

*These notes refer to the Welfare Reform Act (Northern Ireland)
2007 (c.2) which received Royal Assent on 27 June 2007*

Welfare Reform Act (Northern Ireland) 2007

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

PART 1: Employment and support allowance

Entitlement

Section 1: Employment and support allowance

Section 1 sets out the entitlement conditions of the employment and support allowance. This introduces a new benefit structure with both an income-related allowance and a contributory allowance within the same benefit, similar to a jobseeker's allowance. In addition to satisfying the basic conditions of entitlement, a person will need to satisfy either the national insurance contribution-based tests or the income-related tests in order to be entitled to employment and support allowance. The contribution-based tests will be the same, in substance, as apply now for incapacity benefit. The income-related tests will be the same, in substance, as apply now for the purposes of income support.

There will be an alternative to the National Insurance contribution tests for those who were under 20 years old when their period of limited capability for work began (or under 25 years old in certain circumstances). If they had limited capability for work for the preceding 196 days and satisfy other conditions, they would not have to satisfy the contribution conditions to get entitlement to the contributory allowance. This is to ensure that young people, who may not have had the opportunity to build up a sufficient contribution record, would not be excluded from the non means-tested allowance. Again, this is similar to the provisions for young people currently on incapacity benefit, as set out in section 30A of the Contributions and Benefits Act.

A person also has to satisfy the basic conditions mentioned (see *subsection (3)*). One of those basic conditions is that the person has limited capability for work and the meaning of this phrase is set out at *subsection (4)*. Further provision about the test to assess whether a person's capability for work is limited by their physical or mental condition and the limitation is such that it is not reasonable to require him to work is made in *section 8*.

Section 2: Amount of contributory allowance

Section 3: Deductions from contributory allowance: supplementary

Sections 2 and 3 set out how the amount of contributory employment and support allowance will be calculated. *Section 2(1)(a)* provides that the calculation is begun by taking such amount as may be prescribed. It is expected that this amount will be age-related in the assessment phase and based on the levels of contribution-based jobseeker's allowance, but that it will be universal for all ages once the assessment phase is complete.

Once the assessment phase has been completed (the length of which will be determined by regulations, with a proposed length of 13 weeks) a "work-related activity component" or a "support component" will also be added on top of the prescribed amount. Regulations may disapply the requirement to wait until the end of the assessment phase to become entitled to a work-related activity component or support component. A person will be entitled to a support component if he has limited capability for work-related activity (see *section 9*). A person will be entitled to a work-related activity component if he does not have limited capability for work-related activity.

Sums may be deducted from the amount of contributory allowance in respect of certain payments. Regulations will prescribe the same deductions as those which are currently taken into account for the purposes of incapacity benefit. If these payments were over a certain amount, it is intended that the amount of employment and support allowance payable could be reduced by a certain proportion. For example, currently an amount equal to 50 per cent. of certain pension payments over £85 per week is deducted from the amount of incapacity benefit payable. In addition, deductions are also made in respect of local councillors' allowances. This is set out in sections 30DD and 30E of the Contributions and Benefits Act.

Section 4: Amount of income-related allowance

Section 4 provides for the calculation of the amount of an income-related employment and support allowance. Entitlement is based on rules similar to those which apply for income support, which the income-related allowance will replace for people with a health condition or a disability.

The amount of the income-related allowance is the "applicable amount", if the claimant has no income, or the difference between the claimant's income and applicable amount, if the claimant has income. The applicable amount is the weekly amount a person would receive if he had no income at all. Applicable amounts can vary, for example, dependent on whether the claimant has a partner. Like the contributory allowance, there is a proposed assessment phase of 13 weeks after which the amount of the work-related activity component or, if the claimant satisfies the relevant test, the support component will be included in the applicable amount.

Subsection (2)(a) provides the power to prescribe amounts to be part of the applicable amount. This includes, for example, where the claimant is an owner-occupier with housing costs. It is intended that additional amounts will be prescribed in respect of those costs, such as mortgage interest, ground rent or service charges. These are similar to the arrangements which currently apply to income support. The power will also allow for other additions to be made in future without the need for further primary legislation.

In addition to housing costs the power could also be used to include certain premiums. It is intended to pay an equivalent to the enhanced disability premium, severe disability premium and the carer premium using the same rules as for income support.

Subsection (3) provides the power to prescribe nil as an applicable amount. For example, paragraphs 7 and 8 of Schedule 7 to the [Income Support \(General\) Regulations \(Northern Ireland\) 1987 \(S.R. 1987 No. 459\)](#) currently prescribe a nil amount for the purposes of income support in relation to certain prisoners and to members of religious orders who are fully maintained by their order. The intention is that such people will be treated in the same way for the purposes of income-related employment and support allowance.

For both the contributory and income-related allowance, [sections 2 and 4](#) provide for entitlement to the work-related activity and support components to be backdated if, where the regulations provide, the assessment phase is extended ([section 24\(2\)](#)). For example, it is intended that this should be done where it has not been possible to complete the medical assessment process within the proposed 13 week period of the assessment phase. In such cases, if the claimant is subsequently determined to have limited capability for work, entitlement to the relevant work-related activity or support component will be backdated so that the claimant will receive the relevant work-related activity component or support component as if the assessment phase had ended at the end of week 13 of entitlement to an employment and support allowance.

Regulations under [sections 2\(4\) and 4\(6\)](#) will provide that, in certain circumstances, where a person was previously entitled to employment and support allowance, the condition of entitlement to the work-related activity component and support component that the assessment phase must have ended shall be disapplied. This will mean that a claimant may be entitled to the work-related activity or support component immediately he becomes entitled to an employment and support allowance.

Section 5: Advance award of income-related allowance

[Section 5](#) provides for the situation where a person, due to having income exceeding the applicable amount, is not entitled to an income-related employment and support allowance in the assessment phase, but may become entitled to an income-related allowance when, at the end of the assessment phase, he becomes entitled to either the work-related activity component or the support component. This section modifies section 5(1) of the Administration

Act to enable regulations to be made to deal with this situation. Such a case may arise because a person has an income above the applicable amount during the assessment phase (which would mean that the claim would normally be rejected) but, when the applicable amount includes the work-related activity or support component, his income is less than the applicable amount. Regulations will be able to provide that such a person can make a claim and that an award of employment and support allowance could arise at a future date, provided that certain conditions were satisfied.

Section 6: Amount payable where claimant entitled to both forms of allowance

Section 6 provides for cases in which a person is entitled to both a contributory allowance and an income-related allowance. In this section the amount calculated in accordance with *section 2(1)* (amount of contributory allowance) is called the “personal rate”. If the person has no income and his personal rate is higher than his applicable amount (for the purposes of income-related allowance), he will get the personal rate. If the claimant has no income and his applicable amount exceeds his personal rate, he will get his personal rate, plus an additional amount of income-related allowance equal to the excess. If the person has an income, the amount payable will be the greater of his personal allowance and the amount by which his applicable amount exceeds his income.

Section 7: Exclusion of payments below prescribed minimum

Section 7 contains a power equivalent to that in section 130(3) of the Contributions and Benefits Act. The intention is that employment and support allowance will not be paid if entitlement is below 10 pence, unless payment is combined with payment of another benefit.

Assessments relating to entitlement

Section 8: Limited capability for work

Section 8 provides powers to set out the system for determining “limited capability for work” in regulations. Limited capability for work is one of the conditions of entitlement a claimant must satisfy before he can be eligible for an employment and support allowance (*see section 1(3)*). *Section 1(4)* defines limited capability for work. *Section 8* provides powers to specify the type of test that will be used to determine whether or not a claimant has limited capability for work. The test will assess a claimant’s ability to carry out specified activities. The specific activities, and the extent to which a person’s capability to perform them must be limited, will be contained in regulations.

Regulations under *section 8* may make provision about the manner in which the assessment of a person’s capability for work will be performed (including providing for a medical examination to be carried out if required). Regulations may also provide for a claimant to be treated as not having limited capability for work if he fails, without good cause, to provide requested information or

evidence related to his claim, or to provide it in the manner requested or if he fails without good cause to attend for, or submit to, a medical examination he is called to attend as part of the assessment process. *Section 8* is similar to sections 167A and 167C of the Contributions and Benefits Act.

The assessment process used to determine benefit entitlement will be carried out, wherever possible, during the first 13 weeks of a claim. *Subsection (5)* provides regulation making powers that will allow a claimant to be treated as having limited capability for work until the time when his capability for work is actually tested and determined. These powers may be used, for example, so that a claimant can be entitled to an employment and support allowance during the assessment phase, on the basis of medical certificates from his general practitioner, up until the point when the assessment of his capability for work is actually completed.

Section 9: Limited capability for work-related activity

Section 9 refers to claimants whose physical or mental conditions are so severely disabling that it is unreasonable to require them to engage in work-related activity or to participate in work-focused interviews as a condition of receiving the full amount of employment and support allowance. A claimant of this description will have “limited capability for work-related activity”. A claimant who demonstrates limited capability for work-related activity will be a member of the “support group” (referred to in *sections 11 and 12* and defined in *section 24(4)*). A claimant with limited capability for work-related activity will be entitled to receive a support component in addition to the basic allowance of employment and support allowance (see *sections 2 and 4*).

A claimant who is a member of the support group will not be subject to any requirements imposed by regulations under *sections 11, 12 and 13* to attend work-focused health-related assessments, participate in work-focused interviews or undertake work-related activity.

Section 9 provides regulation making powers that are similar to the powers provided under *section 8*. Regulations will make provision about the assessment of a person’s capability for work-related activity and about how the assessment will be performed (including providing for a medical examination to be carried out if one is considered necessary). Regulations will also provide for a claimant to be treated as being capable of work-related activity if he fails, without good cause, to comply with requests for information or evidence related to his claim, or to provide it in the manner requested or if he refuses without good cause to attend for, or submit to, a medical examination where one is required.

Section 10: Report

Section 10 requires the Department to lay before the Assembly an annual independent report on the operation of the assessments under *sections 8 and 9* for the first five years after these sections come into operation.

Conditionality

Section 11: Work-focused health-related assessments

Section 11 provides that regulations may make provision for imposing on claimants who are entitled to an employment and support allowance, but not so severely disabled as to be unable to engage in work-related activity, a requirement to take part in one or more work-focused health-related assessments.

The work-focused health-related assessment will be carried out by a health-care professional approved by the Department, and it is intended that, where possible, it will follow directly on from the assessments under *sections 8 and 9* so that the claimant is only required to attend one appointment. Where it appears to the health-care professional carrying out the *section 8 and 9* assessments that the claimant is likely to be a member of the support group, the work-focused health-related assessment is likely to be deferred at that time, pending the outcome of the Department's decision regarding his capability for work-related activity. The assessment will provide additional information about the claimant's residual functional capability (what the claimant can still do despite the disabling condition) and information about health interventions that would improve their functional capability.

The advice from the work-focused health-related assessment will be made available to the claimant and to Personal Advisers to support actions to be taken during the main phase of the benefit.

The nature and content of the work-focused health-related assessment and report will be set out in regulations. *Subsections (2)(f) and (3)* enable regulations to be made which have the effect of providing that if a claimant fails, without good cause, to take part in the assessment, the amount of employment and support allowance payable to him may be reduced. *Subsections 2(g) and (h)* allow regulations to set out what is to constitute, or be taken into account in determining, good cause.

Section 12: Work-focused interviews

Section 12 provides for work-focused interviews, which are intended to assist claimants in moving closer to the labour market. Regulations under *subsection (1)* will provide for certain claimants who are entitled to the work-related activity component to be required to participate in work-focused interviews. *Subsection (5)* sets out that regulations must provide that requirements to participate in work-focused interviews will cease if the claimant becomes a member of the support group.

It is intended that there will also be a work-focused interview during the assessment phase which will be for the first 13 weeks of entitlement to an employment and support allowance. This interview would have the purpose of, where appropriate, explaining the benefit and conditionality regime to the claimant and helping him think about what activities he may want to do to help

him to return to work. It is intended that regulations will allow interviews to be deferred for those with serious health conditions who may be in the support group after medical assessment.

Claimants will be provided with the date and time of their work-focused interview. Regulations will provide that if the claimant cannot attend the work-focused interview, in certain circumstances it would be able to be moved and take place at another date or time.

Subsection (2)(f), (g), (h) and (i) enables regulations to deal with situations where a claimant has not attended or not fully participated in a work-focused interview. Anyone failing to take part in a work-focused interview would have an opportunity to show he had good cause for his failure to take part in the interview, in a similar way as provided under the current legislation relating to incapacity benefit and work-focused interviews. A non-exhaustive list of the matters to be taken into account in deciding if a claimant can show good cause will be set out in regulations under *subsection (2)(h) and (i)*.

As well as attending a work-focused interview, claimants will normally be expected to participate fully in the interview. Regulations may require claimants to provide certain relevant information (such as about their existing skills) and to participate in discussions about their employability and the steps that could be taken to help them move into work or closer to the labour market. Additionally, it is intended that where work-related activity becomes mandatory for certain claimants in receipt of the work-related activity component, regulations will require them to discuss the relevant work-related activity that they had undertaken.

If the claimant fails to participate fully in a work-focused interview and cannot show good cause for that failure within the permitted time, the amount of employment and support allowance he is entitled to would be reduced. Regulations under *subsection (4)* will set out the amounts of the reductions.

Regulations under *subsection (6)* will provide for waivers and deferrals of work-focused interviews. The circumstances in which a deferral may be granted will be related to a claimant's health condition or other circumstances, such as transport difficulties. A waiver would mean that the requirement on a claimant to take part in a work-focused interview would be considered as not having applied and therefore a sanction could not be imposed.

Section 13: Work-related activity

Work-related activity is activity that helps a claimant obtain work, remain in work or to be more likely to obtain work or remain in work. As set out in the Welfare Reform Green Paper, it is intended that claimants who are entitled to the work-related activity component will be subject to a requirement to participate in work-related activity. This requirement will apply for a set period of time once the assessment phase has been completed. *Subsection (5)* sets out that

regulations must provide that requirements to undertake work-related activity will cease if the claimant becomes a member of the support group.

Regulations under this section may specify the amount of work-related activity a person is required at any time to undertake. This might be exercised so as to provide for a specified number of activities per set period of time and this would be reviewed at a work-focused interview taking place within a subsequent set period of time.

Regulations will set out how matters will be taken into account when determining whether a claimant has met the requirement to undertake work-related activity or whether he had good cause for not doing so.

As for the provisions relating to work-focused interviews under *section 12*, a failure to meet the requirement under regulations to undertake work-related activity and a failure to show good cause for this within the allowed time would attract reductions in the amount of an employment and support allowance the person was entitled to for a fixed period.

Waivers for work-related activity are provided for by regulations under *subsection (6)*. Such regulations may provide that a requirement on a claimant to participate in work-related activity is to be considered as not having applied and therefore a sanction could not be imposed.

Section 14: Action plans in connection with work-focused interviews

Section 14 provides that at work-focused interviews, a written action plan will be developed.

Regulations under *subsections (1) and (2)* may provide that the action plan should include a summary of the discussion that took place during the work-focused interview. In a situation where participation in work-related activity is not required under regulations, the action plan would include possible steps a claimant could consider taking to assist him in returning to work.

Where appropriate, it is intended that the action plan would include steps that, if the claimant undertook them, would satisfy the work-related activity requirement under *section 13*.

It is not intended that the claimant will be required by regulations to undertake specific steps in the action plan, even when participation in work-related activity was required. A claimant could still satisfy the work-related activity requirement by undertaking other activity.

Regulations under *subsection (4)* may provide that a claimant should be able to ask for his action plan to be reconsidered. This would be in order to resolve situations where a claimant believed the steps included were, or had become, inappropriate or that other steps, not agreed at the work-focused interview, should be included. The action plan would then be reconsidered in a set period of time. It is not intended, in a situation where a claimant asks for a reconsideration

of the action plan, that requirements under regulations to undertake work-related activity would be waived or deferred.

Section 15: Directions about work-related activity

Section 15 provides a power for the Department or the Department for Employment and Learning to direct that a specific activity in the case of an individual is not to count as work-related activity. This is intended to stop a claimant seeking to satisfy the requirement to undertake work-related activity by undertaking activity that is considered inappropriate for his circumstances.

Section 16: Contracting out

Section 16 has the effect of allowing contracted providers in the private and voluntary sectors (“providers”) to exercise functions of the Department or the Department for Employment and Learning relating to conditionality. Providers will not be permitted to exercise functions relating to “excluded decisions” which are listed in *subsection (3)*.

Subsection (1) provides that the Department or the Department for Employment and Learning can authorise providers to undertake certain functions (*sections 12, 14 and 15*) relating to work-focused interviews, action plans and directions relating to work-related activity.

Subsection (2) provides for regulations to be made that allow the Department or the Department for Employment and Learning to authorise provider organisations to undertake certain functions under regulations made under *sections 11 to 15* and providers to undertake functions relating to certain conditionality decisions.

Subsection (5) makes it clear that where authorisation is given for providers to undertake a function the authorisation may only apply to part of that function.

Subsection (7)(b) provides that authorisations granted under or by virtue of *section 16* can be revoked and *subsection (7)(c)* provides that giving authorisation to a provider does not preclude the related function from being undertaken by the Department or the Department for Employment and Learning.

Subsections (8) and (9) establish that, where a function is undertaken by a provider, that function is treated as if it had been undertaken by the Department or the Department for Employment and Learning. This will not apply for the purposes of the operation of a provider - for example a contractor would be treated as performing work-focused interviews for the purposes of being paid for them. It also establishes that responsibility lies with the provider in respect of any criminal proceedings brought because of his actions.

Subsection (10) ensures that any decision made by a provider has effect as a decision under Article 9 of the Social Security (Northern Ireland) Order 1998. This ensures that such decisions fit into the decision-making and appeals legislation.

Subsection (11) establishes that where authorisation for a function is revoked and the provider is therefore unable to perform the functions which he is contracted for, the contract can be treated as repudiated.

Miscellaneous

Section 17: Income and capital: general

Section 17 enables the Department to set out in regulations how the income and capital of a claimant (and his partner) is to be calculated for the purpose of determining whether a claimant is entitled to an employment and support allowance and, if so, how much is to be payable. Regulations under this section will be based on the existing provisions for the purposes of income-related benefits.

Subsections (1) and (2) provide regulation-making powers to prescribe how income and capital will be assessed. It is intended that the regulations will provide that income may be averaged. In averaging income for fluctuating earnings, for example, the Department may take an average for a past period and a current period and apply it to a future period, as occurs in connection with income support.

Subsection (3) provides a power to make regulations prescribing that a person is to be treated as having, or not having, certain income or capital. It also enables regulations to provide for income to be treated as capital, or vice versa. In particular, regulations could make provision about how capital holdings would be taken into account in relation to an employment and support allowance. The intention is that a rate of return of £1 per week for every £250 will be applied to capital in excess of £6,000 and below the upper capital limit of £16,000. In the case of persons in residential care and nursing homes this range will be between £10,000 and £16,000. Capital below this amount will not be treated as giving rise to income which is to be taken into account in the assessment. Certain types of actual income from capital will be relevant to the assessment. These are expected to be limited to income from boarders and sub-tenants in the person's own home and income from certain trusts. There will be different provision as to disregarding different types of income which is expected to follow the existing provision for income support.

It is also intended that existing provisions for income support concerning unacceptable deprivation of income or capital will be applied to an employment and support allowance.

Section 18: Disqualification

Section 18 provides that in certain circumstances, similar to those in section 167E of the Contributions and Benefits Act, a person can be disqualified from receiving an employment and support allowance for a period of up to six weeks. This may be because a person is limited in his capability for work because of his own misconduct, because he remains a person who has limited capability

for work through failure, without good cause, to follow medical advice, or because he fails, without good cause, to observe specified rules of behaviour. Regulations will specify the circumstances and the matters which are to be taken into account when making such a decision, including the considerations to be taken into account in deciding whether or not the person concerned had good cause for the failure.

Subsection (4) provides that unless regulations specify otherwise, a person shall be disqualified for receiving contributory employment and support allowance for any period where he is undergoing imprisonment or detention in legal custody, or is absent from Northern Ireland. This is similar to section 113(1) of the Contributions and Benefits Act which currently applies to incapacity benefit and will allow such a person to continue to be entitled to employment and support allowance whilst disqualified from payment. This is because once the period of disqualification has ended it is intended that awards will be resumed where it is appropriate to do so without the need to re-claim.

Section 19: Pilot schemes

Section 19 provides for pilot schemes having effect for a specified period not exceeding 24 months and *subsection (7)* provides that one pilot scheme can be replaced by another pilot scheme which is the same or similar.

Pilot schemes can apply to any regulations under the Administration Act which relate to the employment and support allowance as well as to any regulations under this Part of the Act, apart from regulations under:

Section 3 - deductions from contributory allowance;

Section 8 - limited capability for work; and

Section 9 - limited capability for work-related activity.

It is intended to roll out full conditionality linked to participation in work-related activity as resources allow. It is envisaged that in time pilot schemes may operate to explore different variations of the conditionality regime in order to understand what works best to help employment and support allowance claimants to return to work.

Subsection (3) provides that pilot schemes may only be put in place for the purpose of ascertaining whether their provisions will facilitate or encourage claimants to obtain or remain in work. *Subsection (5)* provides that a pilot scheme may apply to different geographical areas, types of claimant or persons selected to meet certain criteria.

Section 20: Relationship with statutory payments

Section 20 provides for the interaction of an employment and support allowance with statutory payments paid by employers, namely statutory sick pay, statutory maternity pay, statutory adoption pay and additional statutory paternity pay.

Subsection (1) provides that a person is not entitled to an employment and support allowance at the same time as statutory sick pay.

Subsection (2) provides that a contributory employment and support allowance is not payable at the same time as statutory maternity pay, except as regulations may provide.

Subsections (4) and (6) make similar provision in the case of statutory adoption pay and additional statutory paternity pay.

Subsections (3), (5) and (7) contain regulation-making powers to provide for the circumstances in which statutory maternity pay, statutory adoption pay and additional statutory paternity pay respectively may be paid at the same time as a contributory employment and support allowance.

Section 21: Deemed entitlement for other purposes

Where specified legislation leads to a loss of entitlement *section 21* enables regulations to be made so that a person can be treated as still entitled to employment and support allowance in order to retain his rights and obligations. This is similar to provisions which currently apply to incapacity benefit.

Section 23: Recovery of sums in respect of maintenance

Section 23 provides the Department with powers to make regulations so that payments can be recovered from a person who should be paying maintenance to his spouse or civil partner but is not doing so when the spouse or civil partner is receiving income-related employment and support allowance. These payments may be made to the Department. Similar provisions relate to income support (section 101 of the Administration Act) and income-based jobseeker's allowance (Article 25 of the Jobseekers Order).

Subsection (3) states that the regulations under *subsection (1)* may make provision about matters relevant to the determining of an application for such an order, the enforcement of such orders, and the rights of the Department in respect of such orders.

General

Section 26: Assembly control

Section 26 provides that certain regulations under *sections 2 and 4*, the first regulations under *section 13* and regulations providing for a pilot scheme (*section 19*) are subject to the confirmatory resolution procedure in the Assembly. Other regulations under this Part are subject to the negative resolution procedure.

Section 27: General financial arrangements

Section 27 explains that payments of contributory employment and support allowance will be funded from the National Insurance Fund and payments of

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income-related employment and support allowance will be funded out of the Consolidated Fund. It also provides for the repayment to those funds of any sums recovered in connection with payments of employment and support allowance.