

WELFARE REFORM ACT 2009

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Disabled people: Right to control provision of services

Section 38: Purpose of Part 2

200. This section sets out the purpose of this Part of the Act: namely to enable disabled people aged 18 or over to have greater choice and control over the way certain services are provided to or for them by defined public authorities. The section does not create a right to control. This Part of the Act contains a series of enabling powers which will allow the making of regulations that confer new rights on disabled people. These rights are together referred to in these Notes as ‘the right to control’

Section 39: Relevant services

201. *Subsections (1) and (2)* define as ‘relevant services’ the services to which regulations under this Part may relate.
202. *Subsection (3)* extends the definition of relevant services to include the provision by a relevant authority (defined in *section 40*) of grants or loans to a disabled person.
203. *Subsection (4)* provides that relevant services do not include ‘excluded services’. Excluded services are defined in *subsections (6) and (7)*. The excluded services are services which are already the subject of a ‘direct payments’ scheme.
204. *Subsection (5)* provides that the exclusion of community care services from the definition of relevant services is to be subject to the disapplication of that exclusion for the purpose of pilot schemes under *section 44(4)* and to the order-making power in section 48 that would enable the permanent removal of the exclusion of community care services following the evaluation of the pilots or the issuing of directions.

Section 40: Relevant authority

205. This section defines the public authorities who administer the services that could be brought within the scope of the right to control.

Section 41: Power to make provision enabling exercise of greater choice and control

206. *Subsection (1)* provides a general power for an appropriate authority (defined in *section 45*) to make regulations for the purpose set out in *section 38*.
207. *Subsections (2) to (6)* give details of particular matters for which regulations under *subsection (1)* may provide. *Subsection (2)(a)* enables regulations to require an authority to inform a disabled person about the right to control and what it means to them and would enable regulations to require an authority to tell a disabled person how much money is available for their support under the relevant funding streams. *Subsection (2)(b) to (d)* enable regulations to require an authority to work with the disabled person

to agree outcomes, develop a support plan and review and revise that support plan. It also enables regulations to require an authority to ensure that services provided or commissioned by them for the disabled person are provided in a way that is consistent with the person's support plan, where this is reasonably practicable. *Subsection (2)(e)* enables regulations to require the authority to make payments to the disabled person (at his or her request) to secure provision of an equivalent service instead of providing the service itself.

208. *Subsection (3)* sets out further details of the provisions that may be included in regulations. *Paragraph (a)* provides that regulations may specify who is or is not to be treated as a disabled person for the purpose of the regulations. *Paragraph (b)* enables regulations to make provision to determine whether a public authority has exercised its discretion to provide a service to a person. The need for this power arises from the fact that the disabled person's rights to a different service or to a direct payment may depend on whether such a decision has been made. *Paragraph (c)* gives a power to prescribe the matters which a public authority should take into account when making a decision under this Part of the Act. *Paragraph (d)* gives a power to make provision about the steps this public authority must take when making a decision regarding its duties under this Part of the Act.
209. *Subsection (4)* enables regulations to allow information to be shared between authorities for the prescribed purposes of the regulations.
210. *In subsection (5), paragraph (a)* enables regulations to vary conditions attached to any grant made by a relevant authority to a disabled person where it is necessary for the operation of the right to control. *Paragraph (b)* enables regulations to vary conditions attached to any power of a relevant authority to provide financial assistance to another relevant authority in connection with the provision of relevant services. An example of this would be the variation of grant conditions in relation to a grant from a central government department to a local authority.

Section 42: Provision that may be made about direct payments

211. This section makes detailed provision about the provisions that may be included in regulations that provide for direct payments to disabled people. These regulations (which are defined as 'direct payments regulations') are made under [section 41\(2\)\(e\)](#). So they are merely a special type of regulations under [section 41](#). *Subsection (2)* provides that direct payments regulations may—
- specify when an authority is or is not required to comply with a request for a direct payment,
 - outline how the request for a direct payment can be made,
 - enable a disabled person to require an assessment of the amount of direct payment to which that person would be entitled, if that person was to request a direct payment,
 - require a mixture of direct payments and services to be made by an authority, should the disabled person request this,
 - make provision that displaces the function or obligation of the authority if a direct payment is made. Where a providing authority has made a direct payment under regulations made under [section 41](#), regulations would provide that it does not remain under a statutory obligation to provide the service or services to which the payment relates.
212. *Subsection (3)* requires direct payments regulations to provide that where a request for a direct payment places an unreasonable financial burden on an authority it will not have a duty to comply with the request.
213. *Subsection (4)* enables direct payments regulations to make provision—

*These notes refer to the Welfare Reform Act 2009 (c.24)
which received Royal Assent on 12 November 2009*

- for a power to provide for authorities to make direct payments instead of providing services;
 - to prescribe conditions that the disabled person or other payee must comply with in order to receive the direct payment;
 - for authorities to terminate the making of direct payments;
 - for the authority to recover over-payments;
 - for the authority to recover payment where the individual fails to meet conditions attached to receipt of the direct payment;
 - to ensure that an authority can write off any debt arising from an overpayment;
 - for direct payments to be made to a person on behalf of the disabled person.
214. *Subsection (5)* specifies the types of conditions that regulations may require the disabled person or other payee to comply with. These conditions would be designed to secure that any direct payment was used for the purpose for which it was intended.

Section 43: Exercise of rights on behalf of persons who lack capacity

215. This section enables regulations which make provision for the right to control to be exercised on behalf of a disabled person where the person lacks mental capacity to take decisions. It defines this concept by reference to the Mental Capacity Act 2005 in relation to England and Wales and the Adults with Incapacity (Scotland) Act 2000 in relation to Scotland.

Section 44: Pilot schemes

216. *Section 44* enables the making of regulations having temporary effect and constituting pilot schemes. The duration of a pilot scheme is not to exceed 36 months, though it may be replaced by a further pilot scheme. *Subsection (4)* enables pilot schemes to apply to adult community care services. *Subsection (8)* requires the Secretary of State (or other appropriate authority) to publish a report on the operation of a pilot scheme.

Section 45: The appropriate authority by which regulations under section 41 are made

217. This section defines the appropriate authority which is to have power to make regulations under *section 41*. The Secretary of State will be the appropriate authority except in cases where the provisions to be made would be within the legislative competence of either the Scottish Parliament or the National Assembly for Wales. If the provision would be within the devolved competence of either of those bodies, powers are conferred on the Scottish Ministers and the Welsh Ministers respectively. *Paragraph (c) of section 45(2)* enables the regulation-making power in section 41 to be exercised by the Secretary of State or the Welsh Ministers where both have functions in relation to a relevant service in Wales. *Paragraph (d)* enables that power to be exercised by the Welsh Ministers in relation to other relevant services with respect to which functions are exercisable by the Welsh Minister, the First Minister for Wales or the Counsel General to the Welsh Assembly Government. *Subsections (3)* and *(4)* prevent the Secretary of State or the Welsh Ministers from modifying each other's functions when making regulations under section 41. Regulations made by the Secretary of State will require the consent of the Treasury.

Section 46: Regulations under section 41: supplementary provisions

218. *Section 46* makes supplementary provision about regulations made under *section 41*. In particular, it allows regulations to make different provision in respect of different

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circumstances. It also enables the regulations to include incidental, supplementary, consequential or saving provisions, and to amend or repeal any enactment.

Section 47: Consultation

219. This section requires proposed regulations under [section 41](#) to be published in draft and consulted on for a period of not less than 12 weeks.

Section 48: Power to repeal exclusion of community care services

220. [Section 48](#) confers an order-making power that enables the exclusion of community care services to be fully removed. In relation to England, this power is exercisable only if either of two conditions is met. One condition is that the Secretary of State has previously made a pilot scheme and has published an evaluation of that scheme. The alternative condition is that the Secretary of State has previously given directions under community care legislation that were intended to give disabled people greater choice and control.

Section 49: Regulations and orders: control by Parliament or other legislature

221. This section provides that regulations made under [section 41](#) or orders under [section 48](#) are to be subject to the affirmative resolution procedure in Parliament, the Scottish Parliament or the National Assembly for Wales.