

Third Sector Leaders

**ACEVO**

# Personalisation: Exploring the Legal Implications



Written with the help of

**HEMPSONS**



[improvingsupport.org.uk/income](https://improvingsupport.org.uk/income)

A joint initiative to strengthen support services for the third sector

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# Introduction

Personalisation as a movement and a policy initiative clearly has its roots in the third sector, with a key role being played by user-led movements such as the Independent Living Centres. Huge numbers of third sector organisations were established out of a desire to secure services that better respond to individuals' needs and that empower individuals to live life the way they want to. Many, like Look Ahead in Tower Hamlets, have used their own resources or carved out individual service funds out of block contracts to pilot more radical forms of user control.

In the UK, the most advanced moves towards personalisation are in the field of health and social care, where direct payments (cash payments made directly to a social care service user or carer in lieu of services) have been in use since 1997 following the introduction of the Community Care (Direct Payments) Act of 1996. More recently, personal budgets and individual budgets (individual allocations of funding that can be used to meet an individual's assessed eligible needs) were introduced, from 2003, by the social enterprise In Control, working alongside a number of Local Authorities, and then by the Department of Health in 2005-07. The Government has set a minimum target of 30% of Local Authority-funded adult social care service users to be on personal budgets by April 2011, but many Local Authorities have gone further, setting targets of 60-100%.

Over the last few years the vision of giving people greater control over the money spent on services has spread from social care to other public service areas. For instance, the NHS is currently piloting 'personal health budgets'; the pilot areas for the 'Right to Control' programme were announced recently;

individual 'Skills Accounts', giving adult learners an indication of public funding available to them to spend on a variety of courses, are currently being rolled out across the country; and the Department for Children, Schools and Families is currently piloting individual budgets for disabled children and their families.

The legal framework surrounding the personalisation agenda remains rather vague. Very little public law and almost no case law means that, although there are Government targets in place for Local Authorities, there is little understanding of the legal implications of implementing them. ACEVO members have asked what the legal safeguards are for service users employing PAs and, in contrast, how the rights of support workers and carers employed by individuals can be protected. In researching this short publication, it became clear that a lot more thinking needs to be done in order to create a coherent and comprehensive legislative backdrop for the effective roll-out of personalisation across the country. The ACEVO Commission on Personalisation will be following up on this over the next six months and will look to deliver a series of practical recommendations to the Cabinet Office in November 2010. If you would like to be involved in this, please register your interest on the following web page:

<http://www.acevo.org.uk/Page.aspx?pid=1167>

The questions below are by necessity, therefore, only intended to be a starting point. They arose from a workshop delivered by the law firm Hempsons to a range of ACEVO members from a wide spectrum of public service sectors, including health and social care, offender management and welfare to work. As further developments are made, this document will be updated to reflect any changes to the way legislation is implemented.

ACEVO, 2010

# FAQs

Written by Hempsons, the UK's leading law firm, to the health and social, third sector, professional practitioners and real estate markets.

## 1. What is the legal framework for the personalisation agenda?

- Public Law provides some framework behind the rights and entitlements of service users but these are not codified in one piece of legislation and can be found in various laws, policy documents and Government Guidance (please see Further Reading section).
- Policy has developed quicker than the legislative framework in this area.

## 2. Is there a legal right to personalisation?

- Government policy encourages commissioners to pursue the personalisation agenda. Service users can rely upon legislation requiring public bodies to undertake assessments that are person-centred.
- In social care, this will mean that the Local Authority will have an obligation to consider whether direct payments are appropriate in every case in which a service user requests or is put forward for an assessment. Direct payments in healthcare remain at the pilot stage so this does not apply.

### 3. What are the commissioning responsibilities?

- Public bodies have duties to monitor and review any care plan which is developed to meet a service user's needs.
- Self-assessment has been shown not to be a comprehensive analysis of a person's need and a public body is obliged to undertake some form of appropriate assessment themselves. See case R(B) v Cornwall CC and R(JL) v Islington LBC(2009) for further information.
- Assessment of the outcomes specified in any care plan will be crucial to the monitoring and review process.

### 4. What is the scope of a Personal Budget?

- A Personal Budget can be taken as:
  - A direct payment;
  - An account held and managed by the public body in accordance with individual wishes;
  - An account placed with a third party provider under a council/NHS contract;
  - A combination of direct payments and a managed account.
- As shown in Section 29 of the National Assistance Act 1948 and Appendix 2 of LAC(93)10, in social care the potential scope for payment of services is wide and can cover social care, holidays, excursions, education and other activities. Direct payments cannot be used for nursing care or long-term residential care.
- In healthcare, the personal health budget should meet the service user's clinical needs. This is under consultation and will be reviewed following the completion of the personal health budgets pilot.

## 5. What is the relationship between capacity and personalisation?

- Capacity is key to the issue of personalisation given it is required to exercise choice as shown in The Mental Capacity Act 2005.
- Direct payments can now be paid to a 'user representative' if the service user themselves lacks capacity. Issues can arise in relation to user representatives' liability in this context.

## 6. What about issues of risk and safeguarding?

- Capacity is key as a service user can accept aspects of the care plan and the risks involved as long as he/she understands the risk. Service users should be educated about risks.
- Commissioning public bodies continue to have a responsibility to monitor risk under both statutory and common law.
- Service providers should work with their commissioners to use multi-agency procedures when concerns arise regarding safeguarding of vulnerable people or children.

## 7. How will contractual relationships change when service users receive a Personal Budget?

- Commissioners will contract with individuals or their representatives for the purpose of allocating the budget and fulfilling their statutory responsibilities.
- Commissioners may contract with providers to allocate them an individual service fund to hold on behalf of an individual.

- Individuals will be able to commission services directly from providers.
- User representatives or user-controlled trusts may commission services from providers on behalf of individuals.
- Individuals may employ staff themselves or contract with support agencies which employ staff.

## 8. What are the key commercial issues that providers will need to consider?

- Providers will need to be familiar with standard form contracts and their terms; for example the standard form mental health and learning disability services contract published by the Department of Health.
- Providers will need to consider the stability of their income streams in an environment where block contracting arrangements with commissioners are replaced by spot contracting arrangements with individuals.
- Providers may want to consider collaborating with other providers to maximise opportunities for service delivery to individuals.
- Providers will need to consider the effect of consumer legislation where contracting with individuals.



## 9. Has the charity checked that its objects give the necessary flexibility to deliver against wide user choice?

- Section 2 of the Charities Act 2006 recognises the wide charitable purpose of “the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage”.
- However, many charities’ objectives will be narrower than this.

## 10. What is the scope for amending the objects of an unincorporated charity?

- If the charity has no power to amend, it must first convince the Charity Commission that the Commission has statutory grounds (Section 13 Charities Act 1993) to consider an amendment.
- The Charity Commission is generally not averse to allowing amendments of an organisation’s objects as long as they are:
  - not opposed to or disabling current objects;
  - no detriment to current beneficiaries;
  - necessary updating for modern social and economic circumstances.
- The last factor may facilitate the consideration of the wider needs of user-centred approach.

## 11. What is the scope for amending the objectives of a charitable company limited by guarantee?

- Charity Commission consent is required but the Charities Act 1993 as amended does not specify the factors to be considered by the Commission.
- The Commission has indicated that material changes may be possible but their consent would be more likely to be withheld where the changes would be detrimental to current beneficiaries or undermine the current objects.

## 12. What are some of the options for a user-led or influenced organisation?

- Users could be a majority or minority on the board, but the charity must check that its governing document allows a user trustee to receive benefits by way of services or funds from the charity. The board should also adopt a policy to manage conflicts of interest.
- Users could participate as voting members of board sub-committees but the charity must check its governing document allows this.
- Users could be active members of groups, which could have a mix of users, carers and staff, with whom the board consults.
- Users could be members of the organisation with constitutional power to hold the board to account.

### 13. Why should charities consider consortium working?

- A “one-stop-shop” offering wide choice may be more attractive both to commissioners of services and users as customers.
- Charities can “call upon” the specialist skills of others.
- There are many options for a consortium. These would include:
  - A lead contractor with sub-contractors;
  - A contractual framework between the consortium members;
  - A special purpose legal vehicle which could be a charity or a social enterprise, e.g. a community interest company.

### 14. What are some of the key questions when planning to set up a consortium?

- Do the consortium purposes further each charity's own objects?
- Even if a lead contractor subcontracts some of the services, the full scope of services under the main contract should be within the lead contractor's objects.
- What is the risk of service failure by other members?
- What is the risk of financial or reputational detriment on service failure by another member?
- Is a member liable financially for default by another member whose services fall outside that first member's objects?

## 15. What are the employment risks attached to direct employment by the user?

There are a large number of statutory obligations:

- Working time regulations may include:
  - Keeping records, e.g. accident reports, statutory maternity, adoption and paternity pay records, statutory sick pay records, national minimum wage records etc.
  - Managing a payroll;
  - Statutory guidelines around hazardous work;
  - Statutory guidelines around night work;
  - Statutory guidelines around rest breaks.
- Some considerations on annual leave:
  - All employees will be eligible for statutory holiday;
  - Atypical workers, e.g. shift workers, casual workers, part-time workers, will have different holiday allowances.
- The user will have to carry public liability and employer's liability insurance.
- The following pre-employment checks will need to be carried out:
  - Health checks;
  - References;
  - Qualifications;
  - Independent Safeguarding Authority (ISA);
  - Criminal Records Bureau (CRB).
- Income tax and NI will have to be applied.
- Health and safety obligations will have to be performed, including:
  - Risk analysis for those using machinery and equipment, driving, lifting and carrying or working in awkward spaces.

- Personal data will have to be safeguarded.
- Fair, non-discriminatory employment practices will have to be followed.

## 16. What if the employer changes?

- The Transfer of Undertakings Regulations are likely to apply.
- There are strict obligations in relation to informing and consulting with employee representatives.
- Accurate up-to-date employee information will have to be supplied.
- Public sector pensions may be an issue.
- Data protection issues may arise.
- Financial penalties are a risk if there is non-compliance with the regulations.
- The regulations may inhibit the extent to which new staff can be assigned to the user.

# Further information

National Health Service & Community Care Act 1990

Community Care (Direct Payments) Act 1996

Disability Discrimination Act 2005

Our Health, Our Care, Our Say – DH 2006

Putting People First – HM Government 2007

The Health and Social Care Act 2008

Personal Health Budgets: First Steps Pilot Programme  
January 2009

Health Act – November 2009

The Chartered Institute of Public Finance and  
Accountancy

Statutory and Common Law Duties of Public Bodies

Independent Safeguarding Authority

Care Quality Commission

The Health and Social Care Act 2008 (Registration of  
Regulated Activities) Regulations 2009

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