboration and dialogue for many of the problems to be worked through and resolved. Positive relationships and trust between the individuals involved, the provider and council have now been restored and everyone is working well together to resolve any further issues.

### **Lessons Learned**

Issues for local authorities to consider when carrying out a commissioning and procurement process for care and support:

### **Commissioning and Procurement**

- Begin with considering whether a procurement exercise is necessary. The new Social Care Procurement Guidance is clear that 'there are no legal requirements that stipulate a contracting authority must follow a procurement process to meet their obligations under Option 2 s.6 (11) of SDS.<sup>7</sup>

### **Involvement of Supported People**

- Start with the full involvement of supported people. This complies with the duties in the SDS Act, the Equalities Act and the new National Health and Social Care Standards – the second of the five underpinning principles being: 'I am fully involved in all decisions about my care and support.'
- Consider how to involve and consult with service users and families about any commissioning plans, competitive tenders and decision to change their provider.
- Consider their duties, as a public body under the Equality Act, about the rights of disabled people and other protected groups to be consulted in an accessible format when making any changes to service provision.

### **Involvement of other stakeholders and providers**

- When thinking about commissioning and procurement of social care focus on working in partnership and collaboration with all stakeholders. See [P&P's Doing Things Differently guide](#).

### **Guardianship and Capacity**

- Issues around guardianship and capacity should be carefully considered and balanced with individual rights to make choices under SDS about their lives and their support. Not everyone with a learning disability or mental health impairment will require guardianship to be able to make choices about their support arrangements (particularly under

Option 2 of SDS). Financial Guardianship should only be necessary in cases for individuals who lack capacity and are accessing Option 1 of SDS.

- The council should be careful that it does not have a conflict of interest when making decisions under a Welfare Guardianship order and making financial decisions about someone's care package/arrangement. Individuals should also be entitled to independent advocacy when the council holds Welfare Guardianship. Further information is available on the [Public Guardian Scotland](#) and [the Mental Welfare Commission](#) websites.

### **Self-directed Support**

- Consider how to ensure supported people have choice about who provides their support, when and how their support is provided and who their preferred support providers are. Ensure that individuals receiving care and support are offered SDS and the 4 Options.
- Ensure that individuals have the right under Option 2 to choose to stay with their existing provider even if they are not on the council's framework. Under section 19 of the SDS Act, local authorities have a duty to promote a range of providers to ensure real choice for supported people. It is important to consider how they can commission for a diverse range of providers, including specialist providers, for people to choose from.

## Resources:

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

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

Self-directed Support Statutory Guidance, 2014

<http://www.gov.scot/Publications/2014/04/5438/0>

The Procurement Reform (Scotland) Act, 2014

<http://www.gov.scot/Topics/Government/Procurement/policy/ProcurementReform/ProcReformAct>

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<sup>1</sup> <https://www.mwscot.org.uk/the-law/adults-with-incapacity-act/welfare-guardianship/>

<sup>2</sup> <http://www.legislation.gov.uk/asp/2013/1/section/5/enacted>

<sup>3</sup> <http://www.legislation.gov.uk/asp/2013/1/section/9/enacted>

<sup>4</sup> <http://www.legislation.gov.uk/asp/2013/1/section/19/enacted>

<sup>5</sup> <http://www.legislation.gov.uk/ssi/2015/446/regulation/76/made>

<sup>6</sup> .see section 6.11: no requirement for a framework for Option 2

<http://www.gov.scot/Resource/0049/00498297.pdf>

<sup>7</sup> Ibid



## About P&P

P&P is a 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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