



**Myths Buster for
the Procurement of
Social Care**

CCPS
COALITION OF CARE
AND SUPPORT PROVIDERS
IN SCOTLAND

MYTHS BUSTER FOR THE PROCUREMENT OF SOCIAL CARE

Following recommendations set out in the [Feeley Report](#), the Scottish Government is proposing the creation of a comprehensive community health and social care service, a **new National Care System** is on the agenda in Scotland. Nothing has highlighted the importance of our health and social care services more than the COVID-19 pandemic.

At the same time, the UK's exit from the EU is being seen as providing "an historic opportunity to overhaul our outdated public procurement regime". The Government has published its [Green Paper](#) setting out its proposals to **transform public procurement**. While the Green Paper perhaps fails to differentiate how delivering services for people is different to delivering other works, goods or services, it does display an appetite for simplifying and speeding up procurement processes, for making SME participation easier, encouraging innovation and opening markets.

The Feeley Report expressly details the commissioning and procurement of social care as an area for improvement, to create a social care system which **puts service users at the heart of the decision-making** which affects them. There is growing recognition that procurement is a risk area which sits alongside a number of other risk areas in health and social care, including service delivery, meeting legal duties relative to self-directed support and workforce conditions.

There is renewed recognition by the Scottish Government that social care services are often **purchased differently**. This is because of their impact on quality of life and because these services are becoming increasingly personalised.

The question does remain as to whether or not there is a need to designate social care services as a service in the general economic interest, relaxing the need to comply with procurement laws and permitting public intervention to protect service delivery.

Just how different can social care purchases be? This Myths Buster, which is aimed at those who procure social care on a regular basis, aims to quash some of the current misconceptions surrounding social care procurement and to ensure that most is being made of the **flexibilities** available when procuring social care under the current legal framework.

THE LEGAL FRAMEWORK

The key components of the legal framework relevant to the procurement of social care are set out below:

Procurement law framework	Social care procurement/commissioning
<p>Public Contracts (Scotland) Regulations 2015 Role: sets out a set of light touch rules for procuring services valued at over £663,540*.</p>	<p>Social Work (Scotland) Act 1968 Role: key underlying legislation relevant to social care.</p>
<p>Procurement Reform (Scotland) Act 2014 Role: sets out rules for procuring services valued at between £50,000 and £663,540*.</p>	<p>Social Work (Scotland) Act 1968 Role: key underlying legislation relevant to social care.</p>
<p>Procurement (Scotland) Regulations 2016 Role: set out rules for procuring services valued at between £50,000 and £663,540*.</p>	<p>Regulation of Care (Scotland) Act 2001 Role: to improve the standards of social care services.</p>
<p>Procurement Reform (Scotland) Act 2014 Role: sets out rules for procuring services valued at between £50,000 and £663,540*.</p>	<p>Community Care and Health (Scotland) Act 2002 Role: introduces free personal care for older people and rights for unpaid carers.</p>
	<p>Mental Health (Care and Treatment) (Scotland) Act 2003 Role: to develop community -based mental health services and involve service users in decisions.</p>
	<p>Adult Support and Protection (Scotland) Act 2007 Role: gives greater protection to adults at risk of harm or neglect.</p>
	<p>Social Care (Self Directed Support) (Scotland) Act 2013 Role: key legislation relevant to self-directed Support.</p>
	<p>Community Justice (Scotland) Act 2016 Role: to improve community justice outcomes.</p>
	<p>Carers (Scotland) Act 2016 Role: to improve support for all carers.</p>
	<p>Local Government in (Scotland) Act 2003 Role: key legislation relevant to local authorities achieving best value in all that they do.</p>

#1

MYTH NUMBER ONE

Procurement rules apply to all aspects of social care procurement

Procurement rules apply only to 'public service contracts', namely a 'contract having as its object the provision of services' entered into by a local authority (or 'contracting authority') and they only apply above particular thresholds.

Under the Procurement Reform (Scotland) Act 2014, local authorities can **directly award**, without a competitive process, **certain social care contracts valued below £663,540***.

Also, for **self-directed support, procurement rules do not apply to Option 1 where the service user is the purchaser**. This is the case even if the value of the support is £663,540* or more.

Depending on how a local authority arranges **Option 2 for self-directed support, procurement law may, again, not apply to all aspects of an arrangement**. A key example would be where a local authority is simply arranging payment out of a service user's budget and the service user is directing how the money should be spent. Again, this applies even if the value of the support is £663,540* provided it is clear the service user is making the purchase. See our "How to Guide" for further information on direct awards.

#2

MYTH NUMBER TWO

The procurement rules apply to grants

The procurement rules do not apply to grants. This is set out in Recital (4) of EU Directive 2014/24/EU¹. Grants remain in use across areas of social care and while they do not raise procurement points, approaches to their use do need to be considered against Best Value/VfM considerations of public bodies and in terms of budgetary constraints and subsidy control where they concern social care provision within economic markets.

¹Incorporated into Scots law by the Public Contracts (Scotland) Regulations 2015 as amended by the Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020

#3

MYTH NUMBER THREE

Where the procurement rules apply, the 'usual' processes need to be followed

Under the Public Contracts (Scotland) Regulations 2015, a '**Light Touch Regime**' applies to the procurement of social care services valued at £663,540* or more. The Light Touch Regime rules are deliberately designed to give as much **flexibility** to contracting authorities as possible. Authorities can take advantage of these flexibilities to maximise benefits, such as reduced process burdens on procurers and suppliers.

The key things are to be clear about what your process will involve, making sure the process ensures **overall transparency and equal treatment** of suppliers, and **sticking to the process** that you decide to run. We are seeing increasing use of the Light Touch Regime and flexible procurements. See our "How to Guide" for further detail on how to undertake a Light Touch Regime procurement.

#4

MYTH NUMBER FOUR

Tendering an SDS Option 2 satisfies your obligations under the 2013 Act

Insisting, for self-directed support Option 2, that a competitive tender process is undertaken or that a service user must choose a provider from a restricted number of organisations appointed through a previous procurement process where the service user wishes to make a **direct award to a provider of its own choice** may breach obligations under the Social Care (Self Directed Support) (Scotland) Act 2013.

Not affording service users the choice which the 2013 Act sought to provide them with or otherwise failing to use the flexibilities available in procurement law is likely to **impact on meeting legal duties** under the 2013 Act. Refer to Myth #1 for further information on the alternatives to tendering and the “How to Guide” for further detail. Section 19 of the 2013 Act makes it clear that a local authority, through its approach to commissioning should ensure, as far as is reasonably practicable, **a range of providers and supports** in its area.

#5

MYTH NUMBER FIVE

It is not possible to make a direct award above the Light Touch Regime threshold

Where the value of the contract is above the Light Touch Regime threshold Regulation 33 of the Public Contracts (Scotland) Regulations 2015 provides limited circumstances where it is possible to make a **direct contract award without competition**. Examples include where the services are needed on an **extreme urgency basis** outwith the control of the contracting authority. It should also be possible to make a direct award or call off from a framework set up under the Light Touch Regime and it may also be possible to make a direct award or call off from a national framework depending on how the national framework is set up.



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