These notes refer to the Health Act 2009 (c.21)
which received Royal Assent on 12 November 2009

HEALTH ACT 2009

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 – Quality and Delivery of NHS Services

Chapter 1 - NHS Constitution

Section 1: NHS Constitution

84. Section 1 identifies the NHS Constitution and the Handbook as the documents published on 21st January 2009, entitled *The NHS Constitution* and *The Handbook to the NHS Constitution*, or as any revised versions of those documents published in accordance with the provisions of Chapter 1.

Section 2: Duty to have regard to NHS Constitution

85. Section 2 requires specified bodies to have regard to the NHS Constitution when performing their NHS functions. Those functions include the commissioning or provision of NHS services or, in the case of Monitor and the Care Quality Commission, the regulation of those services. The bodies to which the new duty applies are: Strategic Health Authorities, PCTs, NHS trusts, Special Health Authorities, NHS foundation trusts, Monitor and the Care Quality Commission.

86. In addition, those bodies that provide or assist in providing NHS services under arrangements under section 12(1) of the NHS Act or who are providing NHS services under contracts or other arrangements made pursuant to the provisions of the NHS Act listed in *subsection (6)*, must (in doing so) also have regard to the NHS Constitution. This includes bodies providing primary care services, such as pharmaceutical services, dental services and general medical services.

87. *Subsection (7)* defines "NHS services" as being health services provided in England for the purposes of the NHS in England. *Subsection (8)* provides that references to the provision of services include the provision of services carried out jointly with another person.

88. The Constitution is for the NHS in England only. However, on 3 July 2008, England, Scotland, Northern Ireland and Wales committed to a high-level statement declaring the principles of the NHS across the UK. This was to reaffirm that the underlying principles of the NHS across the UK remain the same, even as the way the NHS provides care may vary between the four countries, reflecting their different needs and circumstances.

Section 3: Availability and review of NHS Constitution

89. Section 3(1) provides that the Secretary of State must ensure that the NHS Constitution continues to be available to patients, staff and members of the public. The NHS Constitution and the Handbook published on 21 January 2009 were published under the general powers of the Secretary of State in relation to the NHS. The effect of

subsection (1) (and section 5(1)) is to prevent the Secretary of State from using those general powers to withdraw either document.

90. The Secretary of State is obliged to review the whole NHS Constitution at least once every ten years, with the first review to be completed by 5 July 2018 (5 July is the anniversary of the founding of the NHS; this would be the 70th anniversary). The Secretary of State must ensure, when reviewing the Constitution, that the following are consulted: patients and bodies or other persons representing patients; staff and bodies or other persons representing staff (such as unions or professional bodies); members of the public; carers; local authorities; the providers of NHS services and the independent regulators. If any revision is made to the NHS Constitution as a result of a 10 year review, the Secretary of State is obliged to republish it (see subsection (5)).

91. Any revision to the guiding principles in the NHS Constitution must first be set out in regulations made by the Secretary of State. Those regulations will be subject to the negative resolution procedure.

92. Section 3(7) defines "patients" as those to whom NHS services are being provided. It defines the "guiding principles" as the principles described in the NHS Constitution published on 21 January 2009, or any revised version of those principles. It defines "staff" as those persons who are employed by, or working in some other capacity for, the bodies and other persons who, in providing NHS services, are obliged to have regard to the NHS Constitution where those persons are employed or work in (or in connection with) the provision, commissioning or regulation of NHS services. It defines "carers" as persons who, as relatives or friends, care for other persons to whom NHS services are provided, and section 3(8) defines "local authorities" to include unitary, county and district councils. This mirrors the definition of local authorities in section 229 of the Local Government and Public Involvement in Health Act 2007

Section 4: Other revisions of NHS Constitution

93. In addition to any revisions that follow a review, the Secretary of State is able to revise the NHS Constitution from time to time. However, the Secretary of State will be obliged to undertake appropriate consultation – with patients, staff, members of the public and other persons who are affected by the revision – before any such revision.

94. As in section 3, any revision to the guiding principles in the NHS Constitution (though not to the other parts of the Constitution) must first be set out in regulations made by the Secretary of State. Those regulations will be subject to the negative resolution procedure.

95. After any revision, the Secretary of State must republish the NHS Constitution.

Section 5: Availability, review and revision of Handbook

96. Section 5 provides that the Secretary of State must ensure that the Handbook continues to be available to patients, staff and members of the public (see discussion in paragraph 89 above).

97. The Secretary of State is able to revise the Handbook at any time, but is obliged to review it at least once every three years, with the first review completed by 5 July 2012. After any change to the Handbook, the Secretary of State is obliged to republish it. The Government intends this document to be updated periodically, as Department policy or law evolves.

Section 6: Report on effect of NHS Constitution

98. This section provides that the Secretary of State must publish a report on the effect that the NHS Constitution has had on patients, the public, staff and carers. Each report is required to be laid before Parliament. The first report must be published no later than 5 July 2012 and subsequent reports are required to be published every 3 years thereafter.

99. The Department intends to use the reports on the effect of the NHS Constitution to assess what further measures are required in order for the NHS Constitution to be effective. The aim of the report is to ensure that all bodies who are required to do so are having regard to the NHS Constitution – and so to the principles, values, as well as the legally-binding rights and the pledges, that the NHS is committed to achieve.

Section 7: Regulations under section 3 or 4

100. This section gives the Secretary of State power to make the regulations referred to in sections 3 and 4 by statutory instrument under the negative resolution procedure.

Chapter 2 – Quality Accounts

Section 8: Duty of providers to publish information

101. *Subsection (1)* provides that NHS providers in public ownership (listed in *subsection (2)*) must publish prescribed information in respect of each reporting period, covering the NHS services they provide or procure. The intention is to ensure that providers of NHS services produce regular reports on the quality of the services they provide, and that these reports are publicly available. The definition of "reporting period" in section 9(2) means that NHS providers will have to publish that information for the period 1 April to 31 March each year. Regulations will set out the content of a Quality Account.

102. *Subsection (2)* lists those NHS providers in public ownership. These are PCTs, NHS trusts, Special Health Authorities and NHS foundation trusts

103. The effect of *subsection (3)* is that bodies or other persons not in NHS ownership who provide, or make arrangements for the provision of, NHS services must also publish prescribed information. It defines these persons by referring back to section 2(4) and (5). Those subsections set out different providers of NHS services, including providers of primary medical and other primary healthcare services, by reference to the type of service they provide, and the legislation under which these services are provided.

104. *Subsection (4)* ensures that healthcare providers report on their part of any jointly provided healthcare. The intention is to ensure that each provider should publish their own Quality Account for the services for which they are responsible under any joint arrangement.

105. *Subsection (5)* gives the Secretary of State power to make regulations to exempt providers from the requirement to publish a Quality Account. The intention is to ensure that certain NHS providers, or types of NHS provider, can be exempted if necessary from the requirement to publish a Quality Account. This will be either on a temporary basis to allow certain types of provider, particularly those who are smaller or who are new to providing services for the NHS, to gear themselves up for publication; or on a more permanent basis, in cases where the provider carries out too few NHS services to make it reasonable to require that provider to publish an Account. This subsection also gives the Secretary of State power to make regulations to exempt certain services from appearing in a Quality Account. The intention of this subsection is to exempt certain services if it would not be practicable to include them, for example if the volumes of a particular service are too small to allow users of the Account to draw conclusions about the quality of services offered.

106. *Subsection (6)* defines NHS services by reference back to section 2(7), which defines these services as being those which are provided in England for the purposes of the health service continued by section 1(1) of the NHS Act.

Section 9: Supplementary provision about the duty

107. *Subsection (2)* defines the reporting period for the purposes of section 9. The first reporting period for Quality Accounts will be 1st April 2009 – 31st March 2010, and subsequent reporting periods will run from 1st April – 31st March each year.

108. *Subsection (3)* provides that a provider must republish their Quality Account if they are notified of an error or omission by either the Care Quality Commission or a Strategic Health Authority. Providers must republish the revised Account within 21 days. Guidance will set out how this provision should be applied.

109. *Subsection (4)* requires a provider to send a copy of their Quality Account to the Secretary of State. The Department of Health intends to publish provider Quality Accounts on the NHS Choices website, which is owned by the Department, but not to check or edit the Account.

110. The Act sets out a very basic requirement for the publication of Quality Accounts, and the Government intends to supplement that with subsequent guidelines, which providers will need to have regard to when drawing up their Quality Accounts. Regulations and guidance will have the key objectives of making use of information that providers already collect, of tying that into other NHS reporting cycles, and of keeping burdens on providers down to a minimum.

111. *Subsection (5)* sets out some of the matters about which provision may be made in regulations made under section 8(1) or (3). These matters include the form and content of a Quality Account and the date on which it must be published, duties of the provider to ensure the accuracy of the information contained in the Quality Account, and requirements for the provider to have regard to any guidance issued by the Secretary of State. The intention is to ensure that the content and timetable for publication can be changed easily and speedily in the future to reflect changing national and local healthcare quality priorities, as well as to ensure that providers take responsibility for the reliability of the content of their Quality Account.

112. *Subsection (6)* provides that any person can ask the provider to supply a copy of their Quality Account for the current and the preceding two years. All provider Quality Accounts will be available on the NHS Choices website, but the purpose of this subsection is to ensure that providers are required to supply a hard copy of their Quality Account to anyone who requests one.

113. *Subsection (7)* requires providers to display a notice in their premises informing patients that the latest copy of their Quality Account is available and how a copy can be obtained.

114. *Subsection (8)* sets out that premises that the provider does not own or run (e.g. the patient's own home) or that the provider owns or runs but that patients do not directly access (e.g. a pathology laboratory) are excluded from this requirement.

115. *Subsection (9)* defines "premises" for the purposes of *subsection (8).*

Section 10: Regulations under section 8

116. Section 10 makes provision about the procedure for making regulations under section 8. These will be subject to the negative resolution procedure.

Chapter 3 – Direct payments

Overview of provisions
Direct payments for health care

117. Section 11 inserts new sections 12A to 12D into the NHS Act. New section 12A(1) allows the Secretary of State to make monetary payments directly to a patient, or another person nominated by the patient, to enable them to procure goods and services

in connection with their health care. Such a payment is referred to as a "direct payment" (see new section 12A(5)).

118. Before a direct payment could be made, the patient would have to give their consent, either to receiving a direct payment themselves, or to a direct payment being made to a person nominated by them. For patients who lack capacity to consent, regulations under new section 12B(2)(c) may make provision for a direct payment to be made to a person on the patient's behalf.

119. The Secretary of State may provide in regulations for PCTs to be able to make direct payments for mental health after-care services that PCTs must provide to patients under section 117 of the Mental Health Act 1983 (the Mental Health Act) (see new section 12A(4)). The patient would be required by the regulations to give consent before a direct payment could be made, as in the case of a payment under new section 12A(1).

120. The Government has set out its intentions for how direct payments might operate in *Personal Health Budgets: First Steps.* A health care direct payment would be analogous to a direct payment for social care. The health care that could be procured using this money is health care for which the Secretary of State is responsible under sections 2(1) or 3(1) of the NHS Act, anything for which the Secretary of State must arrange under paragraph 8 of Schedule 1, or vehicles that the Secretary of State may provide under paragraph 9 of Schedule 1 (see new section 12A(2)). Under section 3(1) of the NHS Act the Secretary of State must provide specified services or facilities to such extent as he or she considers necessary to meet all reasonable requirements. This includes hospital and other accommodation for the purpose of the services provided under the Act, medical, nursing and services or facilities for the care of pregnant women and children and for the prevention of illness, care of persons suffering from illness and the after-care of persons who have suffered from illness and for the diagnosis and treatment of illness.

121. Initially the Secretary of State has power to make direct payments for health care only in pilot schemes under regulations, as required by new section 12A(6). Direct payments for health care could in the future be made more widely available following review and an order made by the Secretary of State under new section 12C(8)(a). The order would be subject to approval by each House of Parliament under the affirmative resolution procedure.

Regulations about direct payments

122. New section 12B(1) gives the Secretary of State power to make regulations covering how direct payments will operate. The factors that regulations could provide for are identified in new section 12B(2) to 12B(4) and are similar to those already provided for in respect of social care direct payments.

123. The regulations could identify the groups of patients who might benefit, such as mental health patients; the health conditions for which direct payments could be made, such as those which are long term and are sufficiently predictable to allow a budget to be set; and the services that could be provided, such as nursing care (see new section 12B(2)(a)).

Direct payments pilot schemes

124. New section 12C(1)(a) provides for the Secretary of State to have power to make pilot schemes under regulations under new section 12B through which the Secretary of State could make direct payments. By directions in writing under sections 7 and 273(4)(c) of the NHS Act, the Secretary of State could delegate the operation of a pilot scheme to a PCT (or a Strategic or Special Health Authority). The Government intends to set up a programme of pilot schemes led by different PCTs to assess the effectiveness of direct payments. In *Personal Health Budgets: First Steps*, the Government invited PCTs to apply to become personal health budget pilots, and it has received a number of applications. The Government intends that there should be a further stage in the application process to select direct payment pilot sites.

125. A pilot scheme must have a specified duration and be subject to review (new section 12C(3) and (4)). The geographical scope may be specified (new section 12C(2)(a)), and a pilot scheme could also be distinguished by characteristics set out in regulations under new section 12B(2) (see section 12C(1)(b)). The Secretary of State is also able to make provision in regulations for changing or discontinuing a pilot scheme or schemes under new section 12C(2)(b).

126. The characteristics of a review of a pilot scheme may be set in regulations. For example, regulations may provide for a review to be undertaken by an independent person or that its findings must be published (new section 12C(5). New section 12C(6) sets out subjects that a review may, in particular, examine. The Government intends that the review of the pilot schemes should be independent, and the findings should be published. It also intends that the review should cover all the matters mentioned in new section 12C(6), such as the administration of a scheme, the effect of direct payments on cost or quality of care, or the effect of direct payments on patients' behaviour.

127. New section 12C(7) to (10) provides for the Secretary of State to be able by order either to repeal the requirement for direct payments to be made only in accordance with a pilot scheme (see new section 12C(8)(a)), or to repeal new sections 12A, 12B, 12C and 12D (see new section 12C(10)). However new section 12C(7) requires the Secretary of State to have carried out a review of one or more pilot schemes before making any such order. Any such order would be subject to approval by each House of Parliament under the affirmative resolution procedure. If the Secretary of State chose to make an order under section 12C(8)(a), direct payments for health care would no longer need to be made as part of a pilot scheme, and the power to make pilot schemes provided by sections 12C(1) to (4) would be repealed. However, similar time limited schemes could be set up under regulations under section 12B, to continue to test possible extensions or adaptations of a direct payments model.

128. After reviewing a scheme or schemes, an order under new section 12C(8)(b) would enable the Secretary of State to amend, repeal or otherwise modify any other provision of the NHS Act to facilitate the making of direct payments, so long as the changes were necessary or expedient (see section 12C(9)). The power would enable lessons learnt about the legislation from piloting in schemes to be addressed. The order would be subject to approval by each House of Parliament under the affirmative resolution procedure. New section 12C(9) would not allow provision by order to alter unrelated aspects of the NHS Act.

129. New section 12C(10) allows the Secretary of State to repeal sections 12A, 12B, 12C and 12D, for example if, following a review, the Secretary of State does not believe that direct payments are a viable way of delivering services.

Arrangements with other bodies relating to direct payments

130. New section 12D(1) to (3) provides authority for the Secretary of State to arrange with bodies in addition to local authorities such as a mental health charity or private sector body involved in the provision of health care or social care services to assist in making direct payments. In particular, subsection (2) enables such arrangements to be made with voluntary organisations. In practice, a PCT or other NHS body might be making the arrangements on behalf of the Secretary of State. These organisations could help with any aspect of making direct payments, such as assessing patients, setting budgets or reviewing care plans.

Jurisdiction of Health Service Commissioner

131. Section 12 amends the Health Service Commissioners Act 1993 (the 1993 Act) to enable the Commissioner to hear complaints about services for which direct payments were made, including those provided by independent organisations. This gives patients receiving direct payments for health care similar rights to those enjoyed by patients accessing services from NHS organisations or from private sector organisations commissioned by PCTs.

Detailed explanation of provisions

Section 11: Direct payments for health care

132. Section 11 inserts new sections 12A to 12D into the NHS Act.

133. New section 12A(1) allows the Secretary of State to make a direct payment to a patient or their representative, in order to purchase goods or services that might otherwise be provided by the NHS. The goods or services are those identified in new section 12A(2). Section 12A(1) also requires that direct payments be made only with the consent of the patient. However, where a patient lacks capacity, provision could be made in regulations for consent to be given by a representative of the patient under section 12B(2)(c).

134. New section 12A(2) specifies that direct payments may be made in respect of services the Secretary of State may or must provide under sections 3(1) or 2(1) of the NHS Act, must arrange under paragraph 8 of Schedule 1 to the NHS Act or vehicles that that Secretary of State may provide under paragraph 9 of Schedule 1 to the NHS Act.

135. New section 12A(3) causes the Secretary of State's ability to make direct payments to be subject to regulations made under new section 12B.

136. New section 12A(4) provides for regulations to enable a PCT to make a direct payment for after-care services it is obliged to provide by section 117 of the Mental Health Act 1983.

137. New section 12A(5) defines a payment of the kind described in new section 12A(1) or 12A(4) as a direct payment.

138. New section 12A(6) provides that direct payments may only be made as part of a pilot scheme established under regulations under new section 12C and 12B. However, this section may be repealed by order, as laid out in new section 12C(8)(a).

139. New section 12B(1) enables the Secretary of State to make regulations about direct payments. These regulations enable provision to describe in more detail when and how direct payments can be made.

140. New section 12B(2) enables regulations to define the scope of direct payments, which, under new section 12C(1), includes the way pilot schemes will operate. Under new section 12B(2)(a), it will be possible to set out in regulations which services may or may not be suitable, in what circumstances, and which patients may or may not be allowed to receive direct payments in order to purchase services. The regulation-making power is subject to the negative resolution procedure.

141. Direct payments will often be made directly to the patient themselves, but a patient may prefer to nominate someone else to receive and manage direct payments on their behalf. New section 12B(2)(b) allows for circumstances to be prescribed in which direct payments may or must be made to a person nominated by the patient.

142. Where a patient lacks capacity, new section 12B(2)(c) allows for circumstances to be prescribed in which direct payments may or must be paid to someone other than the patient. This will make it possible, where the individual lacks capacity to make the necessary decisions about consenting to and managing a direct payment, to make direct payments to a suitable surrogate on the individual's behalf. The reference to a person who lacks capacity has the same meaning as in the Mental Capacity Act 2005 (see new section 12B(6)(b)). Regulations could also provide for direct payments to be made to a parent or other person in respect of a child where a child is unable to consent to the making of payments.

143. New section 12B(2)(d) allows regulations to set out conditions that must be complied with by the Secretary of State (in effect, by the NHS organisation granting the direct payment on behalf of the Secretary of State) or the PCT (in relation to after-care under section 117 of the Mental Health Act) when making a direct payment. This might

include ensuring that there is an agreed care plan, that there are proper arrangements in place for paying the money into a secure bank account or for carrying out regular reviews of the payments and of the patient's care.

144. New section 12B(2)(e) enables regulations to set out conditions the patient or payee should comply with when a direct payment is granted. These might include: maintaining a separate bank account; agreeing to a care plan that specifies the agreed health outcomes and the types of services to be purchased to help meet those outcomes; or providing records of their spending to demonstrate that it is in line with the care plan.

145. New section 12B(2)(f) enables regulations to make provision about the amount of a direct payment or how it is to be calculated. For example, the regulations are likely to require that the amount be sufficient to cover the whole of the services set out in a care plan for which they are to provide. As methodologies for estimating the required budget emerge these may also be specified in regulations.

146. New section 12B(2)(g) allows regulations to set out when the Secretary of State, or the PCT when making direct payments for after-care under section 117 of the Mental Health Act, may or must stop making direct payments. Relevant circumstances might include when a patient's health is deteriorating such that it cannot be managed within the budget or where there is evidence that the direct payments have been abused.

147. New section 12B(2)(h) allows regulations to describe circumstances in which the Secretary of State, or the PCT when making direct payments for after-care under section 117 of the Mental Health Act may or must require all or part of direct payments to be repaid, for example, when a significant surplus has accumulated.

148. New section 12B(2)(i) allows regulations to include appropriate monitoring arrangements as regards the making of direct payments, their use by the payee, or the services which they are used to secure. For example the PCT, acting on behalf of the Secretary of State, might require the payee or providers contracted using a direct payment on the payee's behalf, to periodically submit copies of receipts. Similar provision could be made in respect of the making of direct payments for after-care under section 117 of the Mental Health Act.

149. New section 12B(2)(j) allows regulations to make provision about the arrangements to be made by the Secretary of State or the PCT to provide information, advice or other support to patients or others. For example, regulations are likely to require PCTs to provide information about the range of services available in their area.

150. New section 12B(2)(k) allows regulations to be made governing how far support for direct payments can be treated as a service for which direct payments can be made. This could allow provision to be made allowing the PCT to give people direct payments to purchase support, for example help with payroll services for employees, or independent advocacy services.

151. New section 12B(3) allows regulations to make provision to govern situations where a patient has fluctuating capacity, for example where, at the time of initially being granted a direct payment, they do not have the ability to consent, but later regain capacity. Regulations might specify circumstances where direct payments should continue to be paid to a surrogate in the period immediately following the regaining of capacity, subject to the consent of the patient.

152. In the event that repayment to the Secretary of State or the PCT is needed and the seeking of repayment under regulations made under new section 12B(2)(h) has been unsuccessful, regulations under new section 12B(4) could allow the sum owed to be recoverable as a civil debt due to the Secretary of State or the PCT. In addition, for serious abuse of the system, criminal sanctions will be available through the Fraud Act 2006 or the Theft Act 1968.

153. New section 12B(5)(a) and (b) allow regulations to define the extent to which, while patients or another person on the patient's behalf may have procured the goods or services directly, those services should be regarded as goods or services provided by the Secretary of State or a PCT. This means that in prescribed circumstances, but only in prescribed circumstances, the Secretary of State could be considered to have fulfilled the duty to provide a service described at new section 12A(2) by making a direct payment. Similarly, a PCT could be considered, in prescribed circumstances, to have fulfilled its obligations under section 117 of the Mental Health Act by making a direct payment.

154. New section 12B(6) contains definitions. New section 12B(6)(a) specifies that a "service" includes anything for which a direct payment may be made, as set out in new section 12A(2) or section 117 of the Mental Health Act. New section 12B(6)(b) defines references to lacking capacity by reference to the meaning in the Mental Capacity Act 2005.

155. New section 12C(1)(a) enables the regulations that may be made under section 12B to provide for the Secretary of State to be able to make pilot schemes in accordance with which direct payments may be made.

156. New section 12C(1)(b) allows the pilot schemes provided for by regulations to include provision for any of the matters covered by new section 12B(2) as long as the pilot schemes comply with the regulations under new section 12B. For example, a pilot scheme might apply to patients with a particular health condition in particular circumstances for which bespoke monitoring arrangements are appropriate.

157. New section 12C(2)(a) allows provision in regulations to provide for or require specification of the geographical area of a pilot scheme. New section 12C(2)(b) allows the regulations to make provision for or require the pilot scheme to provide for the scheme's revocation or amendment.

158. New section 12C(3) requires that regulations must provide that when a pilot scheme is created, its duration is specified, although they may provide for the initial period to be subject to extension by the Secretary of State. This may occur if, for example, the pilot scheme took longer than anticipated to become established and needs to be extended to allow enough patients to use it for robust review.

159. New section 12C(4) requires that regulations must provide for the review of a pilot scheme or require the pilot scheme to include provision for review.

160. New section 12C(5) sets out particular provision that may be made for the form of a review of the pilot scheme. The section allows provision to be made to ensure that an independent person carries out the review, that the findings of the review are published, and that the review considers certain subjects.

161. New section 12C(6) sets out a range of specific matters the review may consider. These include the administration of the scheme, the effect of direct payments on the cost or quality of care, and the effect of direct payments on the behaviour of patients, carers or people providing services.

162. New section 12C(7) allows the Secretary of State, having carried out a review of one or more pilot schemes, to either repeal section 12A(6) and section 12C(1) to (4), using an order described at section 12C(8)(a), or repeal sections 12A to D using an order described at section 12C(10). Repeal pursuant to section 12C(8)(a) would make direct payments generally available subject to any regulations under section 12B. Repeal pursuant to section 12C(10) would prevent the making of direct payments under the new sections in future.

163. New section 12C(8)(b) provides for other provisions of the NHS Act to be amended, modified or repealed, for example where it has become apparent that this is necessary for a general roll out of direct payments. Any orders made under section 12C(7) are

subject to Parliamentary approval by each House of Parliament under the affirmative resolution procedure (see the amendment made by paragraph 10 of Schedule 1 to the Act to section 272(6) of the NHS Act).

164. New section 12C(9) specifies that any amendments, repeals or modifications to the NHS Act carried out by an order described at section 12C(8)(b) must be necessary or expedient for the purpose of facilitating the making of direct payments. This means that changes could be made to the NHS Act to reflect the lessons learnt from the pilot schemes, but prevents the power at section 12C(7) being used to make other changes to the Act.

165. New section 12C(10) provides for the Secretary of State to be able to repeal sections 12A, 12B, 12C and 12D. In the event that the pilot schemes show that direct payments are not a viable way to deliver services, these provisions allow the Secretary of State to remove the powers from the NHS Act through an order subject to approval by each House of Parliament under the affirmative resolution procedure.

166. New section 12D(1) authorises the Secretary of State to make arrangements with other bodies for their assistance in providing or operating or otherwise in connection with direct payments.

167. New section 12D(2) provides that the bodies with whom such arrangements may be made include voluntary organisations.

168. New section 12D(3) provides that the Secretary of State is free to agree terms with such bodies. The Secretary of State may pay a body for its part in the arrangements concerning direct payments.

Section 12: Jurisdiction of Health Service Commissioner

169. Section 12 amends the jurisdiction of the Health Services Commissioner set out in the 1993 Act.

170. *Subsection (2)* expands the scope of persons subject to investigation to include persons delivering direct payment services who are not health service bodies.

171. *Subsection (3)* expands the definition of independent providers in the 1993 Act to include persons providing direct payment services who are not health service bodies.

172. *Subsection (4)* expands the general remit of the Health Services Commissioner set out in the 1993 Act to allow the Commissioner to investigate a complaint made about a service or other action provided by a person providing direct payment services.

173. *Subsection (5)* amends the 1993 Act to allow the Commissioner to investigate matters arising from commercial and contractual arrangements for the provision of direct payment services.

174. *Subsection (6)* makes a consequential amendment in respect of independent providers who are not persons providing direct payment services.

175. *Subsection (7)* defines direct payment services by reference to section 12A of the NHS Act.

Section 13: Direct payments: minor and consequential amendments

176. Section 13 introduces Schedule 1, which contains minor and consequential amendments relating to direct payments.

Schedule 1: Direct payments: minor and consequential amendments

177. *Paragraph 1* amends the National Assistance Act 1948 to include accommodation in respect of which a direct payment is made within the definition at section 24(6A) of the 1948 Act of NHS accommodation referred to at section 24(6).

178. *Paragraph 2* amends the Health Services and Public Health Act 1968 to clarify that pilots in section 63(2)(bb) are pilots set up under section 134(1) of the NHS Act or section 92(1) of the NHS (Wales) Act.

179. *Paragraph 3* has the effect that references to after-care services in the Mental Health Act 1983 include services provided in respect of which a direct payment for social care or a direct payment for health care is made.

180. *Paragraph 4* amends section 2(5) of the Disabled Persons (Services, Consultation and Representation) Act 1986 with the effect that the authorised representative of a disabled person may at any reasonable time visit him or her and interview him or her in private in hospital accommodation that has been procured using a direct payment made under new section 12A(1).

181. *Paragraphs 5(1) and (2)* amend section 45 of the 2003 Act. The amendments have the effect that the obligations of a Welsh NHS body pursuant to Chapter 2 of the 2003 Act apply where the Welsh body provides health care in respect of which an English NHS body has made direct payments, until sections 45 and 46 of the 2003 Act are repealed on the coming into force of paragraphs 37 and 38 of Schedule 5 to the 2008 Act.

182. *Paragraphs 6 to 11* provide for amendments to the NHS Act.

183. *Paragraph 7* has the effect that references to various pilot schemes elsewhere in the NHS Act become references to pilot schemes established under section 134(2) of the NHS Act, which relates to pharmaceutical services, so as to distinguish them from direct payment pilot schemes set up under new section 12C(1)(a) of the Act.

184. *Paragraph 8* confines the definition of a "pilot scheme" set out at section 134(2) so that it applies only to that Part 7 of the NHS Act, rather than the whole Act.

185. *Paragraph 9* amends the order-making power of the Secretary of State at section 246(3) with the effect that an order may vary the descriptions of exempt information at Schedule 17 to the NHS Act to include descriptions in connection with services in respect of which direct payments are made by a body, where an overview and scrutiny committee exercises functions in relation to the body. Under the Local Government Act 1972 the public may be excluded from meetings of an overview and scrutiny committee to prevent disclosure of exempt information during an item of business.

186. *Paragraph 10* amends provision for the procedure that applies to a statutory instrument under the NHS Act in section 272(6) so that an order mentioned in new section 12C(7) under new section 12C(8) or 12C(10) is subject to approval by each House of Parliament under the affirmative resolution procedure.

187. *Paragraph 11* removes the entry for "pilot scheme" from the index of defined expressions at section 276 of the NHS Act, in consequence of the changes made by paragraphs 7 and 8.

188. *Paragraphs 12 to 15* provide for amendments to the Safeguarding Vulnerable Groups Act 2006.

189. The amendments made by *paragraph 13* provide that the Secretary of State (or an NHS body to whom the Secretary of State has delegated a function of making direct payments) or a Primary Care Trust acting under regulations (in the case of section 117 after-care) is not a regulated activity provider by virtue of anything the Secretary of State or it does in connection with the making of direct payments under new sections 12A to 12D.

190. The amendment made by *paragraph 14(2)* has the effect that making a direct payment is controlled activity to the extent that it is not a regulated activity relating to children, and by sub-paragraph *(3)* that health care, treatment or therapy which is provided to a child out of direct payments is controlled activity.

191. The amendments made by *paragraph (15)* have the effect that a person who has attained the age of 18 and to whom, or on whose behalf, direct payments are made is a vulnerable adult for the purposes of the Safeguarding Vulnerable Groups Act 2006.

Chapter 4: Innovation

Section 14: Innovation prizes

192. *High Quality Care for All* stated the Department of Health's intention to create prizes for innovations in areas such as the prevention and treatment of lifestyle diseases.

193. Under existing provisions of the NHS Act, the Secretary of State can award grants for research. However, the power is limited to research and does not extend to awarding money retrospectively for work that has already been completed.

194. Section 14 enables the Secretary of State to make payments as prizes to promote and reward innovation in the provision of health services in England. Prizes may be awarded for work that has already been completed, including research, or for the completion of future challenges.

195. To assist in this matter, the Secretary of State may establish a committee to advise, for example, on the form and allocation of any such prizes. *Subsection (3)* enables the Secretary of State to pay remuneration, allowances or expenses to a member of the committee.