SOCIAL WORK AND HOUSING COMMITTEE – 12 SEPTEMBER 2013

SELF DIRECTED SUPPORT: CONSULTATION ON DRAFT REGULATIONS AND STATUTORY GUIDANCE

1 Recommendations

Social Work & Housing Committee is recommended to:

a) Endorse the Council’s response to Scottish Government’s consultation on draft regulations and guidance relating to the Social Care (Self Directed Support) (Scotland) Act 2013;

b) Acknowledge that the Director of Housing and Social Work submitted a response on behalf of the Council on 10 July to meet the Scottish Government’s timescale (attached as Appendix 1).

c) Agree to receive further reports as preparation for Self Directed Support.

2 Background

2.1 The Social Care (Self Directed Support) (Scotland) Act 2013 received Royal Assent in January 2013 with a scheduled implementation date of 1 April 2014. The Act places a duty on local authorities to offer the following four options to those eligible for community care services:

Option 1 – The making of a direct payment by the local authority to the supported person for the provision of support.

Option 2 – The selection of support by the supported person and the making of arrangements for the provision of it by the local authority on behalf of the supported person.

Option 3 – The selection of support and the making of arrangements for the provision of it by the local authority.

Option 4 – The selection by the supported person of Option 1, 2 or 3 for each type of support.

2.2 Draft statutory guidance to accompany the Act and regulations relating to Direct Payments (Option 1 above) were published for a period of public consultation from April – July 2013.

2.3 The draft guidance and regulations were circulated to all staff in Housing and Social Work for general comment and specific personnel were approached for comment on sections of the guidance relating to their area of expertise. All comments were collated and combined to form one response on behalf of Aberdeenshire Council.
Key points to note in relation to draft statutory guidance:

1. It is re-assuring that local developments in Aberdeenshire are consistent with the Scottish Government’s vision for the implementation of Self Directed Support.

2. The draft guidance is a useful document for all stakeholders. However there are a few aspects which require clarification or further guidance and the Council’s response reflects this. These are outlined below.

3. There is a strong focus within the guidance on people with disabilities. The Council’s response suggests this be reconsidered as the legislation will apply equally to all care groups.

4. Greater clarity is required around different approaches to ‘resource allocation’, a key component of the SDS process.

5. The relationship between health and social care is mentioned in the draft guidance but there is an over-simplification of key tensions and complex issues, such as joint funding and shared responsibilities.

6. Similarly the contribution of education to the lives of young people does not receive great attention in the draft guidance. The Council’s response suggests there should be collaboration around joint funding between Education and Social Work.

7. Financial monitoring, particularly in relation to direct payments, is addressed with an emphasis on reducing bureaucracy. However reference is made to CIPFA guidance which was last updated in 2007, and was not in keeping with the ‘light touch’ approach emphasised in the current draft guidance. Greater clarity is required.

8. The draft guidance discusses residential care and suggests that it is exempt from Self Directed Support. The manner in which this is addressed in the guidance appears to force Council’s into practices which are inconsistent with the ethos of Self Directed Support.

9. Re-ablement, urgent and intermediate care services are all addressed. However respondents had concerns about delays in accessing this type of provision through Self Directed Support. The response suggests that these services should be excluded from Options 1 and 2 and viewed as interim measures of care pending recovery/rehabilitation or full assessment, followed by the choice of all 4 options if the individual is still eligible for support beyond this first period.

10. The Council’s response highlights potential financial implications arising from the draft guidance and suggests more detailed guidance around the employment of family members through Self Directed Support, in particular better definition of ‘exceptional circumstances’. The response also identifies likely additional costs associated with transformation and double-running as traditional services destabilise.
2.4 Key points to note in relation to draft regulations:

1. The Council’s response welcomes the suggested move towards contributions as opposed to charging and also the ability to make payments net of contributions, cutting down on bureaucracy and administration costs.

2. The regulations suggest that individuals subject to Compulsion Orders or Compulsory Treatment Orders can no longer be excluded from receiving direct payments on those grounds alone. Although this move is welcomed, further guidance is required around individuals who may lack capacity to manage direct payments.

3. The regulations set out restrictions in accessing direct payments for those who are homeless, fleeing domestic abuse or requiring support in relation to drug or alcohol addiction. The response suggests there should be some discretion at local authority level in relation to these groups of people and suggests that each case should be judged on its merits, based on risk assessment.

4. The consultation asked for views on whether there should be any type of restrictions on choice of support for children and families and whether these should just apply to direct payments or all four options. The Council’s response indicates that this should be discretionary and based on risk assessment.

2.5 The SDS Strategy Group continues to guide the development and implementation of SDS in Aberdeenshire with several work streams making good progress to design the new framework for SDS:

- Finance and Governance
- Pathway focus group (developing the individual’s pathway)
- Communications (including awareness raising)
- Commissioning and contracting
- Community capacity building
- Staff training
- Service user reference group

2.6 A series of road shows will take place in Inverurie, Turriff, Fraserburgh, Banchory and Stonehaven during the week beginning 16 September. The aim is to raise awareness of Self Directed Support in local areas for existing and potential service users, carers, partner agencies and providers of care and support services. These are being facilitated by Aberdeenshire Council’s SDS Team in partnership with ARC Scotland.

2.7 The Head of Finance and Monitoring Officer within Corporate Services have been consulted and their comments have been incorporated in this report.
3 Equalities, Staffing and Financial Implications

3.1 An equality impact assessment is not required because the Self Directed Support Strategy Group and their work streams will equality impact assess any policies or procedures they propose in line with legislative requirements as this agenda evolves.

3.2 There are no staffing or financial implications occurring directly from the subject of this report however the final statutory guidance and regulations may result in potential financial implications as detailed in section 2.2, point 10 above.

Ritchie Johnson
Director of Housing and Social Work

Report prepared by Yvonne Strachan
30 August 2013 final
APPENDIX 1

Dear Sir/Madam

SELF-DIRECTED SUPPORT: CONSULTATION ON DRAFT
STATUTORY GUIDANCE ON CARE AND SUPPORT

Responding to this consultation paper

We are inviting written responses to this consultation paper by 10 July 2013. Please send your response with the completed Respondent Information Form (see "Handling your Response" below) to:

E-mail to: selfdirectedsupport@scotland.gsi.gov.uk

or

Adam Milne
Self-directed support Team,
Room 2ER,
St Andrew’s House,
Regent Road,
Edinburgh,
EH1 3DG

If you have any queries please contact Adam Milne on 0131 244 5455

We would be grateful if you would use the consultation questionnaire provided as part of the Respondent Information Form or could clearly indicate in your response which questions or parts of the consultation paper you are responding to as this will aid our analysis of the responses received.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at http://www.scotland.gov.uk/consultations.

The Scottish Government has an email alert system for consultations, http://register.scotland.gov.uk. This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). It complements, but in no way replaces SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the Respondent Information Form attached to this letter as this will ensure that we treat your response appropriately. If you ask for your response not to be
published we will regard it as confidential, and we will treat it accordingly. All respondents should be aware that the Scottish Government are subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public and after we have checked that they contain no potentially defamatory material, responses will be made available to the public in the Scottish Government Library, and on the Scottish Government consultation web pages by 7 August 2013. You can make arrangements to view responses by contacting the SG Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us consider any amendments or additions to the guidance. We aim to issue a report on this consultation process along with our response to it during Autumn 2013.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the address given above.

Yours sincerely

Adam Milne
Scottish Government
Self-directed Support Team
A public consultation on draft regulations and statutory guidance to accompany the Social Care (Self-directed Support) (Scotland) Act 2013

RESPONDENT INFORMATION FORM

Please Note this form must be returned with your response to ensure that we handle your response appropriately.

1. Name/Organisation
Organisation Name
Aberdeen Council

Title  Mr  Ms  Mrs  Miss  Dr  Please tick as appropriate

Surname
Ramsay

Forename
Iain

2. Postal Address
Harlaw Centre
Harlaw Road
Inverurie

Postcode  AB51 4TE  Phone  01467 673861  Email
iain.ramsay@aberdeenshire.gov.uk

3. Permissions - I am responding as...

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(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate
- Yes  - No

(c) The name and address of your organisation will be made available to the public (in the Scottish Government library and/or on the Scottish Government web site).
Where confidentiality is not requested, we will make your responses available to the public on the following basis

Are you content for your response to be made available?

Please tick ONE of the following boxes

- Yes, make my response, name and address all available
- Yes, make my response available, but not my name and address
- Yes, make my response and name available, but not my address

Please tick as appropriate

- Yes
- No

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

- Yes
- No

4. Additional information – I am responding as:

Please tick as appropriate

1. Member of the public
2. Individual health/social care professional
3. Central government
4. Local authority
5. Community Health Partnership
6. Health Board
7. Support & information or advocacy organisation
8. Voluntary sector organisation
9. Private Sector organisation (e.g. private social care and support provider)
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Consultation Questionnaire

Draft Statutory Guidance on Care and Support

Consultation Questions

Section 2 : Values and Principles

Question 1a: Was this section of the guidance clear and easy to understand? (please tick)

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Question 1b: How useful did you find this section of the guidance? (please tick)

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Question 1c: Do you have any further comments on this section of the guidance?

Some advice to help you to answer this question – Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you’d like to make?

Comments

The notion of the supported person’s pathway is positive and ensures the focus remains on the supported person.

Step 2 should make reference to re-ablement and intermediate care to address urgent need or times of crisis.

Step 3 of the person’s pathway – should include mention of risk assessment.

Step 4 of the person’s pathway – bullet point that mentions resources that will help deliver the person’s support plan should specifically mention inclusion of personal and community assets, including strengths and actions which can be utilised to achieve outcomes.

Step 7 – only describes the process of review. It should also indicate the ongoing monitoring of the plan, both financial and in terms of how the plan is achieving the outcomes. This should be re-emphasised in the roles and responsibilities.

It is felt that section 2 should acknowledge the wider legislative context e.g. Adults with Incapacity (S) Act 2000 and Mental Health (Care and Treatment)(S) Act 2003.

It would be useful to include a description of independent advocacy services in Table 2 – Roles and Responsibilities. There is a statement that The Professional
 Draft Statutory Guidance on Care and Support

Consultation Questions

Section 3: Values and Principles

Question 2a: Was this section of the guidance clear and easy to understand? (please tick)

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Question 2b: How useful did you find this section of the guidance? (please tick)

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Question 2c: Do you have any further comments on this section of the guidance?
Some advice to help you to answer this question – Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you’d like to make?

Comments

Clearly articulates statements of values and principles and the relationship between the two.

Greater clarity is required on the difference between collaboration and involvement as the definitions in the guidance are very similar.

Draft Statutory Guidance on Care and Support

Consultation Questions

Section 4: Eligibility and Assessment

Question 3a: Was this section of the guidance clear and easy to understand? (please tick)

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Question 3b: How useful did you find this section of the guidance? (please tick)

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Question 3c: Do you have any further comments on this section of the guidance?
Some advice to help you to answer this question – Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you’d like to make?

Comments

It was felt that this section did not clearly establish the relationship between needs, outcomes and risks and used these terms interchangeably. Suggest a diagram to aid understanding of this relationship.

Paragraph 23 – Not clear what is meant by ‘hidden needs’.

Paragraph 30 should cross reference intermediate care/re-ablement.
Paragraph 31 may read as though practitioners have permission to offer funding or resource to achieve outcomes which are beyond their eligible needs – this requires clarity.

See above for comment about the difference between collaboration and involvement.

Table 5 – bullet point 4 ‘views the supported person as a supported person in their own right with skills abilities and a role to play’, etc. Should this read ‘views the supported person as a citizen/individual in their own right’? Or something similar?

Section on self assessment should be linked more closely to collaboration/involvement and emphasis should be about self assessment contributing to full assessment, not as a starting point. Using terminology like ‘undertakes an assessment of their own needs’ suggests that this is a formal process with a recognised mechanism for doing it. This section should clarify that self assessment is about the individual formulating their own views and opinions about their needs, strengths, weaknesses, resources, etc which will all contribute to full assessment in collaboration with the practitioner.

Draft Statutory Guidance on Care and Support

Consultation Questions

Section 5 : Support Planning

This section of the guidance covered:

- general guidance on support planning
- risk
- resources
- the choices that must be made available to the supported person and
- information and support
Question 4a: Was this section of the guidance clear and easy to understand? (please tick)

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Question 4b: How useful did you find this section of the guidance? (please tick)

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Question 4c: Do you have any further comments on this section of the guidance?

Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you’d like to make?

Comments

The guidance describes and encapsulates what would generally be regarded as good practice in provision of information and support by the professional.

It might be useful to include reference to the SSSC Codes of Practice.

Para 49: It would be useful to have further guidance from the Government on the different approaches to “resource allocation”, and in particular a summary of the advantages and pitfalls of each. The three suggestions in the guidance are an equivalence model, a Resource Allocation System and a case-by-case approach. There have been cases in England where the RAS approach has been criticised for failing to provide a realistic indicative sum. If this model is one of the options for authorities, we should enquire whether there will be further guidance on how it should operate in practice?

The discussion of Option 2 appears to describe a process that is more complicated than it needs to be. Given that through an ISF the supported person can direct proportions of their budget to other providers would it not make more sense to see the ISF provider as a singular body. Doing so should not have any adverse impact on the supported person’s ability to exercise choice, control, flexibility and so on. The concept of the supported person nominating an independent body (i.e. not the LA) is important, but as it stands the guidance seems to muddy rather than clarify the exercising of that option.

As previously noted the relationship between needs and outcomes or the distinction between these is not clear particularly in paragraphs 64-66.

It is felt that further guidance and clarification is required on the differences between a 3rd party direct payment and an Individual Service Fund.

There is nothing in the guidance to address the potential procurement and employment law implications of local authorities administering a budget and
appointing employees/providers on an individual’s behalf. Information regarding this should be provided, or at the very least, the issue flagged up in the Guidance with advice on the approach authorities facing this problem should take.

**Draft Statutory Guidance on Care and Support**

Consultation Questions

Section 6: Monitoring and Review

**Question 5a: Was this section of the guidance clear and easy to understand?** (please tick)

Yes [ ] No [ ]

**Question 5b: How useful did you find this section of the guidance?** (please tick)

Very useful [ ] Quite Useful [ ] Not very useful [ ] Not at all useful [ ]

**Question 5c: Do you have any further comments on this section of the guidance?**

Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you’d like to make?

**Comments**

Clarity is required in relation to the distinction between reviewing and monitoring, although often packaged together these are two different processes with different mechanisms.

This section should provide guidance on frequency of reviews (i.e. that it should be determined and agreed by the level of risk, complexity of situation, etc)

This section should emphasise that where other formal reviews are required for a service user (CPA, CTO, AWI, ASP, etc) efforts should be made to integrate the process to reduce volume of reviews and ensure effective transfer of information.

Emphasis should be placed on the inclusion of other involved parties (family, carers, health providers, etc) in the monitoring and reviewing process.

Further guidance is required on how to build flexibility into the support plan and also more in depth information is required about financial monitoring requirements.
Draft Statutory Guidance on Care and Support

Consultation Questions

Section 7: Facilitating genuine choice for individuals

Question 6a: Was this section of the guidance clear and easy to understand? (please tick)

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Question 6b: How useful did you find this section of the guidance? (please tick)

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Question 6c: Do you have any further comments on this section of the guidance?

*Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you’d like to make?*

Comments

The guidance could be enhanced by discussion of the shift towards commissioning for outcomes and examples of best practice in that respect. Despite the initial statement that section 7 deals with the challenge of providing genuine choice, the actual ‘challenges’ are not discussed or addressed to any real extent.

The guidance suggests that local authorities should promote a variety of providers and should play the role of a facilitator of choice for individuals. What is not clear (and this links to para 59 as well) is whether it is permissible under option 3 in the 2013 Act (where the local authority arranges support for the supported person) for the authority to continue to procure services only from an agreed list of providers. The guidance in section 7 on commissioning of services suggests that that might be appropriate, and from discussions, this seems to be the approach of other local authorities. If this could be clarified, that would be helpful.
Draft Statutory Guidance on Care and Support

Consultation Questions

Section 8: The role of the NHS professional

Question 7a: Was this section of the guidance clear and easy to understand? (please tick)

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Question 7b: How useful did you find this section of the guidance? (please tick)

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Question 7c: Do you have any further comments on this section of the guidance?

Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you’d like to make? That are more appropriate for statutory guidance rather than Regulations?

Comments

This section of the guidance appeared to simplify what are very complex issues and did not address key tensions. Whilst clear and easy to understand the guidance leaves more questions than answers and appears somewhat removed from frontline practice.

Guidance on how to complete a support plan whilst identifying health care components would be helpful, if it is intended to monitor that part of the plan, as the guidance suggests.
Draft Statutory Guidance on Care and Support

Consultation Questions

Section 9.1: Children and Families

Question 8a: Was this section of the guidance clear and easy to understand? (please tick)

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Question 8b: How useful did you find this section of the guidance? (please tick)

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Question 8c: Do you have any further comments on this section of the guidance?

*Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you’d like to make?*

Comments

If we are not identifying any child/young person who is "automatically" ineligible to receive a service, with regard to "Professional discretion to limit choices available to individuals" (Para 62), is it appropriate for the professional judgements as described above to be taken within the context of Para 66 which relates to the exercise of a "duty of care" to refuse to fund a particular type of support where it is clear that the support choices in question will fail to meet the supported person's needs, or does the Guidance need to be more specific in regard to children/young people? It should perhaps identify the professional's obligation to exercise their duty of care and exercise professional judgement in relation to children deemed to be at a risk of harm (child's needs taking precedence over parental rights and responsibilities), and in doing so, to determine whether or not is is appropriate (taking into account the individual circumstances of each case) to offer the options available through self directed support?

Given the primacy of Education in the lives of children and young people, and the fact that an education professional will act as Named Person, it is surprising that Education were not addressed in the guidance in the same way that NHS professionals have been (e.g. discussion about joint funding). Should this section also mention parental responsibilities in relation to young people in full time education? The brief discussion of incapacity in the Children and Families section should be linked better/referred to other parts of the guidance which address this issue e.g. 9.2 – otherwise the discussion in 9.1 is so limited as to be unhelpful.
Draft Statutory Guidance on Care and Support

Consultation Questions

Section 9.2 : Supported decision-making and circles of support

Question 9a: Was this section of the guidance clear and easy to understand? (please tick)

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Question 9b: How useful did you find this section of the guidance? (please tick)

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Question 9c: Do you have any further comments on this section of the guidance?

Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you’d like to make?

Comments

The role of independent advocacy should be included with this section. There seems to be an artificial separation between use of circles of support and appointment of people through AWI routes – there might be both in place for supported individuals. The guidance places a very strong emphasis on agreement of the supported person to a circle of support. We would not wish to minimise the importance of this but in practice circles of support have been used where people may not be able to give that agreement. Potentially this creates a tension between following the guidance and working with practice on the ground. This section places a stronger emphasis on pursuing formal routes through AWI which does not fit other interpretations e.g. use of Section 13ZA or the principles of the AWI (S) 2000 Act, particularly in relation to considering the least restrictive options. There is concern about the lack of clarity here and local authorities require statutory guidance to clearly outline the interface between the 2013 Act and the 2000 Act.

Paragraph 113 should be amended to highlight that a formal assessment of capacity and application for formal proxies may require assessment by a medical practitioner; it implies that this is a straight forward part of the social work process.

Concern around lack of clarity in relation to what could be considered ‘reasonable steps’ in paragraph 107.

Where there is ‘informal’ support with decision making it is good practice to have some sort of working agreement which outlines roles, responsibilities and limits to this arrangement. The guidance does not appear to be detailed enough in relation to this.
Draft Statutory Guidance on Care and Support

Consultation Questions

Section 9.3: Carers

Question 10a: Was this section of the guidance clear and easy to understand? (please tick)

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
</tr>
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<tr>
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Question 10b: How useful did you find this section of the guidance? (please tick)

<table>
<thead>
<tr>
<th>Very useful</th>
<th>Quite Useful</th>
<th>Not very useful</th>
<th>Not at all useful</th>
</tr>
</thead>
<tbody>
<tr>
<td>☐</td>
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</table>

Question 10c: Do you have any further comments on this section of the guidance?

Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you’d like to make?

Comments

The Act identifies that there are duties to both consider the assessment conclusions and to consider whether the carer would benefit from some form of support; however, the type of support provided is a power which LAs can exercise. In this respect there is likely to be significant variation in what forms of support LAs across Scotland deem appropriate to provide. In this context guidance on “funded services or support” could be enhanced so that there is potentially more equity with regard to discharging the spirit of the guidance (it is acknowledged that this is fleshed out a little further in Table 9). A version of the ‘coming alive’ discussion of the options might be useful to include in Section 5 as well as here. Whilst there would be agreement with the last sentence - “Carers need not, therefore, undertake a formal assessment in order to receive some kind of support from the authority” – the guidance should make more explicit what forms the support outwith assessment should reasonably take.

Should there be some reference to young carers and risks to carers?
Draft Statutory Guidance on Care and Support

Consultation Questions

Section 9.4: Direct payments

Question 11a: Was this section of the guidance clear and easy to understand? (please tick)

Yes ☒ No ☐

Question 11b: How useful did you find this section of the guidance? (please tick)

Very useful ☒ Quite Useful ☐ Not very useful ☐ Not at all useful ☐

Question 11c: Do you have any further comments on this section of the guidance?

Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you’d like to make?

Comments

Lack of clarity around third party direct payments and how these differ from Individual Service Funds; is a third party direct payment therefore Option 2?

Paragraph 125 does not appear to make sense, in particular the use of ‘supported person’ as underlined: ‘the supported person can ask for their direct payment to be paid to a third party – a supported person or an organisation – and administered on the supported person’s behalf.’

Paragraph 127 – use of holiday and respite implies specific types of service when the other bullet points remain fairly open and flexible. The feeling is that this should use terminology such as ‘creative break’ or equivalent.

It would be helpful if financial monitoring guidance is provided for all options as surely the LA will have to monitor all expenditure - not just Direct Payments. This section refers to the CIPFA Guidance which was last updated in 2007 – we would question if this reflects the light touch financial monitoring required in terms of SDS. This guidance was used as the basis for current direct payments.

Paragraph 130 does not clarify which responsibilities sit with the practitioner and which sit with the DP recipient.

We think we’d need to be careful in our definition of ‘penalised’ here. It's already noted that a DP is not a benefit or a gift - it’s there for provision of agreed services to meet defined needs. It would not be penalising them to withdraw the DP if equivalent services continued to be provided, but it may impact on their ability to make a choice. That shouldn’t necessarily be seen as a penalty if it’s in their best interests.
Draft Statutory Guidance on Care and Support

Section 9.5: Wider legal duties and strategic responsibilities

Question 12a: Was this section of the guidance clear and easy to understand? (please tick)

Yes [ ] No [ ]

Question 12b: How useful did you find this section of the guidance? (please

Very useful [ ] Quite Useful [ ] Not very useful [ ] Not at all useful [ ]

Question 12c: Do you have any further comments on this section of the guidance?

Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you’d like to make?

Comments

Re-ablement, urgent and intermediate care services should be excluded from options 1 and 2; there are concerns about delays in care provision and poor decision making. These services should be seen as an interim measure allowing for recovery/rehab or full assessment, followed by the choice of all 4 options if still eligible for support.

We acknowledge there are a number of complexities around extending direct payments into care homes, however we cannot make sense of how residential care can be exempt from SDS, when residential care is a service which, in an outcome focussed system, would not be considered until near the end of the process. We feel it is misleading to state that residential care is excluded or exempt from SDS, when in fact it is the individual requiring residential care that is excluded from the 4 SDS options. Stating that residential care is excluded or exempt forces us back into a position of identifying a service or resource at an early stage – a service led approach. Fundamentally we feel that people should be able to purchase residential care with their individual budget but cannot see how this could be possible while we have the current National Care Home Contract and existing charging policies. We also would have concerns that Care homes may consider the individual to be self funding and charge them more, putting pressure on local authority budgets.

Guidance on how to produce a creative support plan that includes an element of personal and or nursing care that is exempt from charge should be developed. An alternative may be for the Scottish Government to provide guidance on a % allocation or flat rate amount of an individual budget that may be in respect of FPNC similar to the flat rate set for self funders in care homes.

We also feel that greater clarity and guidance is required in relation to how other shared living services are dealt with – such as supported accommodation, very sheltered housing. These services bring complexities and risks associated with economies of scales and housing support.
Draft Statutory Guidance on Care and Support

Consultation Questions – General Questions

The Guidance document as a whole

Question 13: Do you have any further general comments on the guidance?
For example, are there any gaps in terms of the topics covered by the guidance? Are there any major changes that you would recommend? Do you have any comments on the style and layout of the guidance, or the language used in the guidance?

Comments

Reference to all care groups which community care services are obligated to provide services to should be included and made explicit throughout the document. This currently reads as a Scottish Government initiative which is predominantly aimed at disabled and older people; this is not in the spirit of Self-directed Support. The statement of intent (para 5) should be reconsidered as it suggests this is aimed at disabled people.

Perhaps there should be a statement about responsibilities on the LA to consider best value when considering support plans and recognising the pressures on LA budgets.

Positive risk taking is mentioned throughout the guidance but there is a lack of clarity around what this means.

The costs and benefits arising from this guidance

Question 14: Do you have any comments on the financial costs or benefits of the requirements set out in the guidance?
Can you identify any financial costs or benefits to individuals, local authorities, health boards, providers or any other person or organisation affected by the guidance. In considering the costs and benefits you may wish to consult the Business Regulatory Impact Assessment published for the Social Care (Self-directed Support) (Scotland) Act available at the following hyperlink: http://www.scotland.gov.uk/Publications/2012/03/5525
We plan to update the BRIA in light of the comments and information from this consultation.

Comments

If there were to be a blanket policy around allowing employment of family members we would expect to see significant pressure on local authority budgets. We feel the guidance should be clearer around this issue and what might be considered exceptional circumstances.

Costs associated with transformation, dual running costs as traditional services destabilise.
The equality and human rights impacts of the guidance

Question 15 (a): Do you have any views on the impact of the guidance on any or all of the following equality categories:
   i) age;
   ii) disability
   iii) gender;
   iv) lesbian, gay, bisexual and transgender;
   v) race, and;
   vi) religion and belief

Some advice to help you to answer this question - By “equality impacts” we mean whether or not the guidance will affect certain groups in a positive or a negative way. In considering the impacts you may wish to consult the Equality Impact Assessment published for the Social Care (Self-directed Support) (Scotland) Act available at the following hyperlink:
http://www.scotland.gov.uk/Publications/2012/03/9876
We plan to update the Equality Impact Assessment in light of the comments and information from this consultation.

Comments

The guidance will have, broadly speaking, a positive impact on protected groups.

There may be a negative impact, financially and in terms of true choice, on older people. Until further clarity is provided on exemptions from SDS and charging policy the extent of this is unknown.

Question 15 (b): Do you have any views on the impact of the guidance on human rights?

For more information about human rights please see the Scottish Human Rights Commission’s website at:
http://www.scottishhumanrights.com/abouthumanrights/whatarehumanrights

Comments

The guidance will promote various aspects of the UNHCR.
Consultation Questionnaire

Draft Regulations
Consultation Questions

Question 1: What are your views on Part 2 of the draft Regulations (calculation, payment and termination of direct payments)?

Comments

Reg 3(1): allows for means testing in relation to direct payments. Local authorities can assess a direct payment user’s “ability to contribute to the cost of securing the support”. The wording of this provision is too vague, and there is no guidance to support it. What does “ability to contribute” mean? Is there scope to consider the means of people other than the direct payment user in “ability”? To what extent does this provision overlap with the existing power given to local authorities under the 1968 Act, to charge service users as long as it is “reasonably practicable” for them to pay? “Ability” seems wider than “reasonable practicability”, but it is not clear if that was intended.

We welcome the move towards contributions as opposed to charging. We also welcome the ability to pay net of contributions but unsure of the ability for the supported person to elect to receive the payments gross. We feel this would be open to abuse and gives no incentive for the supported person to make the contribution. Further detail is needed on what happens if a service user receives a gross payment. For example, when do they need to pay back their contribution? What happens if they don’t?

Payments by instalments – feeling that this should clarify both options (lumps sums and instalments) or a mix of options (some lump sum with the rest paid in instalments)

Clarity required on the difference between third party direct payment and ISF.

Reg 7(1)(b): enables a local authority to terminate a direct payment where it has been used (wholly or partly) for some purpose other than to secure the provision of the support to which it relates. The statutory guidance makes it clear that support plans will be outcome based, therefore it appears that service users have quite a high degree of freedom in choosing how to spend their direct payments. But how broadly/narrowly should this provision be interpreted? E.g. could a service user use a direct payment for a holiday to Disneyland, where one of their outcomes was exposure to greater opportunities away from home? The guidance suggests that the supported person can use the resource in whichever way they wish, provided that it will secure the provision of support agreed with the council and provided that it meets the outcomes contained in the support plan (para 55). At para 124 of the guidance, direct payments are described as being “flexible”, while also relating in some way to the outcomes set in the support plan. However, local authorities do retain some discretion to refuse to fund particular types of support, albeit that it is recommended that they take care in doing so (paras 64-66). It may be useful to have some case study examples of when expenditure was deemed to fall out with a support plan. Particularly given that the repayment provision is triggered where even part of the direct payment has been used inaccurately.
Question 2: What are your views on Part 3 of the draft Regulations (appropriate/inappropriate circumstances for the employment of close relatives)?

Comments

Clarity required around the terminology in g, h, and i. Particularly definition of palliative care.

Local authorities need to have some discretion around the exemptions of family members, specifically Welfare Guardians, powers of attorney, etc. It is suspected that in many cases the only person who could provide care to an individual may well also be the only person able to take on the role of proxy.

We felt this part of the regulations were unbalanced, with section 9 seemingly vague and open to interpretation, and section 10 being overly prescriptive.

It is not clear whether the Government has considered the impact of this on section 12A(3) of the 1968 Act, which removes from the scope of the duty to carry out a carer’s assessment carers who are working under a contract of employment. Would there need to be a specific carve-out?

Question 3: What are your views on Regulation 11 which deems individuals who are placed under a variety of criminal justice orders to be ineligible to receive direct payments?

For example, is it appropriate to impose the exclusions listed in Regulation 11? Are there any persons not listed in regulation 11 to whom it would be inappropriate to offer the option of a direct payment?

Comments

Ineligibility for direct payments no longer applies to people subject to Compulsion Orders or Compulsory Treatment Orders, or people incapable of management of a direct payment with/without assistance. This may cause problems in practice if a service user who is unable to manage direct payments and who lacks capacity is entitled to this SDS option.

Question 4: What are your views on restricting access to direct payments for those who are homeless, those who are fleeing domestic abuse or those who require support in relation to drug or alcohol addiction?

Comments

Services for which direct payments are not available – the feeling is that there should be some discretion here and that decision making should be based on risk assessment of individual situations. Particularly in relation to individuals fleeing domestic abuse, whereby the provision of a direct payment may be helpful and there is low risk and support in relation to drug or alcohol dependency.

There may be exceptional circumstances where someone would require residential care in excess of 4 weeks that is not long term residential care (e.g. informal carer becomes temporarily incapacitated).
Question 5: What are your views on restricting access to direct payments in relation to the provision of long-term residential care?

This question was raised during the initial consultations on a draft SDS Bill. The Scottish Government would like to invite detailed views before making a final decision prior to the laying of the Regulations before the Scottish Parliament. Should the restriction be removed from the final regulations, thereby allowing direct payments for residential care? Or should it be retained? Please provide reasons as to your support or opposition to requiring authorities to provide direct payments for residential care.

Comments

To enable true choice and control it appears incongruent to exclude a specific service ‘type’; this creates inequity for a particular group of people requiring support. However, it is acknowledged that attempts to include it would present significant challenges in practice, some of which relate to national care home contracts and free personal care.

Question 6: The draft Regulations do not specify circumstances where the direct payment option should be unavailable for care and support to children/families. Should there be specific restrictions on choice of support in relation to children/families support (i.e. support provided under Section 22 of the Children (Scotland) Act 1995) and should these restrictions apply to the direct payment only, or to other options as well?

Comments

It may be unhelpful to identify a description or set of circumstances of a child/young person that should indicate ineligibility to receive a direct payment or to identify services for children, young people and their families for which direct payments should not be available. However there are clearly circumstances in which it would not be appropriate to enable the parents/carers of a child to direct services whether through a direct payment or an individual service fund. Typically in such situations, a child/young person (with/without disability) may have been placed on the Child Protection Register and/or may become subject to Compulsory Measures of care under Sec 70. C (Sco) Act 1995 and it is likely that a parent/carer's failure to discharge their parental responsibility in respect of their child, whether through omission or commission has been a relevant factor in the assessment of need/risk of harm.

In such circumstances as described above, it would appear more appropriate to enable professional judgement in determining the extent to which the different options for self directed support are made available. Any such judgement would need to be taken to promote and safeguard the child's interests which are of paramount importance and would be required to take account of the appropriateness or otherwise of enabling a parent/carer to exercise "control" in regard to the commissioning and directing of services. In this context, where there is demonstrable evidence that parent/carers have failed to protect their child's best interests, the provision of services as per Option 3 is likely to be necessary.
Although reference is made to the provision of services under Sec 22 (Sco) Act 1995, there are frequently situations where early in the assessment process a child may not (yet) be subject to compulsory measures but where there are concerns relating to a risk of harm, therefore it would not be viable to identify that only children subject to Compulsory Measures of care should be excluded for the options available through self directed support.

**Question 7: Do you have any further comments on the draft Regulations?**

For example, are there any gaps in terms of the topics covered by the Regulations? Are there any major changes that you would recommend? Are there any topics that are more appropriate for statutory guidance rather than Regulations?

**Draft Regulations**

**Consultation Questions – General Questions**

The costs and benefits arising from these regulations

**Question 8: Do you have any comments on the financial costs or benefits of the Regulations?**

Can you identify any financial costs or benefits to individuals, local authorities, health boards, providers or any other person or organisation affected by the Regulations. In considering the costs and benefits you may wish to consult the Business Regulatory Impact Assessment published for the Social Care (Self-directed Support) (Scotland) Act available at the following hyperlink: [http://www.scotland.gov.uk/Publications/2012/03/5525](http://www.scotland.gov.uk/Publications/2012/03/5525)

We plan to update the BRIA in light of the comments and information from this consultation.

**Comments**
The equality and human rights impacts of the regulations

Question 9 (a): Do you have any views on the impact of the Regulations on any or all of the following equality categories:

i) age;
ii) disability
iii) gender;
iv) lesbian, gay, bisexual and transgender;
v) race, and;
vi) religion and belief

By “equality impacts” we mean whether or not, and in what ways, the Regulations will affect certain groups, and whether they will impact on those groups in a positive or a negative way. In considering the impacts you may wish to consult the Equality Impact Assessment published for the Social Care (Self-directed Support) (Scotland) Act 2013, available at the following hyperlink:
http://www.scotland.gov.uk/Publications/2012/03/9876

We plan to update the Equality Impact Assessment in light of this consultation.

Comments

Question 9 (b): Do you have any views on the impact of the Regulations on human rights?

For more information about human rights please see the Scottish Human Rights Commission’s website at:
http://www.scottishhumanrights.com/abouthumanrights/whatarehumanrights

Comments