

# The tensions between procurement and Self-directed Support (SDS)

**This briefing sets out a local area example** of the tensions between **procurement and competitive tendering, and Self-directed Support (SDS)** and enabling choice for individuals about the provision of their care and support. The briefing concludes with lessons learned and some considerations for local authorities when working across procurement and SDS.

## Background

### Competitive re- tendering

A local authority decided to commission a new contractual framework for its adult mental health and learning disability services which included 'care at home support' for people with mental health problems, learning disabilities or complex needs. The council then decided to hold a competitive tender for the new framework. The tender was issued and providers were invited to bid to be listed on the council's framework.

Those providers who were successful in the tender were appointed to the council's framework and would be allowed to deliver care and support in the local area. Several of the existing providers were informed that they were unsuccessful in the tender and were told that they had lost their contract to provide support in the area.

### The Provider

Provider A had been providing specialist, personalised support to people with learning

disabilities and complex needs in the local area since 2004 under a Service Level Agreement. Provider A describes its support provision as being fully personalised and putting people in control of their own lives. Provider A supports people labelled as having 'challenging behaviour' many of whom have been excluded from society, or have previously lived in long stay hospitals, but are now being successfully supported to live in the community.

The provider bases its values and support provision on SDS and each of the people they support already has their own Individual Budget allocated to pay for their support, in accordance with their needs as assessed by local authority social work staff and set out in their care plan. Every supported person has their own team of support staff chosen by them and matched to their individual needs.

### The council cancelled the contract with Provider A

The council wrote to Provider A advising them that they have been unsuccessful in the tender and that a review of the needs of the people they support will be undertaken with a view to transferring the provision for their support to another provider.

The council also wrote to the individuals and families currently supported by Provider A. The letter told them they will no longer receive support from their existing provider and that they will be moved to another provider that the council has chosen.

## **The issues for individuals and families**

- There was no consultation or involvement with individuals and their families prior to the receipt of the council's letter. There was no consultation in relation to the procurement process and none as a result of the outcome of that process.
- Many of the people affected by the change of provider were people with learning disabilities and complex needs and experienced anxiety because they had difficulty coping with change.
- The council held guardianship for some of the individuals who lack capacity to understand decisions affecting their care and support. The council may have had a conflict of interest in making changes to support provision whilst holding welfare guardianship for the supported person, where there has been no consultation and no access to independent advocacy for the supported person.
- The letters sent to the individuals with learning disabilities were not in an accessible format.
- The Care Manager made some visits to service users telling them that their overnight support might be withdrawn. The service users who required overnight support might then be required to move from their own homes to various group living situations. These were being promoted by the care managers as they were provided on the existing framework.
- The council failed to advise the supported people of their right to choose a different SDS option which would have allowed them to stay with their existing provider.
- Individuals were told they could not choose a provider that was not on the framework. This goes against the principles of SDS and the person's right to choose who provides their support.

## **Request to review decision**

The provider wrote to the council to request a meeting to review its decision, and to delay any further communication with service users until the matter is clarified.

The council agreed to meet with the provider but continued to tell the individuals and families affected that they have no choice but to change to another provider and in some cases that they will be moved home to a new 'group living situation'.

The individuals and families began writing to their local MSPs, councillors and MPs.

## **The legal challenge**

The provider engaged a solicitor to write to the council. A solicitor's letter was sent challenging the council and outlining the following legal duties:

### **Under the Social Care (Self-directed Support) Scotland Act 2013 ("SDS Act") the council has various statutory responsibilities including:**

- Under s.5 (2) of the Act a duty to offer supported people a choice of the 4 Options for SDS.<sup>1</sup>
- Under s.9(2) the council must give the individual:
  - a) An explanation of the nature and effect of each of the Options
  - b) Information about how to manage support.
  - c) Information about persons who can give assistance about making decisions about the options and information about managing the support.<sup>2</sup>
- Under s. 19 of the Act:

For the purpose of making available to supported persons a wide range of support when choosing options for self-directed support, a local authority must, in so far as is reasonably practicable, promote—

a) A variety of providers of support and; b) the variety of support provided by it, and other, providers.<sup>3</sup>

The solicitor asked whether the council had fully explained the options to individuals under SDS and whether the council had also made clear that the individuals could continue to receive support from their existing provider as permitted by the SDS Act.

### **The Public Contracts (Scotland) Regulations**

Regulation 76<sup>4</sup> states that when public bodies are procuring health and social care services, they should take into account **continuity of service and the needs of specific service users.**

The solicitor asked whether the council has applied this duty during its procurement process.

### **Statutory Guidance on the Procurement of Care and Support Services 2016**

The statutory guidance for the procurement of care and support services states that when public bodies are procuring care and support services consultation and sharing of information with service users is of paramount importance and regulations state:

'If procurement activity may result in a change of service provider, or change to service provision, information about the procurement process should be provided to people who use services and their carers who may be affected. Where relevant they should also receive information on the choices available to them and the availability of SDS.'

The solicitor questioned the council about whether it had informed individuals and their families about the procurement process and whether it has considered the importance of continuity of support provision.

### **The council changes its decision**

Following receipt of the solicitor's letter the council met with the provider and apologised

fully for the mistakes made with the procurement process and changed their decision.

The council admitted that there were no problems with either the cost or quality of the provider's support. The provider's hourly rate was same as the rate for the tender for the framework and the provider was consistently scored Grade 5, Excellent, by the Care Inspectorate. The council continues to purchase support from Provider A, albeit outwith the framework.<sup>5</sup>

### **Issues for local authorities to consider when carrying out a commissioning and procurement process for care and support:**

#### **Commissioning and Procurement**

- Begin with considering whether a procurement exercise is necessary. The new Social Care Procurement Guidance is clear that 'there are no legal requirements that stipulate a contracting authority must follow a procurement process to meet their obligations under Option 2 s.6 (11) of SDS.'<sup>6</sup>

#### **Involvement of Supported People**

- Start with the full involvement of supported people. This complies with the duties in the SDS Act, the Equalities Act and the new National Health and Social Care Standards – the second of the five underpinning principles being: 'I am fully involved in all decisions about my care and support.'  
Consider how to involve and consult with service users and families about any commissioning plans, competitive tenders and decision to change their provider  
Consider their duties as a public body under the Equality Act about the rights

of disabled people and other protected groups to be consulted in an accessible format when making any changes to service provision.

### **Involvement of other stakeholders and providers**

- When thinking about commissioning and procurement of social care focus on working in partnership and collaboration with all stakeholders. See [P&P's Doing Things Differently guide](#).

### **Self-directed Support**

- Consider how to ensure supported people have choice about who provides their support, when and how their support is provided and who their preferred support providers is. Ensure that individuals receiving care and support are offered SDS and the 4 Options.

Ensure that individuals have the right under Option 2 to choose to stay with their existing provider even if they are not on the council's framework.

Under section 19 of the SDS Act, local authorities have a duty to promote a range of providers to ensure real choice for supported people. It is important to consider how they can commission for a diverse range of providers, including specialist providers for people to choose from.

### **Resources:**

Social Care (Self-directed Support) Scotland Act, 2013

<http://www.legislation.gov.uk/asp/2013/1/content/enacted>

Self-directed Support Statutory Guidance, 2014

<http://www.gov.scot/Publications/2014/04/5438/0>

The Procurement Reform (Scotland) Act, 2014

<http://www.gov.scot/Topics/Government/Procurement/policy/ProcurementReform/ProcReformAct>

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<sup>1</sup><http://www.legislation.gov.uk/asp/2013/1/section/5/enacted>

<sup>2</sup><http://www.legislation.gov.uk/asp/2013/1/section/9/enacted>

<sup>3</sup><http://www.legislation.gov.uk/asp/2013/1/section/19/enacted>

<sup>4</sup><http://www.legislation.gov.uk/ssi/2015/446/regulation/76/made>

<sup>5</sup> .see section 6.11: no requirement for a framework for Option 2

<http://www.gov.scot/Resource/0049/00498297.pdf>

<sup>6</sup> Ibid



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### **About P&P**

P&P is a policy and practice change programme supporting providers to prepare for, and showcase good practice in the journey to Self-directed Support. P&P is open to all third sector care and support providers.

More about P&P

<http://www.ccpscotland.org/providers-and-personalisation>

### **Legal**

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