Social Care (Self-directed Support) (Scotland) Bill

The Royal College of Nursing Scotland

1. Are you generally in favour of the Bill and its provisions?

The RCN appreciates that self-directed support (SDS) for social care has the potential to be an effective lever, in certain circumstances, to enable people to sustain or regain their independence, which in turn can improve their health and wellbeing. As such, we are supportive of the principles behind the Bill of promoting service user independence and participation in decision-making. However, as we outline in our response, we have some concerns about the impact of the Bill in practice.

The Social Care (Self-directed Support) (Scotland) Bill as currently drafted does not contain a provision that extends the provision of SDS to the NHS. However, section 18 of the Bill does provide for delegation of SDS duties alongside the delegation of social care functions to the NHS (as is currently taking place in Highland). Further, the 2010 Self-Directed Support: A National Strategy for Scotland clearly sets out the Scottish Government’s intention for the principles of SDS to be widened from the social care sector into health. It is on the basis of possible delegation of SDS duties to the NHS through the Bill, the Government’s intention to expand SDS into health in the future, and the Government’s plans for closer integration of adult health and social care that the RCN is providing comment on specific provisions of the Bill (set out below). However, we do believe that the consequences of any future duty on the NHS to provide SDS for health services deserve a separate consultation and full scrutiny by the Scottish Parliament.

Section 8 – Provision of information about self-directed support

The legislation provides that local authorities must give the person who is considering SDS the necessary information to make an informed choice. This includes “an explanation of the nature and effect of each of the options for self-directed support”. However, the RCN notes that the policy memorandum (paragraph 26) stresses that individuals and families “must understand the responsibilities that come with the choices available to them, particularly in managing and choosing to take risks”. This appears to the RCN to be a crucial element of the decision-making process and one that would require skilled staff to facilitate. We believe that there should be exploration of whether the intent with regards individuals’ understanding and taking ownership of the risks associated with SDS as laid out in the policy memorandum is reflected in the wording of the Bill.

Section 18 - Delegation

Section 18 provides for delegation of SDS duties and principles where a local authority delegates some or all adult or child social care responsibilities to NHS bodies. The RCN understands that this transfer of duty would only relate
to the meeting of assessed social care needs as set out under the 1968 Act, not to the meeting of health needs.

What constitutes a social care need may become ever more difficult if how we think about ‘care’ within an integrated system changes. Where closer integration progresses, accompanied by the increased pooling of NHS and local authority monies, this could blur the edges around what is being paid for by SDS budgets. With this in mind, the RCN notes caution about the potential for ‘scope creep’ of SDS into paying for health care without proper discussion and debate of what this could mean for the health sector (we discuss this in greater detail under Q11). We appreciate that the SDS pilots in Lothian and Fife have been looking at this very issue but their evaluations are not yet published.

The training needs of NHS staff – to whom SDS social care duties may be delegated – is another important issue to be considered, both in terms of the knowledge required to provide the necessary support to people who choose to direct their own support, and the underpinning knowledge needed of social care assessment. We consider this in more detail in our answer to Q9.

2. What are your views on the principles proposed?

The RCN considers it appropriate to base new legislation on a guiding set of principles. We believe these principles should emphasise the promotion of service user independence and their participation in decision-making. The principles of involvement, assistance, informed choice and collaboration are hard to find fault with. However, it is difficult to provide comment on whether the legislation will facilitate a demonstration of these principles in practice given that so much of the direction of how to achieve them is being left up to the statutory guidance that will accompany the Bill.

Furthermore, in line with our comments on section 8 of the Bill, the RCN questions whether the principles should be strengthened to reflect the responsibility and accountability that individuals’ are expected to embrace if taking full control of directing their own budgets. The work that has gone into developing the Charter of Patient Rights and Responsibilities, introduced as part of the Patient Rights (Scotland) Act 2011, may provide a useful model for such an approach.

3. What are your views on the four options for self-directed support proposed in the Bill?

The main comment from the RCN on the four options relates to what constitutes a “reasonable estimate of the cost of securing provision of the support to which a direct payment relates”, set out in section 3, subsection 2 of the Bill.

The RCN shares concerns that have been raised by other organisations that SDS may be used by financially struggling local authorities as a means of cutting costs. For example, in their evidence to the Health and Sport
Committee on the Scottish Government's Draft Budget 2012-13\(^1\), Unison Scotland provided evidence that Glasgow City Council has introduced SDS to people with learning disabilities, with a view to roll out to mental health, in the anticipation that this will achieve a 20% saving between 2011 and 2013. This has since been reported in the media\(^2\). Should SDS be delegated to the NHS through section 18 of the Bill, the same cost cutting concerns would be applicable and could be a source of potential conflict between partners when agreeing shared budgets. Moreover, if SDS budgets are exhausted but social care needs remain, knock-on costs for the NHS - as the organisation responsible for providing universal care - are likely.

Our apprehensions extend also to the implications for the long-term sustainability of core services for those who do not want to self-direct their own support. This concern has been recently highlighted by the Highland Partners in their partnership agreement\(^3\) in which they stated:

"When an SDS package is being awarded, the resource for this needs to be identified from within existing resources. This means that traditional services may no longer be sustainable in their current shape and scale. This applies to both services that are Council-run and services that are commissioned. In particular, change in level of demand for services may impact on block contract arrangements that are in place."

The RCN is concerned that if enough individual budgets are removed from a community service through SDS, the service will be lost to the community.

We would therefore welcome further exploration of how local authorities both plan to define monetary resource within SDS and mitigate potential risks to the ongoing sustainability of services for those not choosing SDS options, including knock-on risks to services provided by partners.

6. Are you satisfied that the method for modernising direct payments in the Bill will result in the change that the Government seeks?

The ultimate intention behind SDS, as the RCN understands it, is to generate improved outcomes for people. The RCN questions whether the Bill’s provisions will realise this desired intention. According to the policy memorandum, local authorities will “need to be satisfied that the option chosen can meet the desired outcomes” for an individual. They will have the right to deny people SDS, whether in the first instance or during a review of changed circumstance, “where it is clear that the option itself or the implementation of a particular option will fail to meet assessed needs and desired outcomes”. However, the legislation does not mention outcomes. Indeed, the RCN is unclear from either the legislation or supporting memoranda where measurement of outcomes fits into the ongoing review.

\(^1\) [http://www.scottish.parliament.uk/S4_HealthandSportCommittee/Meeting%20Papers/Papers_2011.11.01.pdf](http://www.scottish.parliament.uk/S4_HealthandSportCommittee/Meeting%20Papers/Papers_2011.11.01.pdf)


\(^3\) The Highland Council and Highland Health Board Partnership Agreement, Adult and Children’s Services within the Highland Council area (Lead Agency Model)
process for SDS – when and how will local authorities assess whether the person is meeting their pre-determined outcomes through their SDS package? And will there be limits set on what can be purchased using an SDS budget? Given that SDS packages of care are funded from the public purse, the RCN considers the review and evaluation of the spending of tax payers’ money against an agreed set of outcomes to be an important point which is not, to our eyes, currently provided for clearly enough in the Bill.

8. **Do you agree with the approach taken by the Scottish Government not to place restrictions on who may be employed by an individual through the proposals in the Bill?**

As stated in our answer to Q1, the Bill contains nothing specific on risk. As the Committee heard in its inquiry into the regulation of care for older people, SDS can present challenges with regards ensuring proper scrutiny and protection of people who may be considered ‘at risk’. In his evidence Lord Sutherland made the point that vulnerable people receiving SDS may be open to people extracting money from them⁴. Issues may arise as personal employers are under no obligation to check the Protection of Vulnerable Groups (PVG) status of anyone employed to undertake work that could be defined as “regulated work” under the terms of the PVG legislation.

Given this context, the RCN considers the Bill could be strengthened around risk and safeguards to support service users’ independence and participation in decision-making to ensure the safety of individual budget holders. For example, the risk could be mitigated by ensuring that local authorities (or an NHS board in terms of delegated function) develop contracts with service users that insist on the production of a PVG Scheme record for anyone engaged by a personal employer to undertake regulated work through a direct payment.

9. **Do you have any views on the assumptions and calculations contained in the Financial Memorandum?**

The RCN agrees with the emphasis given to the need for investment to support culture change, training and workforce development associated with the provisions of the Bill. The majority of costs associated with workforce development, however, are provided for within 2013/14. The RCN considers this potentially short-sighted given that more and more NHS staff are likely to have the duties within the Bill placed upon them following the integration of health and social care. The timing of the integration legislation will mean investment should be allocated past 2013/14 to accommodate NHS staff training needs. This is particularly important given, as the financial memorandum points out, “For NHS staff…no prior knowledge of self-directed support can be assumed”.

11. **Do you have any comments on any other provisions contained in the Bill that you wish to raise with the Committee?**

The RCN is unclear how the current, or a future, Scottish Government will achieve the extension of SDS into directing health monies, in line with the ambitions set out in the SDS strategy. We have previously raised questions about the extension of SDS to health monies in our responses to the SDS strategy and proposals for a draft Bill. Some of the points we have previously raised include:

- How would individuals ensure that they were purchasing health care from professionals that have the right level of skills and competencies, and not be tempted to purchase less expensive but potentially inappropriate healthcare?
- Who would pay for health care if the SDS budget is exhausted - would the NHS pick up crisis/emergency/relapsing costs?
- In what circumstance would clinical care be considered too complex for it to be appropriate for an individual to direct their own budget?
- How would the scope of services that could be accessed by a budget holder be defined i.e. where would the boundaries lie for what could be legitimately purchased that would not endanger the delivery of ‘traditional’ or existing health care services?
- How would conflicts be resolved between patients and healthcare professionals regarding their treatment and care?
- What would be the implications for clinical governance, delegated responsibility and accountability of staff in a system where patients are directly purchasing health care? As set out in the NMC code of conduct, nurses need to be sure that healthcare assistants they delegate tasks to are appropriately skilled and trained to carry out the work. Contractual liabilities regarding delegation and accountability would require significant consideration in a landscape in which SDS was extended to health and individuals were directly purchasing health care.
- How would health outcomes be measured to justify a pre-determined health allocation?
- How would the necessary workforce be planned for and modelled if the way in which people spend their SDS budget on health care cannot be accurately anticipated?
- Would SDS in health represent an erosion of the principles of the NHS, namely being free at the point of need? How much would this bring back market provision to the NHS in Scotland?

In essence, we are cautious about extending SDS to pay for health care without proper scrutiny and debate of the issues given that SDS represents a fundamentally altered way in which NHS services could be provided. The RCN believes that any future moves to extend SDS into health care needs to be through primary legislation so that it attracts the necessary level of scrutiny, consultation and debate in Parliament.

The Royal College of Nursing
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