

# The City of Edinburgh Council

**10am, Thursday, 16 March 2023**

## **Motion by Councillor Nicolson – Self Directed Support**

**Item number**  
**Executive/routine**  
**Wards**  
**Council Commitments**

### **1. Recommendations**

---

- 1.1 It is recommended that the Council.
  - 1.1.1 Notes the operational approach to determining if those in critical need have underspent;
  - 1.1.2 Notes the impact on outcomes for people in need of removing allocated support;
  - 1.1.3 Notes the budget setting process and financial impacts;
  - 1.1.4 Notes the total value of clawbacks each year for the last 5 years

**Judith Proctor**

**Chief Officer**

Contact: Mike Massaro Mallinson, Service Director Operations

E-mail: [mike.massaro-mallinson@nhslothian.scot.nhs.uk](mailto:mike.massaro-mallinson@nhslothian.scot.nhs.uk) | Tel: 07860595382

## Motion by Councillor Nicolson – Self Directed Support

### 2. Executive Summary

---

- 2.1 This report responds to a motion by Councillor Nicolson, which was approved by the Council on 15 December 2022. This report provides clarity on the Council's operational approach to determining if those in critical need have underspent, the impact on people, the budget setting process and the total value of recovery over recent years.

### 3. Background

---

- 3.1 This report has been prepared in response to a motion by Councillor Nicolson, which was approved by the Council in December 2022. The approved motion:
- 3.1.1 Noted the benefits of the Direct Payments scheme which empowers people who have been assessed as requiring critical social care support to achieve their independent living outcomes other than by traditional services.
  - 3.1.2 Noted that many across the city already access these payments in lieu of community care or children's services, at a scale of approx. 1400 individuals across the city being in receipt of Direct Payments.
  - 3.1.3 Noted that care and support services appear to be so broadly defined in legislation that in practice the Council is near sole arbiter of what constitutes support, for which these payments are surrogate.
  - 3.1.4 Noted that many cannot find the support they critically need as a consequence of staff shortages, largely due to Brexit impacts, which can cause delayed hospital discharge, increased hospital admissions and other stresses for individuals and unpaid carers.
  - 3.1.5 Further noted this results in underused Direct Payments being 'clawed back' by the council despite the criticality of unmet need affecting so many.
  - 3.1.6 Agreed that the parameters of use are made as broad as statutory guidance encourages, by delivering care and support through the widest means possible including options to support people with the cost-of-living crisis.
- 3.2 Full Council agreed to a report in one cycle that outlined the Council's approach to self-directed support clawbacks including:
- 3.2.1 The operational approach to determining if those in critical need have underspent;

- 3.2.2 The impact on outcomes for people in need of removing allocated support;
- 3.2.3 The budget setting process and financial impacts;
- 3.2.4 The total value of clawbacks each year for the last 5 years.

## 4. Main report

---

- 4.1 Direct Payments are payments made in lieu of community care, or children's services. The definition of these services is laid down in legislation including that derived from the 1968 Social Work Scotland Act 1968, the Children's Act 1995 and the Community Care and Health Scotland Act 2002.
- 4.2 The 2013 Self Directed Support Act consolidates these elements into a single legislative framework. Self Directed Support Regulations in 2015 and consequential Scottish Government Guidance revised in 2022 give directions to local authorities in delivering Self Directed Support options of which a direct payment is one of four. These options are that the person in need of care:
  - receives a direct payment
  - decides and the local council arranges support
  - discusses with the local authority representative e.g. a Social Worker and the local council decides and arranges support
  - uses a mixture of ways to arrange their care and support.
- 4.3 A direct payment can purchase any outcome that any of the other Self Directed Support Options delivers. While the care and support *arrangements* may differ across the Options (e.g., recipients of a direct payment can contract unregulated care, by exemption from the Regulation of a Care Act 2001) the *outcomes* (living a more independent life by greater choice and control) should not differ.
- 4.4 As public funds are at stake, the Council needs to evidence due diligence in their disbursement, management and recovery of direct payments. Apart from any other audit reporting, either internal or external such as to Audit Scotland, accountability to the citizens of Edinburgh is paramount. The recovery of surplus direct payment funds is a considered process.

### **Operational approach to determining if those in critical need have underspent:**

- 4.5 Identification of surplus funds can be identified in a range of different ways. It may be through the individual highlighting this or alternatively by a family carer, social care worker, managed account service or another relevant third party. Contact is made by the Edinburgh Health and Social Care Partnership (EHSCP) with the person through a member of the social worker team to establish if the indicative surplus is an actual surplus. An actual surplus is considered as funds unused and unusable on any likely framework or pattern of approved purchase. Identifying an actual as opposed to an inferred surplus involves consideration of complex of factors that include the following :
  - An unused respite allocation still appropriately being usable within the framework of a full year;
  - 6 weeks of weekly direct payment being excluded from calculation as an inherent timing variation in all direct payments;
  - Account is taken of unpaid invoices or unmet payroll costs including payments due to HMRC falling to the supported person;

- Contributions from other funders such as Independent Living Fund (ILF) or the persons' own assessed care charge;
- Recruitment delays that disrupt normal patterns of direct payment expenditure;
- The temporary unavailability of care provision, e.g., due to the impact of Covid and related restrictions;
- Fluctuations in purchase, normal to the supported person's life;
- Reporting delays generated by factors outside the person's control.

### **Impact on outcomes for people in need of removing allocated support**

- 4.6 Given the complexity of the factors relevant to identifying an actual surplus, a conversation with the supported person is key to any sound judgement and decision making regarding the allocated funds. No recovery is made without first raising and agreeing with the person concerned an appropriate sum to recover. Working to consent, while not a binding legal necessity given these are public funds, is good practice.
- 4.7 Care is taken to ensure that sufficient funds remain in the direct payment account to purchase in full on an ongoing basis the original outcome identified on the person's approved support plan.
- 4.8 In the remote and unintended event that, in consequence of recovery, insufficient funds remain in the direct payment account to deliver the approved support plan then any or all the recovered sums can be restored.
- 4.9 In addition, work is undertaken with the person to update or improve the support plan in such a manner as to avert future surpluses. Included in this is further advice that can extend the use of the direct payment to ensure the plan outcome is met in full - and for the person's better support.
- 4.10 Any recovery should aim to improve future outcomes for the person whose care and welfare is the primary purpose.

### **The budget setting process and financial impacts**

- 4.11 The 2022/23 budget for Direct Payments is £34.8m and is included in the overall budget delegated to the Edinburgh Integration Joint Board (IJB). When the budget is set it includes an assumption that there will be a certain level of reclaim of unused funds achieved. In 2022/23 this is £2.4m. Any change in practice agreed by the Council will therefore have a direct impact on the IJB's financial position. This which would have to be funded by the Council increasing the budget delegated to the IJB.

### **The total value of clawbacks each year for the last 5 year**

- 4.12 The total funding reclaimed over the past five years is as follows:

<b>Financial Year</b>	<b>Total amount recovered</b>
2017/2018	£2,828,246.32
2018/2019	£1,896,745.66
2019/2020	£2,647,997.64
2020/2021	£2,241,207.51
2021/2022	£1,968,548.36

## 5. Next Steps

---

- 5.1 The Edinburgh Health and Social Care Partnership will continue to undertake due diligence in their disbursement, management and recovery of direct payments.

## 6. Financial impact

---

- 6.1 As outlined in section 4.11 of this report.

## 7. Stakeholder/Community Impact

---

- 7.1 There has been no community engagement in developing this report.
- 7.2 As the recovery of direct payment funds is based on surplus funds, there should be no adverse impacts on the individual. As stated in section 4.7 above, care is taken to ensure that sufficient funds remain in the direct payment account to purchase in full on an ongoing basis, the original outcome identified on the person's approved support plan

## 8. Background reading/external references

---

- 8.1 The legislative background underpinning direct payments:
- 8.1.1 National Assistance Act 1948  
<https://www.legislation.gov.uk/ukpga/Geo6/11-12/29>
  - 8.1.2 Social Work (Scotland Act) 1968  
<https://www.legislation.gov.uk/ukpga/1968/49/section/12A>
  - 8.1.3 Community Care Act 1990  
Part IV Scotland  
<https://www.legislation.gov.uk/ukpga/1990/19/contents>
  - 8.1.4 Children (Scotland) Act 1995  
<https://www.legislation.gov.uk/ukpga/1995/36/contents>
  - 8.1.5 Direct Payments Act 1997  
<https://www.legislation.gov.uk/uksi/1997/734/contents/made>
  - 8.1.6 Community Care and Health (Scotland) Act 2002  
<https://www.legislation.gov.uk/asp/2002/5/section/22>
  - 8.1.7 Social Care (Self-directed Support) (Scotland) Act 2013  
<https://www.legislation.gov.uk/asp/2013/1/contents/enacted>  
most recent guidance  
<https://www.gov.scot/publications/statutory-guidance-accompany-social-care-self-directed-support-scotland-act-2013-2/>

## 9. Appendices

---

None.