

# **SOCIAL CARE (SELF-DIRECTED SUPPORT)(SCOTLAND) ACT 2013**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### ***Section 1 – General principles***

4. **Section 1** places a duty on an authority to have regard to certain general principles in carrying out its functions under the Act, Part 2 of the 1968 Act (with the exception of the provisions mentioned in subsection (5)) and sections 22 to 24 of the Children (Scotland) Act 1995. This means the principles will apply to authorities' social welfare responsibilities (the provision of care and support) to both adults and children.
5. The principles provided under subsections (2), (3) and (4) are, in short-hand terms, related to "involvement", "informed choice" and "collaboration". Under the principle provided in subsection (2) ("involvement") a person must have as much involvement in the assessment of their social care needs and the provision of support or services as the person wishes. Under the principle provided in subsection (3) ("informed choice") a person must be provided with reasonable assistance in order that they can express their own views about the choices available to them and make an informed decision about their preferred choice. Under the principle provided in subsection (4) ("collaboration") authorities are required to collaborate with a person in both the assessment of the person's needs and the provision of support or services following the assessment.
6. When local authorities are carrying out their functions in relation to the provisions set out in subsection (5), they do not have to have regard to the principles in this Act (nor offer the options for self-directed support).
7. Subsection (6) clarifies various references which appear in the principles. References to "assessment of a person's need" mean references to assessments under sections 12A, 12AA of the 1968 Act or, as the case may be, sections 23(3) or 24A of the 1995 Act. References to the "provision of support for a person" are references to the provision of section 2(4) in the Act. References to the "provision of services for a person" are references to the provision of community care services under section 12 of the 1968 Act or, as the case may be, the provision of services under section 22 of the 1995 Act.

#### ***Section 2 –Further general principles applicable to this Act***

8. **Section 2** places an additional duty on a local authority to take reasonable steps to facilitate further principles when carrying out its functions under the Act. These principles – for persons to have their right to dignity and their right to participate in community life respected – reflect core principles of independent living. A further element of independent living – control – is reflected in the provisions of the Act enshrining choice and in the general principle in section 1(2).

### **Section 3 – Support for adult carers**

9. **Section 3** provides a power to authorities to provide support to a carer following an assessment completed under section 12AA (carers assessments relating to carers of those aged 18 or over) of the 1968 Act or section 24 (carers assessments relating to carers of those under the age of 18) of the 1995 Act. Under both provisions a carer who provides care by virtue of a contract of employment or as a volunteer for a voluntary organisation is ineligible for a carers assessment. As a result, such a carer will not be eligible for support under this provision.
10. Subsection (2) requires the authority to consider the outcome from the relevant assessment and to decide if the carer has needs in their own right as regards their ability to care. Subsection (3) requires the authority, where it has decided that the adult has needs, to consider whether those needs could be satisfied fully or in part by support. The definition of “support” in subsection (5) means that this is support that would help the adult to care or to continue in their role as an unpaid carer. If an authority decides that those needs could be met by support, subsection (4) provides a discretionary power to the local authority to provide support to the carer.
11. Subsection (5) provides definitions of “person cared for” and of the “support” which could be provided to a carer under subsection (4). That support is any form of services or assistance which will help the adult to provide, or continue to provide, care. This is distinct from any need which the carer has for community care services (i.e. needs they have as an individual and not in their role as a carer), which would be assessed separately under section 12A of the 1968 Act.
12. Where the local authority has decided to provide such support section 7 would apply, meaning that the carer would be given the choice of the four options for self-directed support set out in section 4.

### **Sections 4 to 14 – Options for self-directed support**

#### **Section 4 – Options for self-directed support**

13. **Section 4(1)** provides the four options for self-directed support, which will be available to individuals when they are assessed as needing care and support or support as an adult carer. The options are:

<i>Option 1</i>	The making of a direct payment by the local authority to the supported person for the provision of support.
<i>Option 2</i>	The selection of support by the supported person, the making of arrangements for the provision of it by the local authority on behalf of the supported person and, where it is provided by someone other than the authority, the payment by the local authority of the relevant amount in respect of the cost of that provision.
<i>Option 3</i>	The selection of support for the supported person by the local authority, the making of arrangements for the provision of it by the authority and, where it is provided by someone other than the authority, the payment by the authority of the relevant amount in respect of the cost of that provision.
<i>Option 4</i>	The selection by the supported person of Option 1, 2 or 3 for each type of support and, where it is provided by someone other than the authority, the payment by the local authority of the relevant amount in respect of the cost of the support.

14. **Section 4(2)** defines a “direct payment” as a payment of a relevant amount to the supported person for the purpose of enabling the person to arrange for the provision

of support by any person (including the authority). It explains the meaning of the term “relevant amount” (which is used in the definitions of all four of the self-directed support options) as the amount that the local authority considers a reasonable estimate of the cost of securing the provision of support for the supported person. It also provides that references to “supported person” and “support” must be read in accordance with sections 5, 7 and 8.

## **Sections 5 to 8 – Choice of options**

15. Sections 5, 7 and 8 apply to the three groups of supported people: adults assessed as requiring support under section 12A of the 1968 Act; adult carers; and children (and/or their families) receiving support under section 22 of the 1995 Act (which includes children who are carers). All three sections require the authority to give the supported person the opportunity to choose one of the options for self-directed support. All three sections require the authority to inform the supported person of the amount of each of the self-directed support options that they are choosing from. And all three sections clarify the authority’s duties where the person is deemed to be ineligible to receive direct payments.

## **Section 5 – Choice of options: adults**

16. Section 5 applies to adults provided with support by an authority following an assessment under section 12A of the 1968 Act (commonly known as a “community care assessment”) (subsection (1)).
17. Subsection (2) places a duty on the local authority to offer the four options to adults who have been assessed under section 12A of the 1968 Act as needing a service, unless that adult is ineligible for direct payments. The grounds for ineligibility for direct payments will be provided for in regulations made under section 15.
18. Subsections (3) and (6) make provision for what the local authority must do if they consider the supported person ineligible to receive direct payments. If the local authority deem the supported person ineligible for direct payments, the local authority is required to inform the supported person in writing and, if necessary, such other form as is appropriate of the reason why they are deemed ineligible and inform them that they may seek a review of that decision if there is a material change in their circumstances relevant to that decision (see section 12).
19. Subsection (3)(b) requires the authority to give the person a choice of the remaining eligible options for self-directed support (Options 2, 3 and, in so far as the person is eligible, Option 4).
20. Subsection (4) places a duty on the local authority to inform the supported person of (a) the amount of funding available under the options and (b) the period to which the funding relates.
21. Subsection (5) provides that that if the supported person makes no choice then they are deemed to have chosen Option 3, whereby the local authority selects the support and makes arrangements on the person’s behalf in order to meet their assessed needs. Subsection (7) provides that an individual is ineligible to receive direct payments if they are a person described in regulations under section 15(2)(a).

## **Section 6 – Choice of options under section 5: assistance**

22. Section 6 places a duty on authorities to take reasonable steps to identify and involve people to assist the individual to make a choice with regards to their options for self-directed support under section 5. The duty applies where it either appears to the authority that because of mental disorder the supported person would benefit from assistance in making decisions about relevant matters, or where it appears to the authority that because of difficulties in communicating due to physical disability

the supported person would benefit from receiving assistance to communicate their decisions about relevant matters.

23. Subsection (4) places a duty on the authority to take reasonable steps to enable the adult to choose from the four options for self-directed support set out in section 4 or, where they are deemed ineligible for direct payments, a choice of the options other than direct payments. This means that a local authority is obliged to allow someone to make a choice even if they have difficulties in doing so.
24. Subsection (5) places the further duty on the local authority to take reasonable steps to identify people who are able to assist the supported person and, if the supported person agrees to the relevant persons providing such assistance, to involve the relevant person or persons in assisting the supported person in making or communicating decisions relating to the supported person's options for self-directed support. The person or persons providing assistance may be relatives and friends of the individual but it may also include other persons who can assist via what is commonly known as a "circle of support". The requirement to have the agreement of the supported person makes it explicit on the face of the Act that section 6 applies only in relation to supported persons who have capacity, but due to mental disorder or difficulties in communicating, may require additional assistance in order to understand, arrive at or communicate their decisions about the options for self-directed support.
25. Subsection (3) sets out conditions which must be satisfied before subsections (4) and (5) can be applied. The duty should not be applied when there is a guardian, continuing attorney or welfare attorney with relevant powers present, or when an intervention order has been granted which relates to the provision of assistance with the assessment. Such an attorney or guardian (or individual empowered by an intervention order) would have the power to make self-directed support decisions on the adult's behalf (in accordance with the principles of the Adults with Incapacity (Scotland) Act 2000).
26. Subsection (6) provides definitions for the various terms used in subsections (1) to (5).

### **Section 7 – Choice of options: adult carers**

27. **Section 7** makes provisions with the same effect for adult carers as section 5 makes for adults as regards the choice of options for self-directed support (the procedure for which is set out in paragraphs 16 to 21 above). Section 7 applies where a local authority decides to provide support under section 3(4).

### **Section 8 – Choice of options: children and family members**

28. **Section 8** provides that the four options must be available to children, and/or their family, where a local authority decides to provide services under section 22 of the Children (Scotland) Act 1995. Provision of services under section 22 can involve a range of types of support and various categories of supported children including children who are carers, disabled children and any other child deemed to be "in need" within the definition of section 93(4) of the 1995 Act. Services under section 22 can also be provided to a member of the child's family.
29. **Section 8(2)** requires the authority to offer the four options to the "supported person" unless they consider the supported person ineligible to receive direct payments (as may be defined in regulations under section 15). If the authority consider that the supported person is ineligible to receive direct payments subsection (3)(a) requires the authority to inform the supported person of the reason for that decision and to inform them that they can request a review of the decision. As with services for adults, where this is the case the authority is required to give the person a choice of the other options for self-directed support (subsection (3)(b)).

30. Subsection (4) places a duty on the local authority to inform the supported person of the amount of funding available under the options and the period to which the funding relates.
31. Subsection (9) provides definitions of “appropriate person” and “supported person” which are important to the wider operation of this section. In general terms an “appropriate person” is a person with parental rights and responsibilities, or their equivalent under the laws of England, Wales and Northern Ireland. The definition under subsection (9) sets out the relevant enactments which provide for those rights.
32. It is the “supported person” who has the ability to make the choice under subsection (2). The supported person is first of all identified on the basis of whether they receive any support under section 22 of the 1995 Act (which may be whole or partial). If the supported person is a child (i.e. under 18) who is either 16 or 17 they will make the choice. If the supported person is a child who is under 16 it is an “appropriate person” who makes the choice. Under subsection (6) the appropriate person must, so far as practicable and taking account of the maturity of the child, give the child an opportunity to indicate if they wish to express any views about the choices available, and if the child so wishes, provide that opportunity and have regard to their views. If the supported person is an adult, then that person makes the choice.
33. As with the provisions on adults, subsection (7) provides that when the supported person does not make a choice they are deemed to have chosen option 3 whereby the local authority selects and makes arrangement for the provision of services.

## **Section 9 – Provision of information about self-directed support**

34. **Section 9** imposes certain duties on the local authority to provide information and advice about the options (available under section 4) and the provision of support under any of those options. These duties are imposed where under section 5, 7 or 8 a person is given the opportunity to choose an option for self-directed support.
35. **Section 9(2)(a)** places a duty on the local authority to explain what each option means in practice to the person. An example may be the opportunities and responsibilities that go with the option. Subsection (2)(b) requires the local authority to provide the person with information about how they might manage their support after they have chosen their preferred option. Subsection (2)(c) requires the authority to provide the person with information about persons who can provide help or further advice to them to help them to choose an option. This includes sources of advice or information other than the authority itself. In practice this will include organisations known as direct payment or self-directed “support organisations”. Subsection (2)(d) requires the authority to provide the person with information about providers of independent advocacy services where they consider it is appropriate to do so. Subsection (3) requires the authority in all three instances to provide the relevant information both in writing and, where appropriate, in alternative formats appropriate to the person’s communication needs.

## **Section 10 – Provision of information: children under 16**

36. **Section 10** places a duty on the local authority to give information to a child who is making or, in relation to whom an appropriate person is making, a choice under section 8. The information given to the child is an explanation of, and information relating to, the options for self directed support. The duty applies in so far as practicable and taking account of the maturity of the child and the information should be given in a form that is appropriate to the child.

## **Section 11 – Local authority functions**

37. **Section 11** sets out a local authority’s functions when a choice is made under section 5, 7 or 8.



- 38. Subsection (2) requires the authority to give effect to the option selected by the person under section 4 and accompanying section 5, 7 or 8.
- 39. Subsection (3) provides that a local authority has fulfilled its duty to provide support under either the 1968 Act or the Children's (Scotland) Act 1995 when it has offered the options as set out in section 4 and when it has given effect to the chosen option.
- 40. Subsection (4) provides that compliance with subsection (2) does not extinguish any other function of a local authority. It is similar to provision made by section 12C of the 1968 Act (to be repealed by section 25 of the Act). If for example, a person's needs were not being met by the support they were being provided a local authority's duty has not been extinguished by virtue of their already having provided support. In particular subsection (4)(b) states that the exercise of an authority's power to make available assistance in cash to or in respect of the person in an emergency persists.

## **Section 12 – Eligibility for a direct payment: review**

- 41. [Section 12](#) places a duty on the local authority to review their decision (on the request of the supported person) to deem a person ineligible for a direct payment where there is a material change in the circumstances which led to the person being deemed to be ineligible.

## **Section 13 – Further choice of options on material change of circumstances**

- 42. [Section 13](#) places a duty on the local authority to offer the supported person the opportunity to change their choice of the options set out in section 4. This duty applies after an individual has made a choice and where the local authority becomes aware of a material change in the person's circumstances after the choice has been made. This could, for example, cover the situation where someone has received a direct payment, has managed the direct payment with assistance from a family carer, but where the carer is no longer able to provide this assistance. In such circumstances the individual must then be offered a choice once again (subsection (2)). Subsection (3) provides that the authority and the person may agree additional circumstances under which the opportunity to review might apply (for example, by agreeing to an annual review).

## **Section 14 – Power to modify [section 4](#)**

- 43. [Section 14](#) provides for a regulation-making power for Scottish Ministers to modify the four options and, in so far as necessary, to modify the accompanying section 5, 7, 8, 15(2)(b) and 23(2) in consequence of any changes made to section 4.

## **[Sections 15 to 16](#) – Direct payments**

### **Section 15 – Power to make further provision about direct payments**

- 44. [Section 15\(1\)](#) provides for Scottish Ministers to make regulations about direct payments and the provision of support to which they relate.
- 45. Subsections (2)(a) to (j) set out specific powers included within the power in subsection (1).
- 46. Subsection (2)(a) provides the power to specify descriptions of persons who will be ineligible for direct payments. This will inform the definition of ineligibility for direct payments throughout the Act. Section 5(7) states for the purposes of section 5 that a person is ineligible for direct payments if they are of a description prescribed in regulations (under this power) and that definition is applied to the whole Act by section 24.
- 47. Subsection (2)(b) provides the power to specify circumstances where the local authority will not be required to offer the supported person option 1 (a direct payment) or option

4 so far as it relates to option 1. This would include, for example, excluding a direct payment from being used to secure a particular service.

48. Subsections (2)(c) to (e) provide power to prescribe how direct payments are paid, circumstances in which a contribution to the cost of support may be required and how individuals are assessed to ascertain the individual's ability to contribute. They also provide power to describe how the repayment of a direct payment may be made following the assessment or reassessment of an individual's ability to contribute. For example, enabling deduction from direct payments, separate repayment or payment by instalments.
49. Subsection (2)(f) provides circumstances that may be specified where a local authority may, must or may not terminate a direct payment.
50. Subsection (2)(g) gives power to set out the circumstances when the local authority would be able to make a direct payment to a person other than the supported person. Subsection (2)(h) gives power to specify persons to whom such direct payments may not be paid.
51. Subsection (2)(i) and (j) provide that regulations may set out descriptions of persons who are prohibited from providing support to which a direct payment relates, other than where specified circumstances apply and where specified conditions have been met.

## **Section 16 – Misuse of direct payment: recovery**

52. **Section 16** provides for the local authority to require repayment of all or part of the direct payment from the supported person if they have used all or part of the direct payment on things other than the assessed services or support required or where the person has contravened any regulations made under section 15.

## **Sections 17 to 20 – Local authority functions**

### **Section 17 – Assessments under section 12A of the 1968 Act: assistance**

53. **Section 17** inserts section 12AZA after section 12A of the 1968 Act. It applies where the authority is assessing a person's needs under section 12A of the 1968 Act. It is similar to, although at an earlier stage than, the duty under section 6 requiring assistance to an adult making a choice of an option for self-directed support.
54. Section 12AZA places a duty on authorities to take reasonable steps to identify and involve people to assist the individual where either it appears that because of mental disorder the supported person would benefit from assistance in relation to the carrying out of the assessment, or where it appears that because of difficulties in communicating due to physical disability the supported person would benefit from receiving assistance to communicate in relation to the carrying out of the assessment.
55. Subsection (4) places a duty on the local authority to take reasonable steps to identify people who are able to assist the supported person and, if the supported person agrees to the relevant persons providing such assistance, to involve the relevant person or persons in assisting the supported person in relation to the carrying out of the assessment or communicating in relation to it. The person or persons providing assistance may be relatives and friends of the individual but it may include other persons who can assist via what is commonly known as a "circle of support". The requirement to have the agreement of the supported person makes it explicit on the face of the Act that section 12AZA applies only in relation to supported persons who have capacity, but due to mental disorder or difficulties in communicating, may require additional assistance in order to understand, arrive at or communicate their decisions about the options for self-directed support.
56. Subsection (3) sets out conditions which must be satisfied before subsection (4) can be applied. The duty should not be applied when there is a guardian, continuing attorney

or welfare attorney with relevant powers present, or when an intervention order has been granted which relates to the provision of assistance with the assessment. Such an attorney or guardian (or individual empowered by an intervention order) would have the power to make self-directed support decisions on the adult's behalf (in accordance with the principles of the Adults with Incapacity (Scotland) Act 2000).

57. Subsection (5) provides definitions for the various terms used in subsections (1) to (4).

### **Section 18 – Power to charge for services provided under section 3**

58. **Section 18** amends section 87 of the 1968 Act (authorities' power to charge for services or support). This introduces a power to local authority to charge carers for the support provided to them under section 3 of the Act.. It has the effect that Scottish Ministers can regulate how this power is used by authorities. For example Scottish Ministers could use regulations to specify in what circumstances an authority is permitted to charge carers for the support they receive under section 3 of this Act.

### **Section 19 – Promotion of options for self-directed support**

59. **Section 19(1)** places a duty on a local authority to take steps to promote the options available to individuals.
60. Subsection (2) places a specific duty on the authority to promote both a variety of providers of support in the local area and a variety in the types of support provided by those providers and by the local authority itself. The purpose of this provision is to encourage a range of services from which supported persons can choose from.

### **Section 20 – Delegation**

61. **Section 20** amends section 15 of the Community Care and Health (Scotland) Act 2002. The effect is that Ministers can lay regulations which prohibit delegation of functions which would otherwise be permitted to be delegated by a local authority entering into an arrangement in accordance with section 15 of the 2002 Act. A prohibition under the new power in section 20 would state that certain functions may only be delegated where the arrangement entered into also delegates the appropriate self-directed support duties in the Act.

### **Sections 21 to 29 – General**

#### **Section 21 – Guidance and directions**

62. **Section 21(a)** amends section 5(1) of the 1968 Act in order to require authorities to perform their functions under this Act under the general guidance of Scottish Ministers. Paragraph (b) amends section 1B of the 1968 Act to enable Scottish Ministers to issue directions to authorities, either individually or collectively, as to how they are to exercise their functions under this Act.

#### **Section 22 – Regulations: general**

63. **Section 22** provides for general ancillary powers to the other regulation making powers under the Act. In particular it allows the regulations to make different provision for different cases and to make such ancillary provision (i.e. supplementary, incidental, consequential, transitory and transitional provision and savings) as the Scottish Ministers consider appropriate. Subsections (2) and (3) set out the Parliamentary procedure to which regulations will be subject. Subsection (4) places a duty on Scottish Ministers to consult before laying regulations made under section 14 or 23.



### **Section 23 – Power to modify application of Act**

64. **Section 23 (1)** provides a power to Scottish Ministers to make regulations which specify circumstances when the duties on the local authority to give the supported person a choice of the four options will not apply. Subsection (2) provides that in the event that the power to disapply the option is used by Scottish Ministers they must include a provision deeming a person to have chosen Option 3. This places an important restriction on the regulation-making powers of Ministers, preventing them from removing all 4 of the options of self-directed support by means of regulations. Subsection (3) provides that such regulations may include provision for or in connection disapplying or modifying any other section in consequence of this.

### **Section 24 – Interpretation**

65. This section defines terms that are used frequently in the Act. In particular “community care services” has the meaning given by section 5A of the 1968 Act except that it does not include a reference to services under any of the provisions mention in section 1(5) of the Act: sections 27 to 27B, 28 and 29 of the 1968 Act.

### **Section 25 – Consequential repeals**

66. This section repeals sections 12B and 12C of the 1968 Act which are replaced in substance by the power to make regulations under section 15, and the provisions of section 16, of this Act.

### **Sections 26 and 27 – Ancillary provision and Transitional provision etc.**

67. These sections give the Scottish Ministers the power to make consequential, supplemental, incidental, transitional, transitory or saving provisions by order for the purpose of giving full effect to the Act. Under section 26 any order which makes textual amendments to primary legislation will be subject to the affirmative procedure, otherwise an order will be subject to the negative procedure. Orders under section 27 will be subject to the negative procedure.

### **Section 28 – Commencement**

68. **Section 28(1)** provides for certain provisions of the Act to come into force on the day after Royal Assent. Subsection (2) gives power to Ministers to appoint a day for the coming into force of the other provisions of the Act. Subsection (3) provides that a commencement order may include transitory, transitional or saving provision.

### **Section 29 – Short title**

69. **Section 29** gives the short title of the Act.