

RESEARCH REPORT

Accountability and the Implementation of Self-Directed Support:

Complaints, redress, and human
rights principles in practice


University of
Strathclyde
Humanities &
Social Sciences

in  **Control**[®]
Scotland

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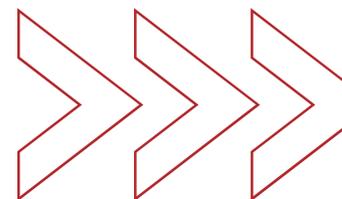
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Executive Summary



The Centre for the Study of Human Rights Law, working with Strathclyde Law School postgraduate students and student members of the University of Strathclyde Law Clinic, partnered with In Control Scotland in order to undertake research pertaining to the implementation of self-directed support (SDS).

SDS gives individuals who are eligible for social care choice and control over the delivery of their care. It places the human rights of the individual at its heart [1], and in doing so reflects the United Nations Convention on the Rights of Persons with Disabilities 2006. The project aimed to support efforts by In Control Scotland to monitor the implementation of self-directed support.

The research was motivated by an apparent lack of legal challenges relating to self-directed support since the introduction of the Social Care (Self-Directed Support)(Scotland) Act 2013 [2].

Its primary aim was to fill a gap in knowledge regarding the frequency and outcome of complaints made to certain local authorities in the Scottish central belt, by identifying any barriers to accessing complaints processes, and to uncover why such barriers may exist.

Over the course of our research, we conducted 15 interviews. We were unable to conduct in-person interviews as originally planned as a result of the COVID-19 pandemic. Interviews were conducted through a mixture of Zoom video calls and written responses.

Interviewees included staff from law centres, advocacy organisations and advice agencies. Some of our interviewees had personal experience of claiming SDS and of complaints procedures.



Executive Summary (2)

Overall, the report highlights three key findings:

1. Inconsistency and unpredictability of complaints processes;
2. Limited availability of free legal advice; and
3. Lack of detailed focus on human rights dimensions.

These findings suggest a range of barriers to effective redress:

- Structural barriers stemming from the weight of demands placed upon individuals who are inherently in challenging circumstances;
- Knowledge barriers characterised by lack of awareness of entitlements or the option of pursuing complaints, as well as lack of awareness of potential human rights dimensions;
- Relational barriers based on fear of making complaints which might impact negatively on interactions with social workers, or on SDS funding being delayed or withdrawn;
- Legal support barriers as a result of limited availability of specialised solicitors and legal aid constraints;
- Legal process barriers deriving from the long periods of time involved in seeing complaints through from internal to the highest levels of external complaint, as well as practices of settling complaints before legal judgments.

The report highlights that pursuing legal challenges is, of course, a last resort. Nevertheless, formal avenues for holding public authorities to account are an essential part of the protection of individual rights, and therefore these avenues should be accessible. The data indicates ways in which this range of barriers can come together to create impediments for those who wish to formally challenge SDS-related decisions. These coalescing barriers show that, at least in some local authorities, when complaints processes are pursued this can take place within a culture that is neither proactive in improving service delivery in response to individual complaints, nor in framing complaints around human rights.

In Their Own Words

"[...] because these hurdles are so big, [people] have to balance out, is it actually worthwhile doing it? And when all the barriers keep getting put up, ultimately, I think a lot of people end up accepting, well I'm just going to have to take what I can get, which, as a solicitor, that shouldn't be what clients end up having to do but [...] they almost don't seem to have any fight left by the time you get through the initial steps of figuring out what's going on, what the budget is, what's allocated, what the problem is, and then explaining to them what steps can be looked at, they are just are like, it's not worth it anymore."

Law Centre Staff Member

"[...] the feeling from service users that we're made aware of is that it isn't about their human rights, it isn't about their individual needs as a disabled person or a person with a long term condition, it's kind of couched in terms of, you know, this is what the local authority's able to offer because of A, B, C bureaucratic restrictions, budget limitations, etc [...]."

Advocacy Organisation Staff Member

Research Aims

The Centre for the Study of Human Rights Law, working with Strathclyde Law School postgraduate students and student members of the University of Strathclyde Law Clinic, partnered with In Control Scotland in order to undertake research pertaining to the implementation of self-directed support (SDS).

SDS gives individuals who are eligible for social care choice and control over the delivery of their care. It places the human rights of the individual at its heart, and in doing so reflects the United Nations Convention on the Rights of Persons with Disabilities 2006. The aim of the research team was to support In Control Scotland's policy work, through its 'Care and Law' group, by obtaining knowledge from relevant professionals about current complaints practices and processes in Scotland related to the implementation of self-directed support.

At the outset of the research, there was an apparent lack of high-profile legal challenges since the introduction of the Social Care (Self-Directed Support) (Scotland) Act 2013 [3] and there exists a gap in knowledge surrounding the frequency and outcome of complaints made to local authorities.

The research objective was to identify if, and if so where, there are barriers within processes for complaints and remedies. For this reason, the views of professional law centre solicitors, advocacy workers and advice agency workers were sought.

Recent research exists on the experiences of individuals who are eligible for SDS [4] Indeed, a range of resources shared by research participants [5] highlighted a number of key themes in existing knowledge. These related to, for example, personal and professional experiences of social care support, SDS budgets (allocations and limitations), the transparency of SDS decision making processes, and the essential work undertaken by advocacy services providing independent support to people who use or are trying to access social care.

Research Aims (2)

The intention was not to overlap with this, but instead to focus on a different but overlapping dimension in line with the legal expertise of the research team.

The initial aim of the research was to identify and interview law centre solicitors and advocacy and advice agency workers about their experiences of talking to local authorities around self-directed support on behalf of clients.

Overview of the Research

The research project aimed to interview law centre solicitors and advocacy and advice agency workers in Glasgow and other local authority areas in the central belt.

Ethical approval for the research was given by Strathclyde Law School's Ethics Committee. The research complied with all relevant ethical processes, including on the provision of consent, storage of recordings, and participant privacy.

Participants were invited to a maximum 1 hour virtual (video or audio) interview with one or two members of the research team.

The breakdown of the overall participants, law centres, advocacy workers and geographical areas incorporated in the research is illustrated below.

Overview of the Research (2)



Participants

A total of sixteen advocacy organisations and ten law centres were invited to participate in the research project interviews [6]. A further three participants came forward via the SDS Scotland bulletin. Two insight presentations and Q&A session were held via Zoom involving one advocacy agency in Glasgow and one advocacy forum in North Lanarkshire. Extra responses were received following referrals from other advocacy organisations and law centres.

The total number of invited participants was twenty-nine. At the end of data collection process, and out of the overall twenty-nine participants contacted, the total number of participants who responded was twenty-two (76%).

The number of those who did not participate for reasons such as lack of time due to workload, not relevant or a lack of expertise was seven of twenty-nine (24%). The final number interviews carried out via Zoom was thirteen and the number of written responses was two. Overall, data was collected from fifteen participants (52% of those invited).

After the conclusion of the research, the team was approached by additional individuals willing to participate. Although the interviews at that point had been concluded, we would like to thank those who volunteered. We would also like to thank those individuals who contacted us to volunteer participation but whose experience either pre-dated the implementation of the 2013 Act or whose relevant local authority fell outwith the scope of our research.



Overview of the Research (3)

Advocacy and Advice Agency Staff

Out of the sixteen organisations contacted, fourteen responded to the research communications and a total of eleven interviews were carried out. Ten of the interviews were carried out via Zoom.

Law Centre Staff

Out of the ten law centres contacted, five responded to the research communications. A total of two interviews were carried out, one via Zoom and another via written response [7]. Five of those who were contacted did not respond and a further three did not wish to participate. A common reason for non-participation was a lack experience in dealing with self-directed support complaints, indicative of limited legal involvement from within the free legal advice sector as discussed below.

Geographical Breakdown

The research aimed to interview law centre solicitors and advocacy and advice agency workers in Glasgow and other local authority areas in the central belt.

The geographical breakdown of participants was:

- Advocacy and advice organisations: Edinburgh, North Lanarkshire, South Lanarkshire and Glasgow.
- Law Centres: Glasgow.

Limitations

As a result of time and resource constraints, the research is limited to four Scottish local authority areas – all located in the central belt. Research into all or a larger number of Scottish local authority areas would have given a stronger picture of implementation and complaints procedures in Scotland as a whole.

An additional potential limitation of the research is the relatively low number of interviews conducted with law centre solicitors. As discussed below, of the fifteen interviews conducted, only two were carried out with law centre solicitors. This is despite efforts to recruit interviewees from 10 law centres. Additionally, both interviewees from law centres were active in the same local authority area – Glasgow. Again, this is despite efforts to contact law centres in Edinburgh (we could not identify any law centres exclusively active in North or South Lanarkshire). Efforts to engage with a wider geographical spread of law centres, and recruitment of interviewees from this wider pool, would have strengthened the report's findings in relation to experiences of the free legal advice sector. However, the low number of interviews with those from the free legal advice sector may also be suggestive of a general lack of involvement of that sector with SDS-related claims, which in itself is an important finding.

Finally, this report drew merely on the experiences of those involved with initiating complaints. Experiences from those on the other side of the process, local authority staff members with experience of handling complaints, were not sought at this time but would have further enriched the findings. This is an area that could warrant further research.

Interview Questions and Responses

All participants were asked a series of standard questions and additional questions depending on their role and organisation.

Familiarity with SDS and requirements of the Social Care (Self-Directed Support)(Scotland) Act 2013

Interview participants were asked: *how familiar are you with Self-Directed Support as a concept, and the requirements on local authorities under the Social Care (Self-Directed Support)(Scotland) Act 2013?*

All participants indicated that they were familiar with self-directed support as a concept, with a large majority suggesting that they were 'very' or 'extremely' familiar.

There was marginally less awareness of the legal requirements on local authorities under the 2013 Act, although a large majority again suggested that they had strong familiarity.

Participants indicated that they had knowledge of SDS and the requirements on local authorities under the 2013 Act for numerous reasons. For example, some participants noted that they had campaigned for the 2013 Act to be enacted. Others were involved in researching the implementation of SDS and some had direct experience of helping others to rely on the Act's provisions.

Awareness and familiarity with SDS and the 2013 Act appeared to span across the organisations that participated in the research. That said, it should be noted that only two interviews were carried out with those in the free legal advice sector. Indeed, when declining to be interviewed, some organisations in this sector explicitly mentioned that they had no experience in dealing with self-directed support complaints.

Interview Questions and Responses (2)

Judicial review and implementation of the 2013 Act

Interview participants were asked: *Why do you think there has been no judicial review in relation to the failure to properly implement the 2013 Act? Are you aware of any cases that have been settled before an application for judicial review is made?*

Participants' responses regarding a lack of judicial review were varied. Many said they were unsure but inferred a number of reasons, ranging from complaints being successfully remedied (fully or partly), to people giving up on pursuing complaints/ local authorities capitulating, and a lack of independent advocacy support. Overall, participants noted two major barriers: a lack of awareness of judicial review, and a lack of access to legal representation.

Lack of awareness of judicial review was by far the most common response. One participant observed that, in Scotland, there is not a culture of legal challenge; another referred to a lack of legal literacy. One participant pointed out that individuals receiving SDS must exhaust all avenues before judicial review would even be explained to the individual. This means that the possibility of judicial review in the context of the 2013 Act's application is not very well known to many. One participant observed a lack of awareness amongst those receiving SDS that decisions could be challenged at any level, as there is no specific appeals mechanism (discussed below).

The idea of collective challenge came up. For example, it was noted that it was difficult for people to have their voices heard and to mobilise challenges together. It was also observed that there may be a lack of awareness amongst individuals even of the 2013 Act itself.

Interview Questions and Responses (3)

Further, some participants observed that this lack of awareness of the 2013 Act extended to the legal profession. As a result, this was seen to be a barrier to accessing legal support. One participant stated:

“[...] quite often if you contact lawyers about issues to do with social care, they quite often bring in the idea of guardianship and the Adults with Incapacity Act and connect it to [social care] [...]”.

Advocacy Organisation staff member

It was suggested that this not only misses the point about individuals being supported to make their own decisions, but also indicates a lack of knowledge amongst lawyers about the 2013 Act.

Indeed, participants commonly observed that there are not enough solicitors with particular knowledge of the 2013 Act and its requirements. One participant noted that there are, generally speaking, not many human rights and equalities lawyers embedded within Scottish legal culture. A lack of solicitors working in this area was observed by both advocacy organisation and law centre staff participants.

Participants associated lack of access to legal representation, not only with availability of specialised or knowledgeable solicitors, but also with funding. It was suggested that legal aid funding restraints might prevent solicitors from taking on SDS-related cases, and also prevent individuals from accessing legal representation. One participant described efforts to try to get legal representation for an individual in one case as “impossible”, and saw legal aid cuts as a “significant contributor” to the lack of judicial review (*Advocacy Organisation staff member*).

Interview Questions and Responses (4)

A solicitor interviewee cited funding as a main reason: legal aid funding is often available for initial advice and assistance and claims about SDS budgets tend to get resolved; efforts to obtain funding beyond that level face many barriers. This participant suggested that building a successful legal claim was very difficult if individuals did not have appropriate advocacy support from the start of the complaints process because “there are so many barriers in someone’s way”. These barriers lead to a focus on resolution and negotiation because:

“[...] the cost implications or the difficulty of raising court actions is not worth the effort when you’re also already caring for someone.”

Law Centre staff member)

AMost, but not all, participants were unaware of cases that had been settled before pursuing a judicial review.

One participant suggested that the threat of judicial review was usually sufficient to force local authorities to take an individual's complaint seriously:

“[“In my experience whenever it’s been challenged [...] each time [the local authority] has backed down.”

Advocacy Organisation staff member

Interview Questions and Responses (5)

This approach, where local authorities would only take a complaint seriously after the threat of legal action, was considered to be extremely frustrating given the costs of hiring a solicitor:

"It's the exact same letter, worded in the exact same way but just with a solicitor's header on it and the response was like 'oh we better actually take notice now' [...] It cost us £1000, we are a charity [...] let's not make us go down that road."

Advocacy Organisation staff member

Another participant was aware of a few cases over the previous five or six years that had gone further but these were usually settled at the last minute. Another stated that a case that had been at the point of seeking permission for a judicial review had to be settled because legal aid was refused. Recalling a claim that other colleagues had been involved in, this participant described an example of a solicitor being called before a Legal Aid Board panel to justify a request, which was ultimately refused. This participant referred to "multiple applications and reviews which have been fought at every stage by the council" (*Law Centre staff member*). In this particular example, alternative funding options were explored as a final resort:

"[...] then looked into whether it was the possibility of crowdfunding but for legal funding that has other implications for expenses for the clients and ultimately it just was impossible to pursue the judicial review."

Law Centre staff member

Interview Questions and Responses (6)

Another participant who was aware of settled cases in Scotland also noted the impact of non-disclosure agreements:

“One of the issues is that they are, you know, virtually settled on the steps of the court, and non-disclosure agreements are made part of these deals [...] so we have had instances where people have said [...] along the lines of [...] I can’t talk to you about that, no I mean I’m legally bound to not talk about this. So we know that that’s happening [...].”

Advocacy Organisation staff member

As a result, detailed information on legal challenges is therefore difficult to access, and one participant referred to a lack of transparency regarding how many cases local authorities had settled early.

While participants were not all aware of legal challenges being instigated or settled, the responses show that such challenges have been pursued, despite personal demands, local authority resistance, and funding challenges which impact on the possibility of legal representation.

Interview Questions and Responses (7)

Access to local authority complaints processes

Interview participants were asked: *In your experience, what internal complaint procedures exist for local authorities responsible for implementing the legislation? How effective are these in ensuring individual redress?*

Participants pointed to local authority internal complaints procedures as the route to challenge decisions about SDS. These procedures are generic, not tailored to SDS. Some participants saw the lack of a tailored process as problematic while others did not. For example, one participant stated that the process in itself was not necessarily problematic:

“The complaints procedure process works. Whether you get a satisfactory outcome is in the eye of the beholder.”

*Advocacy Organisation
staff member*

One participant said that there were sometimes additional, general policies within local authorities that had been used to help challenge practice, such as a Customer Service Charter.

One participant highlighted that there is no *prior mechanism* for challenging SDS-related decisions before engaging in a formal process, noting that there was perhaps a perception due to the participatory ambition of the 2013 Act that some mechanism for this was, perhaps wrongly, thought to be unnecessary.

This participant, as well as others, observed grey areas within practices of addressing complaints, noting, for example, that sometimes *outcomes change* even if a complaint is *formally unsuccessful*.

Interview Questions and Responses (8)

Another participant highlighted that sometimes initiating a *formal complaint* can lead to an *informal response*:

“[...] what can often happen is someone comes back and says, let’s have a meeting, let’s have a discussion about this [...] But is that part of the complaints process? [...] Are they treating that as an appeal? [...] [S]o sometimes you don’t know whether that, often that first opportunity for resolution is being formally considered, or that’s them really wanting to kind of head you off at the pass a bit and try and resolve things [...]”.

Advocacy Organisation staff member

This sort of informal response was seen to be positive on occasion, because it enabled progress, but it sometimes simply led to a delay in the formal process. Another participant described an informal "dialogic" approach as their focus when supporting individuals to initiate complaints. This can divert the need to make a complaint in some cases, whilst still pursuing better outcomes for the individual.

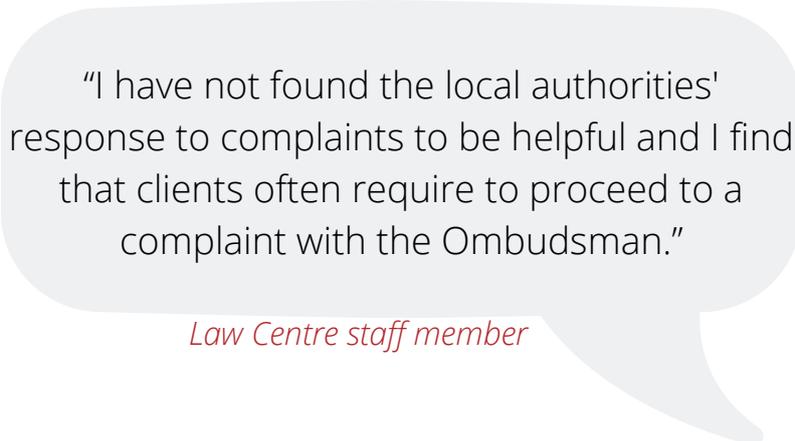
Several participants referred to the Scottish Public Services Ombudsman (SPSO) process, as a follow up to local authority processes.

A minority of participants mentioned judicial review as a potential route after engaging with the SPSO process. The possibility for raising some issues with more specialised organisations, such as the Mental Welfare Commission for Scotland, was noted.

Interview Questions and Responses (9)

When asked about the effectiveness of local authority complaints procedures in ensuring individual redress, several participants acknowledged where processes had been effective, but outcomes for individuals were, of course, not always favourable. One participant gave an example of nine formal complaints having been lodged in the previous six month period, where three were upheld, three were partially upheld and three were not upheld, therefore it was a very mixed picture.

The majority of participants described local authority complaints processes as not very effective. For example:



"I have not found the local authorities' response to complaints to be helpful and I find that clients often require to proceed to a complaint with the Ombudsman."

Law Centre staff member

Some participants noted the time-consuming nature of the process. One participant gave an example of a challenge via a local authority complaints process that took almost one year; another gave an example of a complaint that had not been satisfactorily resolved after three years. Conversely, one participant who had supported an individual with a formal complaint (in North Lanarkshire) said the process was efficient, with a response being provided within days.

Some participants found the nature of the process to be problematic. Processes were described as antagonistic, alienating, and inaccessible. One participant described slow complaints being passed internally from person to person. Another participant spoke of clients fearing the consequences of making a complaint, on their future relationships with the local authority and local authority staff:

Interview Questions and Responses (10)

"Quite often, I think, a lot of service users are loathe to go down the complaints procedure because they don't feel that their voices are going to be listened to. And there's also a, whether it's a real or imagined fear, there's a fear, a very real fear I think for a lot of service users that by going down the complaints procedure it's going to be problematic for them in the future, that they might be viewed negatively by the local authority in the future if any other issues'll arise, so you know they hold off going down the complaints procedure for as long as possible [...] or maybe just don't bother at all in the end [...], not that they don't want to see a different outcome but they just feel the, the time commitment, the pressure, the anxiety that it's going to cause them just, you know, isn't worth the trouble when they feel that they're maybe not going to get a change to the outcome that's already been decided."

Advocacy Organisation staff member

A number of participants also highlighted a lack of independence: complaints are addressed to the same local authority; although they will be considered by someone different, it remains within the same department and the same organisation. This suggests an inherent lack of independence.

Participants highlighted inconsistency of approach ("postcode lottery" (*Advocacy Organisation staff member*) to complaints depending on the local authority and the individual responding.

One participant, reflecting on their own organisation's previous research, stressed that while there are very positive examples of empowered individuals taking complaints and of these complaints leading to the outcome sought by the individual, the prior issue of barriers to access is also relevant for thinking about *effectiveness*.

Interview Questions and Responses (11)

Structural barriers – and sometimes multiple structural barriers – faced by individuals can mean that the complaints process is not only less accessible, but also less likely to lead to an outcome favourable to the individual.

Participants highlighted a number of practices which had improved, or had potential to improve, the effectiveness of complaints processes including independent advocacy, and independent complaints processes outside of local authorities.

Awareness of, and access to, independent advocacy was described as lacking because of its under-resourcing, yet this was seen to be extremely significant. The advocacy accessed through the *Support in the Right Direction fund* [8] was specifically mentioned as having been very helpful in supporting people in complaints processes.

The need for an impartial body to look at SDS complaints was suggested. It was suggested that there is sometimes a need for an impartial determination of what the legislation demands, i.e. how the legislation should be interpreted.

On the whole, therefore, participants tended to acknowledge that there was a clear route for making a complaint, which sometimes led to effective outcomes, but that the nature of the process itself was problematic.

Processes appear to be inconsistent in terms of timescales, and have an impact on crucial individual relationships with social workers. The latter was linked to a culture of fear around pursuing complaints, and where complaints are pursued, the responses indicate that this can lead to informal as well as formal practices and outcomes.

Interview Questions and Responses (12)

Outcomes of local authority complaints processes

Interview participants were asked: *How long does the process take? What is the quality of response?*

Overall, responses from participants indicated that there is an inconsistency concerning the length of the complaints process, which can depend on a number of factors.

The most common response from participants was that the process took, on average, from four to 12 weeks. However, the responses were quite diverse: at one end of the scale, one participant advised it could take mere hours; on the other hand, one participant was aware of an instance where a client had been waiting a year for a care manager assessment. The process was described by one participant as “wearisome” (*Advocacy Organisation staff member*).

One respondent highlighted the fact that prior to the pandemic, they deemed the system to be quite efficient, but since March 2020 the process has become “much longer” (*Advocacy Organisation staff member*), with it taking up to 12 months for the SPSO to investigate any issues.

The reason for this inconsistency in timeframe is debated within the responses: two participants believed the length of time was based on the particular local authority; one believed it was influenced by the type of complaint; one believed it was affected by the information provided by the client; and one thought it depended on the individual handling the complaint.

Interview Questions and Responses (13)

That is not to say that every claim will be subject to an undefined waiting period, as demonstrated by one interviewee:

“For some people, things are resolved really quickly. Part of our role is actually around supporting people with their expectations because obviously the local authority has a right and a duty to investigate and to put people forward to carry out that piece of work. So, there needs to be time for that due diligence. But it does vary. I would say on the whole, most of the complaints that I have supported people to submit have met the timeframe that the local authority states, but not always. Not every time.”

Advocacy Organisation staff member

The general consensus is that the length of time that the complaints process takes varies, depending on a number of previously mentioned factors, and whilst complaints can be handled efficiently, claimants can, in some cases, expect to wait up to a year for a result.

Equally important as the length of time is the quality of the response. Overall, the responses were again mixed, with both positive and negative local authority responses highlighted by the participants.

Most commonly, participants said that the quality of response was “really varied” (*Advocacy Organisation staff member*). One respondent felt that the quality of response depended on the individual dealing with the complaint, and that responses were not personal enough, focusing more on budget-related issues rather than the needs of the individual or their human rights.

Interview Questions and Responses (14)

One interviewee who had personal experience of making a claim describing the process as “pathetic” (*Advocacy Organisation staff member*). Another said that claimants often felt they had to ‘take what they could get’ in terms of a response, and when hearing the next steps in addressing a local authority response, claimants often felt it would be difficult to pursue the process due to their personal circumstances.

Overall, the quality of the response seemed to usually be poor. One participant said:

“My understanding is that it’s rare for people to get a really good outcome from it. There were as many positive responses as there were negative ones, but even the positive ones might have been grudging, very slight improvements rather than actually being what people were looking for. We need a lot closer scrutiny to see actually how decisions pan out in terms of what people are really looking for compared with what they’re getting.”

Advocacy Organisation staff member

Not all experiences were seen to be negative: one respondent detailed their positive experiences with the quality of responses. One said that the quality of response was impressive, with a good performance from a Quality Assurance Officer.

Unfortunately, given the analysis of all interviews, it seems that this high standard is not consistently met, with the quality of response falling short for many.

Interview Questions and Responses (15)

Legal arguments challenging the implementation of the 2013 Act

Interview participants were asked: *What legal arguments have been/could be made on the failure of local authorities to implement self-directed support?*

Complaints appeared to be based on budget decisions, and also inconsistencies/lack of transparency. For example, responses indicated that within one local authority area, there could be two individuals who experience a varied outcome based on similar SDS issues. This outcome could reflect differences in budget constraints and/or differences in the decision making procedures in place.

Participants reiterated that the question of legal arguments is often remote, given that individuals are sometimes not willing to make a complaint in the first instance due to the fear that any complaints – internal or eventually external – could undermine the individual's SDS funding or lead to it being withdrawn. There was a view that some individuals were concerned about the relationship with their social worker, which could be damaged if any complaint was made.

Advocacy workers reported that a key barrier to constructing a legal argument is that often issues with local authorities are viewed from the individual's perspective as one large problem rather than separate issues. At the same time, an individual seeking assistance in making a complaint often presents a myriad of issues, not one specific problem. Framing a complaint as a legal argument, therefore, is not always straightforward and is dependent on the circumstances of each individual case. This blurs the ability to progress matters as it depends on confidence in identifying a potentially successful legal argument.

Interview Questions and Responses (16)

Respondents reported that SDS legislation, the Equality Act 2010 and the CRPD were often referred to when framing a legal argument as compared to the Human Rights Act 1998. While domestic law (social care legislation and equality legislation) is utilised, human rights arguments did not appear to be a main consideration in seeking legal redress. This is despite the fact that the Human Rights Act 1998, used in context with the 2013 Act, could be useful in some circumstances when making a complaint and/or developing a legal argument on the failure of local authorities to implement self-directed support, and most local authorities recognise human rights as part of SDS legislation.

In summary, there appeared to be a lack of awareness of potential legal arguments. This was combined with apprehension and/or unwillingness to pursue internal complaints procedures in the first place, which contributes in part to the lack of judicial challenge.

Human rights framing

Interview participants were asked: To what degree are complaints framed around the human rights of the service users? When complaints are framed around human rights, does this have an impact on the process and result?

There were two noticeable and contrasting trends to the question about human rights framing: seven of the fifteen interviewees responded by saying complaints were not framed around human rights, stipulating that complaints tend to be more focused on other areas such as “health and finance” (*Advocacy Organisation staff member*) and on a bureaucratic process.

Interview Questions and Responses (17)

One participant, who talked about their impressions based on hearing indirectly about service users' experiences, stated:

"[...] the feeling from service users that we're made aware of is that it isn't about their human rights, it isn't about their individual needs as a disabled person or a person with a long term condition, it's kind of couched in terms of, you know, this is what the local authority's able to offer because of A, B, C bureaucratic restrictions, budget limitations, etc, as well, so there tends not to be the focus on that individual and their individual human rights."

Advocacy Organisation staff member

One participant observed that a failure to frame complaints, from the start "in terms of the impact that it is has on someone" (Law Centre staff member), rather than changes to expected budgets, hindered the likelihood of later framing a successful human rights-based claim.

Another respondent noted that the lack of human rights framing was due to lack of awareness, knowledge and accessibility of human rights:

"Lack of awareness from the people that they themselves are rights holders [...] Human rights often seem like big, fancy ideals [...] rather than something people have a legal right to [...]. There is a lack of empowerment and knowledge for people to know that they can draw on [human rights]."

Advocacy Organisation staff member

Interview Questions and Responses (18)

"[...] when somebody says 'I'm unhappy' because you haven't provided the level of support that I need or if you've said I'm not eligible and I'm desperate for support, people don't think about human rights. People, generally in their life, don't think about how does that apply to the UN Declaration on Human Rights and my family life [...] people are not aware of that sort of stuff."

Advocacy Organisation staff member

Others reported that the Human Rights Act 1998 was difficult to apply and that they do not use human rights language; rather, they use the words of service users.

This is in stark contrast with the remaining eight respondents who believed that complaints are framed around the human rights process to a high degree, noting that "legislation [...] and post legislative policy is very explicit about being about people's rights to choice and control" (Advocacy Organisation staff member). One respondent noted that human rights are present around "every aspect of every single complaint" but highlighted that they "personally haven't framed any arguments or negotiations around human rights" (Advocacy Organisation staff member). Interestingly, these eight respondents were from advocacy centres highlighting two respondents' observations that human rights legislation is more used in advocacy terms; for example:

"Advocacy organisations do that best [use human rights]."

Advocacy Organisation staff member

"[...] we are a human rights organisation so we absolutely take them [human rights] into account."

Advocacy Organisation staff member

Interview Questions and Responses (19)

Regarding the impact of human rights framing on the process and result, responses were varied, however there were some noticeable trends. For example, two respondents highlighted that complaints are only framed around human rights if third parties become involved in the process, stating that individuals might get advocacy workers involved, or local councillors and/or other elected representatives, and often this can add a human rights perspective. One interviewee stated that: “human rights are more likely to be referenced” (*Advocacy Organisation staff member*) when an ombudsman becomes involved.

Three out of the fifteen respondents stated that it does have an impact, in that it gives gravity to the case (*Advocacy Organisation staff member*), and “it [Human Rights Act 1998] is sometimes used as a threat” (*Advocacy Organisation staff member*). However, these responses were often qualified by comments such as: “it depends on the complaint and whether or not it is being upheld” (*Advocacy Organisation staff member*); it “probably would be more effective” (*Advocacy Organisation staff member*). This highlights that it is not the typical route of complaints: “if the complaint is valid [...] they tend to focus more on the Act [Social Care (Self-Directed Support) (Scotland) Act 2013] itself and on their own Local Authority Guidance” (*Advocacy Organisation staff member*).

One respondent from an advocacy organisation stated that human rights should be framed around complaints but they are not. This respondent suggested that it is not only the complaints process that needs to be framed around human rights but also “the distribution, allocation and management of budgets”, advising that there “needs to be awareness of what support/guidance is available [...]” (*Advocacy Organisation staff member*). Some respondents were unable to comment as they were not involved in human rights arguments. This suggests that, due to lack of awareness, human rights might only be used around a complaint when a third party who is familiar/aware of human rights becomes involved.

Interview Questions and Responses (20)

Complaints and referrals to law centres

Interview participants who were law centre workers were asked: *How many referrals have you received on the basis of the failure to implement self-directed support?*

Both interviewees told us that they had received at least one referral about the failure to implement SDS. However, only one participant had received a significant number of referrals in this area (*Law Centre staff member*). That interviewee noted that, at the time of the interview, her organisation had received around four to five referrals in the past week to ten days and also noted that complaints are very rarely initially framed around the failure to implement SDS. Instead, there are three broad types of complaints which could relate to SDS. Firstly, there are general complaints about lack of access to support from social work. Secondly, there are complaints where a budget is in place and the individual has access to services but where this budget/service is being cut. Thirdly, there are referrals where there are particular complaints with the service providers.

The interviewee noted that those from a middle class background were often better able to navigate the process and access support, and that those who did not have the same education/resources could sometimes have services and budgets foisted upon them, and were not really listened to in the same way, although it was stressed that this was not always the case.

Interview participants who were advocacy or advice agency workers were asked: *How many individuals have approached you complaining about local authorities' failure to implement self-directed support?*

Interview Questions and Responses (21)

The answer to this question tended to vary depending on the size and role of the interviewee's organisation. However, at least five of the interviewees suggested that requests for advice/complaints reached high into the hundreds with some as many as 700, with over 100 every year. Indeed, one interviewee suggested that such approaches were "only scratching the surface" (*Advocacy Organisation staff member*). Further, one interviewee suggested that some potential complainants were put off because they felt that complaining about their social worker would lead to their support being withdrawn.

Other organisations indicated that they had received fewer or no communications of this kind, but generally explained that this was down to the organisation's size, how well known it was or because it's role was not necessarily linked to receiving complaints of this kind.

Some interviewees were keen to emphasise that many communications did not necessarily come in the form of complaints but rather requests for information, advice or support. One interviewee suggested that this was indicative of a failure on behalf of local authorities to provide quality information to potential beneficiaries of SDS.

As one interviewee explained, the form of referrals tended to vary. Some interactions would concern failures in implementation. However, in local authority areas which have good practice in relation to SDS (the example of North Lanarkshire was given), many of the communications would be about encouraging individuals to take advantage of that practice. Additionally, much of the communications received were about providing extra independent support, such as encouraging individuals to use their budget creatively, and, where new to SDS, about giving some additional support with planning or individual outcomes. These interactions were therefore not necessarily complaints but rather requests for additional assistance.

Interview Questions and Responses (22)

It was suggested that around half of the individuals contacting the interviewee's organisation were unhappy with their experience whilst the other half were looking for support in making the most of the system.

Where individuals did raise concerns, these tended to be about the budget, process, interventions or a lack of transparency. Another interviewee suggested that they had received several complaints from individuals as a result to changes in support as a result of the Covid-19 pandemic. This was particularly the case at the early stages of the pandemic where some local authorities were "tightening their flexibility" relating to self-directed support (*Advocacy Organisation staff member*), although this issue had been alleviated somewhat by the issuing of government guidance and increased funding.

Barriers to making complaints were again raised in response to this question. One interviewee noted that the approach of some local authorities, and indeed the system as a whole, was fundamentally flawed:

"[...] [L]ocal authorities think this is their money. They're in charge of it, they decide how much goes into social care, they're going to stick to that regardless of what the need is, and regardless of what their responsibilities are in terms of enabling people to live an independent life and to access [...] opportunities in their community. So Money and control [...] They want to hold on to both. And unfortunately I think the question for me is, are local authorities really the right organisation to deliver social care in Scotland. I mean we've had six years of an Act that fundamentally is not being implemented as it should be. And it's those people where it's very easy to provide support where [...] it might be working ok. It might still not meet the requirements of the Act [...] but things are working ok, so there's no need for them to question or challenge anything."

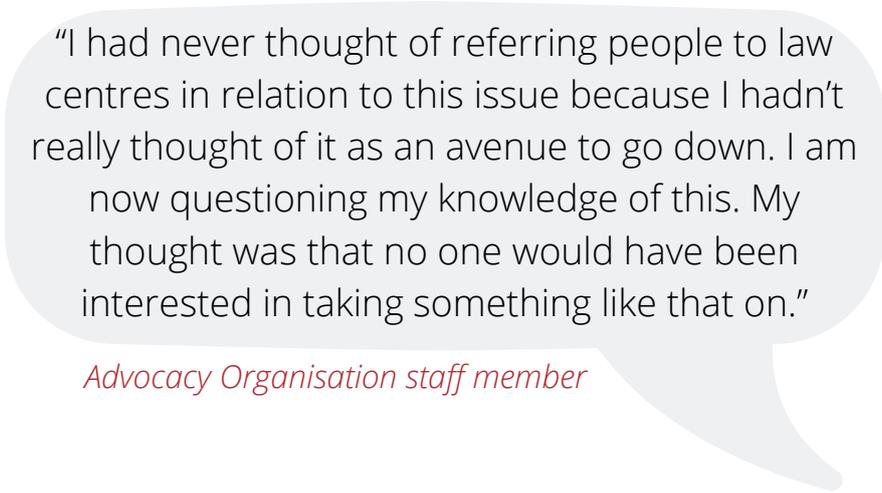
Advocacy Organisation staff member

Interview Questions and Responses (23)

This indicates that causes for complaint are being missed because arrangements may be “ok” and nevertheless fail to reflect full and ambitious implementation of the standards in the 2013 Act.

A small number of interviewees told us that they had experience of referring individuals to law centres. Some interviewees mentioned that although they would not refer individuals to law centres, they would often speak to the legal department of the advocacy organisation MECOPP (Minority Ethnic Carers of People) which was able to provide them with legal advice. It was suggested that this service was used regularly and was extremely helpful but that it was no longer available. Others noted that they had signposted law centres and legal options without explicitly referring individuals.

However, a large majority said that they had little to no experience of referring individuals to law centres:



“I had never thought of referring people to law centres in relation to this issue because I hadn't really thought of it as an avenue to go down. I am now questioning my knowledge of this. My thought was that no one would have been interested in taking something like that on.”

Advocacy Organisation staff member

A number of reasons were given for the relatively low number of referrals. Interviewees noted that most individuals preferred to seek the support of advocacy centres, write to their local MSPs or complain to the Ombudsman rather than seek legal advice. It was noted that there did not appear to be many law centres that had experience/capacity to challenge local authority practice on SDS. Time limits, issues with accessibility, and a general lack of clarity about the different complaints procedures and how they interact with one another, were also advanced as reasons why there were few law centre referrals.

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Interview Questions and Responses (24)

Additional

A research insight presentation was delivered to members of the North Lanarkshire Disability Forum in October 2020. The key points from the discussion were that:

- complaints processes were not clear enough and were inconsistent;
- communication, expectations and eligibility for support require greater clarity and understanding in order to manage individuals' expectations;
- limited carer advocacy services, and gaps in awareness about advocacy assistance act as a further barrier to making complaints on behalf of individuals;
- teamwork, support and a better community effort is needed to improve complaints processes;
- need for clearer signposting, impartiality, and participation to encourage complaints;
- need to improve regional differences in handling complaints in order to streamline approaches and make improvements to help reduce barriers to complaints, misunderstandings and responses to complaints;
- and transparency in the general process would enhance peoples' experiences of SDS, eligibility and fairness when managing budgets.

Key Findings



Inconsistency and unpredictability of complaints processes

There is an overwhelming view that complaints processes were problematic in some way, but it is not the case that participants saw these as wholly unsatisfactory.

Practice varied over different local authority areas. North Lanarkshire was referred to on a number of occasions as an area where the local authority's approach to SDS was proactive and responsive and in line with the original aims of the legislation. However, this approach was not necessarily matched amongst the other local authority areas we considered.

All participants acknowledged that the route for complaints was clear and most acknowledged that the process works in some cases for some individuals. Further, it appears that flexibility and informality might lead to good outcomes on occasion. Despite this, the research surfaced several features and impacts of the process that were seen to be detrimental to the individuals who were challenging decisions.

Complaints processes were seen to be characterised by inconsistency and uncertainty in multiple ways. This related to geographical location, the individual receiving the complaint, and levels of individual knowledge and awareness.

The research identifies a precarious chain of events, which leads to engagement in local authority complaints processes being unpredictable and contingent upon a range of individualised factors.



Key Findings (2)

Limited availability of free legal advice

Those looking to challenge SDS might access legal advice outside of the free legal advice sector, but it is clear that there is some demand for expertise within this sector.

In the local authority areas that were part of the research, connections between SDS challenges and the free legal advice sector seemed limited. There are few practicing solicitors who specialise in this area. This has resulted in few advocacy organisations referring clients to law centres.

Without this support, particularly in light of the structural barriers facing individuals claiming SDS, the prospect of challenging non-compliance via judicial review is extremely low.

A lack of detailed focus on human rights dimensions

Many respondents praised the Social Care (Self-Directed Support) (Scotland) Act 2013, advising that it was a progressive piece of legislation.

The responses identified the implementation of the Act as the cause for concern.

Interviewees who were from a human rights-based organisation had a greater level of awareness of human rights implications.

Respondents were almost evenly split in their views on whether human rights tend to be used to frame complaints. What these responses do show, however, is that there tends to be a lack of detailed knowledge of human rights and the relevant legislation that promotes and protects them, and of potential human rights-based grounds for challenging SDS decisions.

Key Findings (3)

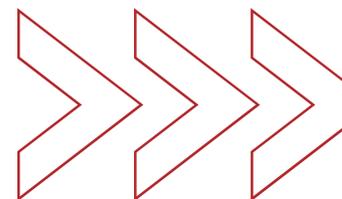


This lack of detailed knowledge of relevant human rights law appeared to lead to under-utilisation of human rights arguments when challenging decisions.

Despite this, several respondents suggested that complaints framed around human rights were likely to improve the response of the local authority.

The research findings indicate that human rights law is under-utilised and that it could be valuable to bring human rights dimensions from the background to the foreground of implementation practice and complaints processes.

Conclusion

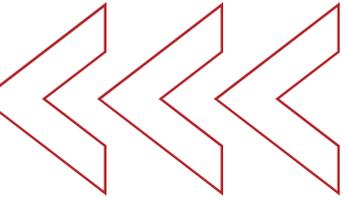


This research was initially motivated by an apparent lack of legal challenges relating to self-directed support since the introduction of the Social Care (Self-Directed Support) (Scotland) Act 2013. It has aimed to fill a gap in knowledge regarding the frequency and outcome of complaints, by identifying any barriers to accessing complaints processes, and to uncover why such barriers may exist.

Improved implementation is, of course, the aim and reduces the likelihood of recourse to complaints processes. Pursuing legal challenges is a last resort. Nevertheless, formal avenues for holding public authorities to account are an essential part of the protection of individual rights, and therefore these avenues should be accessible.

The interview data provides rich insights into the multiple dimensions of complaints avenues, and the barriers to accessing these. The barriers at various stages along the continuum of complaints processes can be summarised as:

- *structural* barriers stemming from the weight of demands placed upon individuals who are inherently in challenging circumstances;
- *knowledge* barriers characterised by lack of awareness of entitlements or of the option of pursuing complaints;
- *relational* barriers based on fear of making complaints which might impact negatively on interactions with social workers, or on SDS funding being delayed or withdrawn;
- *legal support* barriers as a result of limited availability of specialised solicitors and legal aid constraints;
- and *legal process* barriers deriving from the long periods of time involved in seeing complaints through from internal to the highest levels of external complaint, as well as practices of settling complaints before legal judgments.



Conclusion (2)

The data indicates the ways in which these different dimensions can come together to create impediments for those who wish to formally challenge SDS-related decisions. Notably, it demonstrates that the wearisome process demanded by complaints procedures can act as a deterrent in the initial raising of complaints and has a resultant effect on the likelihood of a legal challenge.

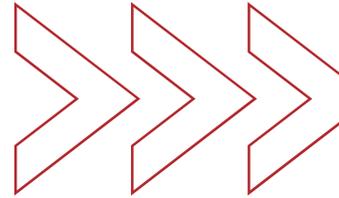
Participants often reiterated that there is a generalised reluctance to proceed with a complaint. This colours the whole question of legal challenge, since if individuals are not able or not willing to complain in the first place, this impacts on the possibility as well as willingness to later seek legal action. The data indicates that pursuing a complaint to the level of a judicial review judgment requires overcoming barriers that seem almost insurmountable. As one participant stated when explaining why challenges may not tend to reach judicial review:

"All along the stages, I suppose, in terms of reaching that point, you've got to go through a process which might [...] kind of hold you back from taking the legal option."

Advocacy Organisation staff member

This quote also, indirectly, highlights – as does the interview data as a whole – that complaints avenues can lead to better outcomes. The interview data indicates that engaging in formal complaints processes can create opportunities for resolution at a number of stages. The process of articulating a challenge with advocacy support, and/or raising a challenge formally within a local authority, and/or escalating the complaint externally (via the SPSO or by seeking legal advice), can lead to *informal as well as formal resolution*. If better outcomes for individuals is the goal, this is positive, and in this sense, we can describe complaints processes as effective.

Conclusion (3)



However, the findings also show that complaints avenues are a very precarious path to pursue. As the vast majority of participants noted, engaging in such processes, both within and beyond local authorities, comes with a significant cost – to individuals’ and families’ energy and health. Currently there is no alternative to placing the burden repeatedly on particular individuals. At least in some local authorities, this appears to take place within a culture that is neither proactive in improving service delivery in response to individual complaints, nor in framing complaints around human rights.

Notes

[1] Social Care (Self-directed Support)(Scotland) Act 2013, s.2, and accompanying Statutory Guidance (paragraph 1.2) available at <https://www.gov.scot/publications/statutory-guidance-accompany-social-care-self-directed-support-scotland-act-2013/pages/1/>

[2] After the data collection was completed, the research team was made aware of the case of *Lennon v NHS Highland and Another* [2021] CSOH 56, in which a judgment was handed down in May 2021. Mr Lennon's claim was based on the Social Care (Self-Directed Support)(Scotland) Act 2013. There were a number of issues at stake prior to the judgement, but the judgment itself focused primarily on the meaning of certain provisions in the legislation and whether it was Mr Lennon or the health board (acting on behalf of the relevant local authority) who was entitled to make the ultimate decision on the choice of support to meet the outcomes in the individual's Personal Outcomes Plan. It was confirmed that there was a duty to undertake a proper consultative, collaborative, and cooperative assessment (respecting also the statutory guidance that accompanied the Act) but that the responsible authority retained some discretion as to how support was to be delivered. The Court, thereby, did not uphold the individual's complaint. This was a judgment of the Outer House (i.e. first instance) of the Court of Session.

[3] See note above on the 2021 judgment in the case of *Lennon v NHS Highland and Another*.

[4] A recent example is from the SDS Scotland and ALLIANCE joint research project called My Support My Choice looking at the experiences of people using social care services in Scotland (September 2021), which can be found here: <https://www.sdsscotland.org.uk/mysupportmychoice/> and here: <https://www.alliance-scotland.org.uk/health-and-social-care-integration/self-directed-support/msmc/>

[5] A total of fourteen resources were shared by participants.

Notes (2)

[6] Some organisations straddled both categories. Responses from interviewees from such organisations have been included in the most relevant category for responses.

[7] One participant represented an organisation that provided both legal advice and advocacy support. For the purpose of this report, this interviewee is classified as an 'advocacy and advice agency worker'. However, it should be noted that this interviewee also responded to questions relating to 'law centre solicitors'.

[8] Please see <https://www.sdsscotland.org.uk/sird/> for further information on the Support in the Right Direction fund.

Acknowledgements

On behalf of all of the research team at the Centre for the Study of Human Rights Law and the University of Strathclyde, we would like to take this opportunity to express our special thanks to all of interviewees who have dedicated their time, knowledge and experiences to this research project.

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Finally, we would like to thank Dr Sam Smith and In Control Scotland for their collaboration and for supporting us throughout the research process.

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