

## SELF-DIRECTED SUPPORT: A DRAFT BILL FOR CONSULTATION

### RESPONSE TO CONSULTATION

The Association of Directors of Social Work (ADSW) welcomes the opportunity to respond to the current consultation on the draft bill on self-directed support. This follows an earlier consultation on the outline proposals for the Bill, completed in June 2010.

#### General Questions

QUESTION 1(a) What are your views on the objectives that we have set for the Bill?

The objectives are clear and are supported. The explanatory accompanying text is helpful and is supported. The Bill will assist in engaging more people in formal and informal settings in the agenda by giving weight and clarity to what has previously been seen by some as 'optional'. It is also an important step in widening the understanding of self-directed support beyond direct payments.

It is our view that the term 'self -directed support' should be enshrined in statute. ADSW believes that the term 'social care', as written in the title of the Draft Bill, does not adequately describe the principles of partnership, mutuality and co-production that underpin self-directed support and this term should be replaced.

QUESTION 1(b) Do you think that the draft Bill meets the objectives that we have set?

Yes... although there is a lack of clarity within the section 'Options for Self-Directed Support' (section 6). In relation to the options for self-directed support (section 6) there is reference to the local authority decision on the need for provision of community care services ("the support") under the 1968 Act (12A). There should be more clarity around the issue of 'eligibility' for services and the application of criteria to determine eligibility. 'Self-directed support', more so than 'individual budgets' (actually a term little used in the Bill), is difficult to define. It is perhaps even more important, therefore, that some clarity is provided around the application of the legislation, i.e. through a system of resource allocation at local level.

There is a confusing interchange of terminology within the Bill.

QUESTION 2(a) What are your views on the general principles included in the draft Bill? [Bill reference: section 1]

The principles are generally welcomed but are somewhat focused on the process of self-directed support which, in reality, is a means to an end ( i.e. achieving equality/quality of life) rather than an outcome in itself.

'General Principle 2' is clumsy and could be more clearly worded as:-

"A person should have as much involvement in the assessment of their own needs and the provision of services and support to meet their needs as is reasonably practicable".

'Reasonably practicable' is a term that requires definition in guidance.

'General Principle 3' is particularly welcomed- choice without information is of limited benefit.

ADSW is of the view that 'General Principle 4' does not adequately capture the co-production, enabling,

partnership and mutuality activities essential to delivering good self-directed support practice (although these are described elsewhere).

The notion of 'contribution' by the person requiring support goes beyond empowerment to include their co-operation, including with the pooling of financial resources they may have from a variety of sources to meet agreed outcomes. In other words, there are responsibilities upon the individual as well as on the providers of the support.

Although there may be a presumption that reviewing/ongoing support is included in the phrase 'any matter relating to the services or support', there may be benefit in clarifying that self-directed support is a fluid and adapting activity. The principle of 'involvement' should also include assessment activities.

There should be reference to the rights of people to express choice in relation to the risks they wish to take in order to achieve quality of life and the role of providers in taking a positive, enabling approach whenever possible.

It should be clear that the whole agenda is driven by a desire for equality underpinned by human rights legislation.

QUESTION 3(a) What are your views on our "framework" provisions? [Bill reference: sections 2, 3, 6, 9, 13, 14 and 15]

ADSW supports these sections and takes the position that no one option should be the assumed default. We agree with the notion of clear options for the level of choice and control exercised by individuals over their budget.

Many local authorities will need to develop an appropriate resource allocation system and increase their capacity to meet new demands by developing additional resources and skills, including the provision of information of formal and informal resources for individuals. There will be challenges in finding the capacity and resources to make these changes within a context of cuts to staffing and funding.

QUESTION 3(b) Do you think that the rights, duties, powers and choices set out in the Bill are the right ones, specifically the four options, the duty on local authorities to provide those four options and the duty to provide the adult's preferred option?

The four options are agreed, as are the duties placed upon local authorities in relation to these.

The wording of the options could be clearer or will require to be explained within guidance.

There is a potential difficulty, option 1, if the individual chooses a support that has not been approved by the local authority/ put out to tender and this requires to be done under current procurement regulations.

Local authorities will struggle to meet expectations during transition periods without sufficient additional funding.

The term 'individual budget' is used in Option 1 only and is described later in the document 2(2) as meaning the 'amount the local authority is to make available for the provision of the services or support'. However, this amount may also include non local authority monies.

The order of the listed options is different to that in the self-directed support strategy document. For consistency and ease of use, they should be the same.

Specific consideration is required of circumstances whereby a third party has a significant role in the choices made and payments received.

There should be a specific recognition of the local authority's duty of care which is a part of the consideration when co-producing plans with individuals where additional risks may exist. ADSW supports a positive approach to risk taking backed by government policies.

Support for individuals is only covered within the draft Bill in relation to capacity issues with little

consideration of individual's need for support to manage the self-directed support process. The strategy document does, however, give recognition to the challenges involved.

QUESTION 3(c) Is there anything that you would change or do you think that something is missing from this legislative framework?

Please refer to previous comments made.

Clarity is required, Option 1, in relation to the limits of a person's rights and the responsibilities of the local authority.

The issues should be linked to matters of eligibility, assessment, identified outcomes, allocation of resources and risk to ensure vision is informed by reality and leads to more consistency across Scotland.

Guidance should emphasise the role of a resource allocation system with the aim of maintaining local flexibility in approach whilst supporting a more consistent approach across Scotland.

QUESTION 4(a) What are your views on section 16 within the draft Bill? In particular, do you think that there should be further legislative provisions relating to self-directed support, individual care packages and joint working between social care, health and beyond? If so, what should be added and why?

Contributions from the NHS to individual budgets to meet certain needs are entirely appropriate, particularly in complex care cases and this should be better covered within the legislation. The way forward is through the flexible use of resources across health and social care with better integration of approaches in planning, assessment and delivery functions to meet individual outcomes that have been identified.

It is appropriate that NHS bodies have knowledge of and apply the principles and provisions of self-directed support and make provision for a range of services to be available that individuals could reasonably request, consistent with the expectations on local authorities.

ADSW is of the view that best use of knowledge, expertise and resources will come from shared responsibility for meeting support needs. To change the lead player will simply relocate the same issues.

Self-directed support within housing services is, in our view appropriate although obviously choice will be restricted by established criteria for allocation.

Local authorities are likely to experience additional difficulties in meeting demands as a result of the changes being proposed to Disability Living Allowance along with the introduction of the Personal Independence Payment. The closing of the Independent Living Fund to new applicants is an associated 'reform' that will have a direct impact upon ability to meet expectations. Whilst welfare benefits are a reserved matter there is an urgent need to consider the feasibility of local authorities meeting the demands alone and the need to place the same requirements on health and other services.

Whilst the draft Bill is not, at present, the 'vehicle to place duties on other bodies apart from the local authority', there are inherent difficulties with this approach in both meeting holistic needs and meeting resource demands. The Bill has missed an opportunity to establish a legislative framework for a real partnership approach.

QUESTION 5(a) What are your views on the provisions relating to self-directed support for children and young people? [Bill reference: section 8]

ADSW agrees that the principles underpinning the Self-directed Support Bill should apply to young adults aged 16 and 17 years and acknowledges that support will need to be made available to this group, (as indeed it will for other groups).

The emphasis on transitional arrangements for young people aged 16/17 years is welcomed, along with the inclusion of young carers.

QUESTION 5(b) Do you agree that all forms of self-directed support should be available to children, young people and their families, and that they should have the same options as adults directing their own care and support?

Yes

QUESTION 5(c) Do you think that sixteen and seventeen year olds should be empowered to direct their own support?

Yes

QUESTION 5(d) What are your views on how the various other provisions within the Bill apply to children and young people? For example, are there any specific circumstances where you feel that a particular provision should not apply to children and young people's support?

ADSW is of the view that the principles of choice and control should apply across service groups. There is evidence that co-production of support plans leads to improved outcomes - even when the support is not provided through a voluntary arrangement.

However, children and families may receive a service due to concerns about the care provided at home. It will be necessary to give separate and detailed consideration to the application of the Bill in this area. ADSW would welcome the opportunity to engage in these discussions with the Scottish Government and relevant partners.

We would not promote the use of direct payments for purchasing residential care for children and young people and it is relevant to note that providers for this age group are not part of the National Care Homes Contract (see comments at 9(c)).

QUESTION 6(a) What are your views on providing a power to local authorities to facilitate an "appropriate person" arrangement where guardianship or power of attorney is not in place and where such applications under AWI procedure would be disproportionate? [Bill reference: sections 10 to 12]

ADSW is of the view that an alternative to 'Guardianship' is required for people who may lack full capacity but would benefit from self-directed support and who would otherwise have no need for Guardianship. However, to be of benefit to people who may lack full capacity to make decisions on their support, it will require the appropriate person be able to consent to support and services on their behalf. The proposal seems to be for the appropriate person only to give 'assistance in making decisions'.

Under current legislation, assistance may be given by the local authority. Clarity is needed on whether local authority officers can take on this role and in what circumstances.

QUESTION 6(b) What are your views on the “trigger point” to allow such powers to be used

More discussion and clarity is needed regarding responsibility for, and the criteria used in, determining 'capacity'. For example, the Adults with Incapacity (Scotland) Act 2000 requires a medical opinion on decision-making capacity, whereas the draft Bill states the decision will be left to the local authority (Section 10(1)(b)).

Current mental health legislation allows a person to indicate their views on care and treatment to a nominated person in advance of becoming unwell. If an 'appropriate person' is a different individual who wants to manage the support arrangements, there is a responsibility to ensure that these roles work effectively together. ADSW would welcome clarification on the role of local authorities in these circumstances and also guidance on resolution of situations where a conflict of interest is thought to exist in relation to the appointment an 'appropriate person'.

QUESTION 6(c) If enacted, the provisions in this Bill would join the current Section 13ZA of the 1968 Act. Section 13ZA provides quite wide ranging powers to local authorities. Do you think that section 13ZA should be amended in any way in light of this Bill?

Section 13ZA of the 1968 Act allows local authorities to take steps to provide a community care service when an adult lacks capacity but is assessed as needing the support. The Bill states the requirement for choice in how support is provided. The use of the two pieces of legislation as they currently stand may result in confusion. Indeed, if a person lacks capacity, a Guardian or appropriate person would be involved to make decisions on services. It seems difficult to imagine a situation where Section 13ZA would be applied if the Bill is passed.

It would therefore be pertinent to amend Section 13ZA to ensure that decisions are not made inappropriately by the local authority when a Guardian or appropriate person has been appointed.

QUESTION 7(a) What are your views on the provisions within the draft Bill relating to carers? [Bill reference: sections 5 and 7]

ADSW supports the inclusion of carers and recognises the important contribution they make to both individual lives and to the social care system.

Carer's outcomes may well be different from those of the person they care for and at times they may not be compatible.

It is reasonable to presume that some carers (and the people receiving their support) will wish to provide personal care tasks (covered by 'Free Personal Care'), but purchase domestic assistance. Local authorities need to be clear on what flexibility is allowed in such instances to make these statutory provisions produce the best and most consistent outcomes across the country.

QUESTION 8(a) What are your views on the provisions within the draft Bill relating to direct payments? [Bill reference: sections 17 – 22]

These are consistent with current provision and ADSW supports the additional clarity that bringing direct payment regulations together under one Bill brings. There is a need for clarity on the Options available, particularly Option 1.

QUESTION 9(a) We propose to remove the current restriction which prevents people subject to a Compulsory Treatment Order receiving their care and support as a direct payment. Do you believe that any of the restrictions on various other categories of people should also be removed? If so, which ones and why?

ADSW is of the view that the principles that underpin the draft Bill should apply to everyone. The safeguards built into the draft Bill are sufficient to support decisions on an individual's unsuitability for a direct payment. Experience of the use of Advanced Statements in mental health legislation may be helpfully applied here.

QUESTION 9(b) Some have asked for the regulations that limit the employment of close relatives via a direct payment to be reformed. What are your views?

ADSW is mindful of the demands that can be placed upon family members to take on a paid caring role. Such arrangements can adversely affect family networks and relationships. However, relatives should not be excluded as there may be very particular circumstances when this arrangement is the only reasonable option - for example in some rural areas where resources are limited.

QUESTION 9(c) What are your views on making direct payments available for residential accommodation?

ADSW sees little benefit in offering a direct payment to an individual for residential accommodation and there is an argument that to do so would undermine the government's drive to re-balance care. Individuals funded by local authorities already have the right to choose their accommodation under existing legislation. The choice of who provides support on a daily basis is not available in the same way as it is in a community setting. Individuals paying for residential accommodation through a direct payment may, in fact, be charged a higher rate as a 'self funder', rather than paying the National Care Homes Contract rate. ADSW does, however, support increased choice and control for individuals within residential care and acknowledges the importance of engaging all staff and sectors in training and in the sharing of best practice.

QUESTION 9(d) If this were to be permitted under the law, do you consider that in practice there will be any adverse issues in relation to: i) The National Care Home Contract for those 65 and over – particularly in relation to the potential for top up fees being imposed; or ii) Ordinary Residence. If so, how might these issues be addressed?

Please see comments above.

Clear guidance on funding responsibility is required in relation to ordinary residence for the occasions when an individual moves into a local authority which was not involved in the placement.

QUESTION 9(e) Should we consider an alternative to the stark choice of imposing or removing a particular time limit on residential care? Instead should we consider new, reformed regulations that provide greater scope for local practice and circumstances? For instance, to define particular circumstances where direct payments can be used in residential settings as opposed to the current situation where regulations define only where they cannot be used?

No - please see response to 9(c)

QUESTION 10(a) What are your views on bringing forward some additional amendments to elements of the Social Work (Scotland) Act 1968 in order to modernise the law in line with the theme of self-direction and person-centred support?

ADSW is of the view that amendments to the Social Work (Scotland) Act 1968, particularly 12 and 12A of the Act, would support the shift in culture and practice from providing 'care' and 'services' to providing 'support' and 'choice'.

Section 12A1 (b) of the 1968 Act, for example, emphasises the role of the medical practitioner's view which should be replaced by a focus on the individual's involvement in assessment and their own view.

QUESTION 10(b) In particular, what are your views on the additional changes put forward in the discussion document: the proposals to reform the "trigger point" for assessment, to secure adults' rights to request an assessment and to raise the role and profile of the individual in the assessment process?

ADSW supports the above - although an individual request is currently the usual trigger for an assessment.

As with almost all practice changes that increase the opportunities for individuals to request an input, there will be resource implications and eligibility criteria will be applied to ensure these are managed.

Transition funding is required for rhetoric to become action.

QUESTION 10(c) If you think that there are major items that are missing from the draft Bill, what are your proposals for additions to the Bill and why do you think they will make a difference?

Please see previous comments on option1.

Many matters raised earlier in this response, such as those relating to eligibility criteria and resource allocation systems, are best addressed in accompanying guidance.

The inclusion of other funding within individual budgets, for example from Further Education/ NHS/ Welfare Benefits, etc, needs to be explored.

QUESTION 11(a) We have published a draft Business Regulatory Impact Assessment. What are your views about the potential costs, benefits and impacts provided within the BRIA?

Whilst welcoming the changes to practice that will result from the Bill, ADSW is concerned by the additional costs and strain on resources that will inevitably result in the short term. The organisational changes hoped for as a result of the Bill will require the engagement of staff across the organisation. The Business Regulatory Impact Assessment recognises the additional costs involved and the need to consider bridging finance. ADSW welcomes this report.

QUESTION 12(a) We have published a draft Equality Impact Assessment. What are your views on the draft EIA?

ADSW supports the draft Equality Impact Assessment.