

## Self-directed support: frequently asked questions

Publication date: 20 November 2018

Publication code OPS-1118-417

We support the ethos and principles of self-directed support, in keeping with the Health and Social Care Standards, whereby:

- people exercise their right to choose and control their own care and support arrangements
- people are asked what matters to them, and staff act on this when exploring and explaining care and support options
- systems and policies enable and support self determination and staff are knowledgeable, skilled and empowered so that they can effectively implement self-directed support
- leaders create a culture that has the principles of self-directed support embedded within practice
- people and their families are supported to experience positive personal outcomes
- leaders recognise the need for preventative services and value what communities can offer, developing and building on existing assets.

## Frequently asked questions

### 1.0 Personal assistants (PAs)

#### 1.1 What are the Care Inspectorate's expectations of personal assistants supporting people while they are using a registered service?

Where an individual employs a personal assistant and also uses a registered care service such as a support service – day care, we would expect that:

- the responsibilities of the personal assistant and the care service staff are clearly defined, recorded and understood
- where the personal assistant is conducting tasks along with the care service staff, such as lifting and transferring the person using the service, that relevant training has been undertaken
- the person employing the personal assistant can assure the manager of the care service that their personal assistant is posing no risk to other people experiencing care. For example, they can confirm PVG membership or police checks.

#### 1.2 If a family employs a personal assistant to support their child, can the personal assistant provide care and support in their own home and the family's home?

The definition of childminding excludes someone who “looks after the child wholly and mainly in the parents' home”. Therefore, the Care Inspectorate would have no role where a personal assistant supports a child in the child's family home.

However, where a personal assistant uses their own home to mainly or wholly look after the child, we would consider this to be a childminding service. We will consider this to be childminding when more than 50% of the contracted time is spent in the personal assistant's own home.

**2.0 Registration**

**2.1 Personal assistants - what is a sole and private arrangement and when would registration be required?**

We recognise how important the support of personal assistants is to people and would not want to register personal assistants unnecessarily. However, where a personal assistant is providing a defined care service, the law requires that we register, inspect and offer assurance to the public.

The criteria below sets out when we would consider a care service to be operating:

<p><b>A personal assistant providing a defined care service</b> has a private arrangement with one of more supported people and:</p> <ul style="list-style-type: none"> <li>would make arrangements for another person to undertake the support in their absence, including the details of the support required and hours of support</li> <li>may pay the person replacing them or may be aware of arrangements for person to be paid by the supported person</li> <li>employs others directly to cover for them or work as a cooperative covering each other</li> <li>would be aware of appropriate insurance being in place, tax arrangements and so on.</li> </ul>	<p><b>A non-regulated personal assistant</b></p>
	<p>Has a private arrangement with one or more supported people and:</p>
	<ul style="list-style-type: none"> <li>Would not make arrangements for individual/s to cover for them when sick/on leave</li> </ul>
	<ul style="list-style-type: none"> <li>May provide details to supported people of other people who may be able to provide support but is not responsible for this.</li> </ul>
	<ul style="list-style-type: none"> <li>Would have no responsibility or interest in the arrangements reached by supported person and replacement PA</li> </ul>

**2.2 What degree of flexibility does the Care Inspectorate have when applying the legislation and regulations?**

We have a duty to ensure that care services operate within the law and we expect appropriate registration. We require care services to develop person-centred support plans, keep records of support and conduct reviews. If they employ staff, we also expect care services to fulfil the duties of an employer, training and supervising their staff.

Where we can use our discretion is by being proportionate and recognising that some services provide less intensive care and support than others, for example telecare services.

**2.3 Do care services managing supported people’s budgets on their behalf (option 2) require to be registered with the Care Inspectorate?**

The need for registration depends on the nature of the service and not the funding arrangements. There is no requirement for services to be registered in order to support people with their personal budget (option 2) unless the provider is offering a care service as determined by the legislation.

**2.4 Do cooperatives, micro-enterprises and collectives need to be registered?**

Sole and private arrangements do not require to be registered as care services. These arrangements may include the employment of personal assistants . A

personal assistant may work for more than one individual and an individual may employ more than one personal assistant however, this is still classed as sole and private arrangement. The supported person must be in charge of their arrangement, make their own choices, contingency arrangements and so on, and not be led by the personal assistant.

Where a group of personal assistants work together to support each other and provide holiday and sickness cover for each other, this may fall under the definition of a care service and registration may be needed. (See 2.1 above.)

Cooperatives, micro-enterprises and collectives would only require to be registered if they were providing a specific care service.

### **3.0 Inspection**

#### **3.1 What is the Care Inspectorate's role when an individual uses mainstream community services?**

If someone receives their self-directed support from a registered care service to use mainstream community services for example, to attend social activities, we would have an interest in the care and support arrangements being provided.

However, if the supported person uses an unregistered service, we would only have an interest if a registered service has enabled the supported person to use the community service unaccompanied. This is because we would want to ensure that the service has completed a risk assessment and provided the necessary support and advice to enable the person to attend the activities they choose.

#### **3.2 How do we balance risk prevention and risk enablement?**

While we expect care services to protect people from avoidable harm or abuse, everyone has the right to make choices that may involve an element of risk. This may include people travelling independently to the shop, managing their own medication or money, developing friendships with members of the local community, and being supported to attend community facilities by unpaid workers or friends or family of support workers.

We focus on the positive experiences and outcomes that these potentially risky activities will afford the individual but we do expect providers to have carried out risk assessments. Risk assessments are not to prevent these activities taking place, but to enable them to take place by putting in necessary supports in order that people can achieve their personal aspirations.

#### **3.3 Who scrutinises the work of personal assistants?**

The supported person by employing a personal assistant is ultimately responsible for their own support, as the ethos of self-directed support intends.

Local authorities and health and social care partnerships supporting a person to obtain Option 1 and employ a personal assistant should give advice and guidance about practical issues such as safe recruitment, PVG checks, training, the need for insurance and a duty to ensure that public money is spent appropriately. However, local authorities and health and social care partnerships are not

accountable for the personal assistant or their day-to day-work, as they are not the employer despite being the provider of the funding.

The local authority or health and social care partnership has a duty of care to advise, support and intervene as necessary if they identify someone using self-directed support to be vulnerable.

While personal assistants are an unregulated workforce, the support provided by local authorities and health and social care partnerships would form part of our strategic inspection and scrutiny.

## **4.0 Good practice**

### **4.1 Can a family member be employed by a registered care agency to work as the supported person's carer?**

The Direct Payment 2014 Regulations clearly set out when it may be appropriate for a close family member to provide care and support. The expectation being that this would be in particular circumstances in order to meet the supported person's particular needs.

Where people do not wish to employ a personal assistant they may choose to purchase a service. Where such a service is registered, this may offer less control but it does afford safeguards and the ability to raise complaints and provide feedback to the service and the Care Inspectorate about the support workers.

Therefore, we would consider it a conflict of interest for a care service to employ a family member to support their relative. This would also be true of any care service where staff are related to the people they support.

This would also apply where someone with guardianship powers aims to be employed by a care service to provide care and support to the person they act for.

We would consider employment of family members by a registered care services to work with their own relative as a means of circumventing the intentions of the regulations and Act.

However, it would be acceptable for a family member to work for a care service so long as they were allocated to work with other people using the service. Equally, a care service provider, owner or chief executive can provide a service that their own relative uses so long as they do not personally provide their care and support.

### **4.2 Guardianship - when should legal intervention be considered?**

For people to choose and direct their own support they need to have capacity. All of us must start from the premise that each person aged 16 or over has capacity to consent, even if they need help to do this. The UN Convention on the Rights of Persons with Disabilities (UNCRPD) states that everyone with a disability should have "legal capacity on an equal basis with others in all aspects of life". It is discriminatory and illegal to deny a person's human and legal rights on the basis of reduced decision-making capacity.

There are various ways people can be supported to make choices for themselves, including advocacy, support services and circles of support.

Where a person does not have the capacity to make decisions about their welfare or manage their financial affairs even with support, it will be necessary to consider legal interventions. However, the approach taken should be based on human rights and always seen as a last resort. After powers are granted, the appointed guardian(s) should seek the views of the supported person, whether these are expressed verbally or otherwise.

### **What type of intervention is required?**

Identifying what legal interventions are necessary will depend on the individuals' personal situation. The three main legal forms of intervention are:

- financial guardianship, where a person takes on responsibility for managing someone's financial affairs
- welfare guardianship, where a person takes on responsibility for making decisions about someone's health and social care and support.
- power of attorney, where someone **with** capacity appoints someone to act on their behalf in all matters, when or if they lose capacity.

### **Do all guardians get awarded the same powers?**

No, at the point of applying to the court for financial or welfare guardianship, the supported person's solicitor can seek specific powers and authority proportionate to the role. For self-directed support this can be minimal but specific powers.

Financial guardianship may include for example:

- claiming and receiving self-directed support in order to purchase care services appropriate for the adult
- employing a personal assistant
- contracting with a care provider and paying for services and care using self-directed support payments
- arranging for employer's liability insurance on the adult's behalf.

Welfare guardianship may include for example:

- having access to confidential documents or information about the supported person that the supported person would have had if they had capacity
- consenting or withholding consent to medical treatment
- opening, reading, attending to and replying to mail (paper, electronic or otherwise) on behalf of the supported person
- taking the person on holiday, excursions or outings or authorising someone else to do so
- making decisions about the social or cultural activities the person may pursue.

### **Who does the guardian account to?**

Most financial guardians are expected to report to the Office of the Public Guardian (Scotland) and submit specific financial records. With self-directed support, financial guardians and those with welfare powers are only required to report to the local authority.

## **Who should consider appointing power of attorney?**

Anyone can appoint a power of attorney at any time, so long as they have the capacity to do so. Everyone at some time in their life will need to use health or social care services. While we hope people can make informed choices throughout their lives, we know that unexpected events can result in capacity being impaired or lost.

Appointing someone, while you have capacity, to act on your behalf in the event you lose capacity means that:

- you can appoint someone who you know has your best interests at heart and who can advocate for you as they know you
- you can plan in advance and make decisions for your future should you become unable to express these for yourself.

We support power of attorney as a preventative measure to Guardianship.

## **Would a family carer with welfare guardianship require financial guardianship powers if the supported persons care and support was to be managed by a support service (option 2)?**

Financial guardianship would only be required where the person was managing the supported person's budget (option 1).

See Appendix 1 for examples.

## **Would the Care Inspectorate expect to see care and support arrangements reviewed?**

Yes; just because someone at one point in their life has chosen a particular option this should not be set in stone. At reviews, the supported person should not only consider if their current support arrangements are suitable to them but also whether they would like to consider another approach, particularly if their current arrangements are not achieving positive outcomes. The opportunity to review support should not be limited to reviews, but should reflect people's needs.

## **Can Option 1 (direct payment) be used to purchase a care home service?**

No, the legislation currently places restrictions on the use of option 1: direct payment.

The regulations state that direct payments are not to be used to fund residential accommodation (care home) for a period of more than four consecutive weeks in a period of 12 months.

This restriction also reflects the Care Inspectorate's definition within the Public Services Reform (Scotland) Act 2010 of a care home service as "a service which provides accommodation, together with nursing, personal care or personal support, for persons by reason of their vulnerability or need".

The legislation does not however restrict the use of option 2, 3 or 4 when people move into care home services. We would very much like to see providers of care homes working with people to manage their own personal budget and as such, controlling their care and support on a day-to-day basis (option 2).

Irrespective of the funding source or arrangements, we expect all care providers to be familiar with the principles of self-directed support and the importance of choice, control and personal outcomes.

### **Can a person use option 1, 2, 3 or 4 when living in supported accommodation?**

Yes, where people live in supported accommodation, sheltered housing or other accommodation that is not registered as a care home, people can and should be offered all four options.

The self-directed support legislation refers to residential accommodation. In respect of the legislation, residential accommodation means a care home and as such option 1 would not be available to people moving into a care home, however options 2, 3 and 4 can and should be offered.

Where any accommodation is provided with nursing or personal care, or personal support, this arrangement would be defined as a care home service. As such, providers of accommodation also wanting to offer personal care and support need to ensure that this is not a condition of the tenancy or occupancy agreement. The care arrangements then would be registered as a care-at-home support service. This way the supported person is able to select an alternative support service or their own personal assistant under option 1.

Accommodation provided together with a housing support service is not considered to be a care home due to the lack of personal care and support, and as such these arrangements can be a condition of tenancy/occupancy.

This has been the position of the Care Inspectorate and the Scottish Government since regulation of housing support and support services (care at home) commenced.

## Appendix 1

### What form of intervention is needed?

George has a significant learning disability. He is 18 and lives at home.

His parents are looking to access option 1 so that they can employ a small team of young personal assistants to accompany George to college and on nights out.



George does not have capacity to manage his financial or welfare affairs.

Both financial and welfare guardianship powers will be



**Financial and welfare guardianship attorney**

Asha has recently experienced a significant head injury following a road traffic accident. Her husband is her primary carer but she has an established network of friends who continue to provide support.

Asha communicates using some words and a communication aid. She is able to make some choices about her life, what she likes to eat, wear, and her activities.

Asha has indicated that she is uncomfortable when depending on her husband or friends for personal care



With support, Asha can make decisions and choices about her day-to-day life, but is unable to recognise or handle money, manage a bank account, keep records and be accountable to the local authority.

Asha will be involved in the recruitment of her personal assistant and will develop a support plan with support from her husband.



**Financial guardianship**

Grace has recently been diagnosed as having dementia. She has a very supportive family and after a frank conversation they recognise that over time Grace's ability to manage her own financial and welfare decisions is likely to be impacted.

The family want Grace to make as many decisions for herself as she can in order to maintain her independence as long as possible



Grace has decided that she would like to appoint her oldest daughter as her Power of Attorney. Over the next few months, she will develop an anticipatory plan, setting out clearly what she wants for her future lifestyle.



**Power of**

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