

EXPLANATORY MEMORANDUM TO
THE COMMUNITY CARE, SERVICES FOR CARERS AND CHILDREN'S SERVICES
(DIRECT PAYMENTS) (ENGLAND) REGULATIONS 2009

2009 No. 1887

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument consolidates and extends existing legislation on social care direct payments. These are cash payments given to people in lieu of social care services that would otherwise have been arranged for them by local authorities. The instrument widens access to such payments by making them available to previously excluded groups, including people who lack capacity (within the meaning of the Mental Capacity Act 2005) to consent to the making of the payments (“capacity”) and people who are subject to certain aspects of mental health or criminal justice legislation.

3. Matters of special interest to the Joint Committee on Statutory Instruments

None.

4. Legislative Context

4.1 The Community Care (Direct Payments) Act 1996 gave local authorities the power to make cash payments in lieu of social care services to adults of working age who needed those services. The scheme was extended in 2000 to include older people. The power to make direct payments is now governed as regards England and Wales by the Health and Social Care Act 2001 (“the 2001 Act”) which extended direct payments to include carers and by the Children Act 1989 (“the 1989 Act”) which extended direct payments to include parents of disabled children and 16 and 17 year olds. The 2001 Act and the 1989 Act also allowed regulations to impose a duty as well as a power on local authorities to make direct payments to individuals who fulfilled the requirements of the direct payments scheme with their consent.

4.2 Under the 2001 Act, prior to its amendment, direct payments were not available to people who lacked capacity. Under the Mental Capacity Act 2005 a person lacks capacity in relation to a matter if they are unable to make a decision for themselves in relation to a particular matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

4.3 The Health and Social Care Act 2008 amended the 2001 Act, under which this instrument is partly made, to enable regulations under it to make provision requiring or authorising local authorities to make direct payments in respect of people who lack capacity, providing that there is a willing and appropriate “suitable person”, such as a family member or friend, who can receive the direct payment on behalf of the person lacking capacity.

5. Territorial Extent and Application

5.1 This instrument applies to England.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 Direct payments are crucial to achieving the government's aim to increase independence, choice and control for service users and their carers through allowing them the opportunity to arrange their own personalised care. They give people the freedom to design services around their specific circumstances and needs, resulting in better outcomes for both the service user and their carer. They are a key part of the transformation of adult social care agenda set out in *Putting People First*.¹

7.2 The 2005 Green Paper, *Independence, wellbeing and choice*, consulted on the possibility of extending the scope of direct payments, focusing in particular on those who lack capacity. The responses to the consultation showed strong support for this change and a commitment to extend the availability of direct payments to those who lack capacity was made in the 2006 White Paper, *Our health, our care, our say*.

7.3 Extending the availability of direct payments to those people who lack capacity will benefit a number of groups including some people with dementia, adults with severe head injuries and severely disabled children who lose their direct payments when they reach 18.

7.4 The removal of the blanket exclusion of people who are subject to various provisions of mental health and criminal justice legislation follows a review of this policy in light of the modernisation of the Mental Health Act 1983 by the Mental Health Act 2007. It is considered that people in these groups should have the chance to benefit from direct payments, where the circumstances are right and the local authority agrees that they are appropriate. This is an important change which should help to tackle the stigma which can be associated with treatment for mental disorder.

7.5 As regards the extension of direct payments to people subject to certain aspects of mental health or criminal justice legislation, the instrument creates a power to make such payments in respect of some categories of these people or for certain services and a duty to make direct payments in other circumstances subject to certain exclusions. The reason for this is as follows.

7.6 In some cases, mental health or criminal justice legislation are used to put conditions on people which, in effect, make them accept services for their mental disorder which they might otherwise prefer not to receive. There could be a tension between such conditions and a duty on local authorities to make direct payments for those services. The person concerned might not, for example, be as committed to making a success of the service as would normally be the case where people use direct payments to arrange their own care.

7.7 For that reason, the instrument gives local authorities a power to make direct payments to people in respect of those services which they are obliged to receive as a result of a condition imposed under mental health legislation or aspects of criminal justice legislation relating to mental health. It also creates a power to make direct payments to people who are conditionally discharged from hospital. In other cases the instrument extends the duty to make direct payments by removing the blanket exclusion of people subject to mental health legislation or aspects of criminal justice legislation relating to mental health. This is subject to the retention of certain exclusions as mentioned below. This will give local authorities a discretion to refuse direct payments in cases where they think there is a risk that making direct payments might compromise the effectiveness of conditions applied under mental health legislation or certain aspects of criminal justice legislation.

7.8 The instrument retains the exclusions applying to people who are subject to certain aspects of criminal justice legislation including requirements relating to substance misuse. A distinction

¹ *Putting People First: a shared vision and commitment to the transformation of Adult Social Care* (2007)
http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_081118

between these groups and those who are under mental health legislation or other aspects of criminal justice legislation is considered appropriate because of the different nature and purpose of the regime to which they are subject.

8. Consultation outcome

8.1 A public consultation on a draft of this instrument took place between 19 August and 11 November 2008. Over one hundred responses were received and comments made, reflected in changes to the draft regulations or to the accompanying guidance for local authorities.

8.2 The consultation document was placed on the Department of Health website and notification sent out on health and social care bulletins. Responses were received from the following groups:

- Local government
- Charity and voluntary organisations
- Health and social care professionals
- Professional and representative bodies
- User and carer groups and networks
- Individual members of the public
- Independent providers
- NHS bodies
- Social care and direct payment networks
- Regulators

8.3 Overall, the responses received demonstrated widespread support for the Government's proposals to extend direct payments to previously excluded groups.

8.4 Respondents were overwhelmingly supportive of the proposal to remove exclusions placed upon people subject to mental health legislation (97% in favour). However, several respondents put forward strong arguments for giving local authorities a duty rather than a power to make direct payments to this group. In light of these arguments, the Department has amended the instrument to the effect that local authorities will have a duty to make direct payments to this group and to people subject to aspects of criminal justice legislation relating to mental health, except in the case of people who are conditionally discharged or where people are obliged to receive certain services under conditions of mental health or criminal justice legislation. In these exceptional circumstances, there will be a power to make direct payments.

8.5 Many respondents also put forward useful proposals concerning who should be consulted before a direct payment is made to someone acting on behalf of a person lacking capacity. The consultation also stimulated a helpful debate around the arrangements for review of direct payments made for people lacking capacity. Proposals on both these issues have been incorporated into the instrument. Comments on measures to minimise risk for people lacking capacity will also be used to inform the guidance for local authorities accompanying the instrument.

8.6 A more detailed summary of the consultation responses including how they inform the final instrument and accompanying guidance can be found on the Department's website.²

8.7 Amendments to the instrument in the light of the consultation responses have proved more complicated than was anticipated. Therefore, the proposed date for the coming into force of the instrument has been slightly delayed. While the consultation report suggested that the instrument

² A summary of the responses can be found at the following link:
http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_096495

would come into force in October 2009, it is now proposed that the instrument will come into force on 9 November 2009.

9. Guidance

9.1 Guidance on direct payments has been available to local authorities since they were first introduced in 1997 and has been updated and expanded as their use has developed and increased. This guidance has been revised to reflect the changes to the direct payments scheme made by this instrument. A guide for service users receiving or deciding whether to receive direct payments has also been updated and an easy-read version produced.

9.2 A copy of the guidance for local authorities and the guide for service users will be made available to the libraries of both Houses.

10. Impact

10.1 Making direct payments and personal budgets more widely accessible inevitably presents certain challenges to existing providers of social care services, including voluntary and independent sectors providers. However, we estimate that this particular extension of direct payments will have a negligible effect on the social care market as it merely extends a scheme already in place and expanding. The increase of users receiving direct payments as a result of this extension is likely to be small and occurs against a backdrop of gradually increasing uptake of direct payments.

10.2 There will be an impact on local authorities who will now be able to make direct payments to people lacking capacity and to people previously excluded from the scheme by certain provisions of mental health or criminal justice legislation.

10.3 Any additional costs associated with the extension of direct payments would fall on local authorities. We would expect one-off set-up costs to be minimal. Increased demand may result in approximately 200 to 500 additional direct payments across all local authorities which amounts to £1.75m to £4.75m per annum recurrent. The local authority allocations for 2008/09 to 2010/11 take account of the additional cost pressures arising from the extension of the direct payments scheme.

10.4 An Impact Assessment is attached to this memorandum.

11. Regulating small business

11.1 The legislation does not directly apply to small business.

11.2 However, by improving choice for users and by providing better information to facilitate those choices, the amendments to the existing direct payment regulations should support the move towards a more dynamic and efficient social care market. Increased choice and control for users should provide incentives for new providers to enter the market and current providers to adapt if they are able to supply affordable services that meet the needs of users.

12. Monitoring & review

12.1 The policy will be reviewed three years after implementation in 2012. We anticipate that as part of the personalisation agenda set out in *Putting People First*, local authorities should have made significant progress in making personal budgets available to all eligible users of social care services by 2011. Direct payments will be one way in which personal budgets can be deployed and as such their uptake will be monitored closely to ensure that the objectives of the programme are achieved.

13. Contact

John Crook at the Department of Health can answer any queries regarding the instrument.
Tel: 0207 972 4086 or email: john.crook@dh.gsi.gov.uk

Summary: Intervention & Options

Department /Agency: Department of Health	Title: Impact Assessment of Extending Direct Payments	
Stage: Implementation	Version: Final	Date: 13 July 2009
Related Publications: Response to the consultation on the extension and revision of direct payments regulations		

Available to view or download at:

<http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/index.htm>

Contact for enquiries: John Crook

Telephone: 020 7972 4086

What is the problem under consideration? Why is government intervention necessary?

Currently a direct payment can only be made to an individual who has the capacity to consent to have one, and who is able to manage the payment (with help if necessary). In addition, a number of groups are also currently excluded from receiving direct payments as they are subject to various sections of the Mental Health Act 1983. This means that individuals who lack capacity to consent or are excluded due to restrictions under Mental Health legislation are unable to benefit from the flexibility that direct payments offer. Legislative changes are required to widen the scope of direct payments and therefore Government intervention is necessary.

What are the policy objectives and the intended effects?

To offer individuals lacking in capacity (via individuals acting on their behalf) and those subject to sections of the Mental Health Act 1983:

- greater choice and control over the way the services they receive are delivered;
- increased consumer satisfaction;
- greater consumer participation in and ownership of care;
- improved health and well-being outcomes

What policy options have been considered? Please justify any preferred option.

1. Do nothing; 2. Extend the availability of direct payments (preferred option)

Option 2 – Intended effects:

Option 2 widens the scope of direct payments to allow certain previously excluded groups to benefit from the flexibilities they can offer. As part of the Government's drive towards high quality, personalised services, direct payments are a key mechanism in supporting independence, choice and control for service users and their carers. Extending direct payments to these groups will therefore enable more people to design and manage their care and support in a way that suits them and their families best, leading to better outcomes, enhanced self-esteem and social inclusion and participation.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? The policy will be reviewed 3 years after implementation in 2012.

Ministerial Sign-off For Final Proposal Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister: Phil Hope

Date: 14th July 2009

Summary: Analysis & Evidence

Policy Option: 2	Description: Extending the availability of direct payments
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COSTS	ANNUAL COSTS	Description and scale of key monetised costs by 'main affected groups' Increased demand for DPs may occur as a result of widening eligibility. This will potentially increase costs for councils. The average net unit cost of a DP is around £180 p/w at 07/08 prices. Increased demand may result in approx 200 to 500 additional DPs across all councils, which amounts to £1.75m to £4.75m per annum recurrent. This amounts to approx £9.75m aggregated over 3 years (adjusted for inflation).				
	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 70%;">One-off (Transition)</td> <td style="width: 30%; text-align: center;">Yrs</td> </tr> <tr> <td style="background-color: #ffff00;">£ 0</td> <td></td> </tr> </table>		One-off (Transition)	Yrs	£ 0	
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Total Cost (PV)	£					
Other key non-monetised costs by 'main affected groups' None						

BENEFITS	ANNUAL BENEFITS	Description and scale of key monetised benefits by 'main affected groups' The benefits are not monetised. However, we expect benefits to exceed costs.				
	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 70%;">One-off</td> <td style="width: 30%; text-align: center;">Yrs</td> </tr> <tr> <td style="background-color: #ffff00;">£</td> <td></td> </tr> </table>		One-off	Yrs	£	
	One-off		Yrs			
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Total Benefit (PV)	£					
Other key non-monetised benefits by 'main affected groups' Research has shown that direct payments can lead to increased consumer satisfaction with services, greater participation in, and ownership of, care, as well as improved health and well-being.						

Key Assumptions/Sensitivities/Risks

- The average cost to councils per client week of direct payments will be similar to the average cost for packages of care for similar clients.
- The extension of direct payments will lead to increased overall demand in the range of 200 to 500 extra clients (who would not have elected to receive services if direct payments were not available).

Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £
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What is the geographic coverage of the policy/option?	England				
On what date will the policy be implemented?	October 2009				
Which organisation(s) will enforce the policy?	Local authorities				
What is the total annual cost of enforcement for these organisations?	£ 1.75 – 4.75 million				
Does enforcement comply with Hampton principles?	Yes				
Will implementation go beyond minimum EU requirements?	Yes				
What is the value of the proposed offsetting measure per year?	£				
What is the value of changes in greenhouse gas emissions?	£				
Will the proposal have a significant impact on competition?	No				
Annual cost (£-£) per organisation (excluding one-off)	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; background-color: #ffff00;">Micro</td> <td style="width: 25%; background-color: #ffff00;">Small</td> <td style="width: 25%; background-color: #ffff00;">Medium</td> <td style="width: 25%; background-color: #ffff00;">Large</td> </tr> </table>	Micro	Small	Medium	Large
Micro	Small	Medium	Large		
Are any of these organisations exempt?	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; text-align: center;">No</td> <td style="width: 25%; text-align: center;">No</td> <td style="width: 25%; text-align: center;">N/A</td> <td style="width: 25%; text-align: center;">N/A</td> </tr> </table>	No	No	N/A	N/A
No	No	N/A	N/A		

Impact on Admin Burdens Baseline (2005 Prices)		(Increase - Decrease)
Increase of £	Decrease of £	Net Impact £

Key: Annual costs and benefits: Constant Prices (Net) Present Value

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

Option 2 - Extend the availability of direct payments

This option means extending the offer of direct payments to certain people currently excluded either because they lack the capacity to consent to them or because they are subject to various provisions of mental health or criminal justice legislation relating to mental disorder.

Background

Direct payments for adults of working age were introduced in April 1997, through the Community Care (Direct Payments) Act 1996. They were extended to older disabled people in 2000. Since April 2001 (Carers and Disabled Children's Act 2000), direct payments have been available to carers, parents of disabled children and 16 and 17 year olds.

In April 2003, the Government changed the law placing a duty upon local councils to make direct payments to individuals who consent to have them.

Direct payments accounted for nearly 7% of net expenditure on community services in 2006-07, amounting to £344 million. Direct payments have increased considerably over recent years. As of 31 March 2008, 55,900 adults and older people used direct payments- an increase of 38% on 2007 (40,600)³.

In December 2007 the cross-government agreement *Putting People First* described a shared vision for the transformation of adult social care. This vision builds on and reinforces the principles of choice and control established by direct payments. Central to reform is the concept of personal budgets, which give individuals a clear understanding of how much is to be spent on their support and allows them to make their own decisions about how to spend this amount to meet their assessed needs. It is the Government's aim that everyone eligible for social care support will be able to have a personal budget through which they can exercise choice and control over how that support is delivered. This move towards personalisation therefore upholds direct payments as a key vehicle for managing care and support arrangements, and it is expected that the numbers of people using direct payments will increase substantially as a result.

Consultation

Within Government

1. We have consulted with the Ministry of Justice, the Home Office, Office of the Public Guardian, the Department of Children, Schools and Families and the Welsh Assembly extensively and they are content with our proposals.

Public Consultation

2. Three public consultations have taken place which included the proposals to extend direct payments:

³ *The state of social care in England 2007-08*, Commission for Social Care Inspection, January 2009
http://www.csci.org.uk/about_us/publications/state_of_social_care_08.aspx

- The Green Paper consultation for *Independence, well-being and choice* took place between 21 March to 28 July 2005. Over 1,500 formal responses were received. A wide range of organisations and individuals were represented in this response, including key stakeholders from all sectors. In addition, it is estimated that more than 2,000 individuals participated in discussions at regional and national consultation events. A document detailing the responses to the consultation was published in October 2005.⁴
 - The White Paper *Your health, your care, your say*, was an innovative and deliberative listening exercise, one of the largest research based consultations ever to take place in the country. It took place during the autumn of 2005. Further details and a full summary of the responses to the listening exercise are available on the DH website.⁵
 - A public consultation specifically on the draft regulations extending direct payments took place between 19 August and 11 November 2008. Over one hundred responses were received. A summary of the consultation responses including how they will inform the final regulations and accompanying guidance can be found on the DH website.⁶
3. All three consultations showed wide public and stakeholder support for increasing the availability of direct payments in general and enabling previously excluded groups to benefit from the advantages they offer.
 4. This IA draws greatly upon the IA produced when the draft revised direct payments regulations were put out for public consultation in August 2008 (available at http://www.dh.gov.uk/en/Consultations/Closedconsultations/DH_087108). We have made some small amendments to the regulations in light of the consultation responses, and the responses have also helped inform the accompanying revised guidance for local authorities. These amendments do not carry material cost implications.

Costs and Benefits

Sectors and Groups affected

5. Local authorities will be able to make direct payments to a third party acting on behalf of people eligible for social care services who lack the requisite mental capacity to consent to receiving direct payments. In addition, they will be able to make direct payments to people previously excluded from the scheme by certain provisions of mental health or criminal justice legislation relating to mental disorder.
6. Service providers may be affected due to the fact that direct payments enable people to choose how their care and support is provided rather than simply relying on services provided directly by their council. This may have the effect of stimulating the market but may also impose some degree of pressure upon small independent providers of traditional services, as demand for newer, more personalised services increases. However we would expect this trend to occur with or without this particular extension of the direct payments

⁴ A summary of the responses can be found at the following link:
http://www.dh.gov.uk/Consultations/ResponsesToConsultations/ResponsesToConsultationsDocumentSummary/fs/en?CONTENT_ID=4121622&chk=6lcaV%2B

⁵ A summary of the responses can be found at the following link:
http://www.dh.gov.uk/PublicationsAndStatistics/Publications/PublicationsPolicyAndGuidance/PublicationsPolicyAndGuidanceArticle/fs/en?CONTENT_ID=4127357&chk=UYgWq5

⁶ A summary of the responses can be found at the following link:
<http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/index.htm>

scheme as the overall numbers of direct payments continue to rise, in line with the Government's ambition to increase personalisation, choice and control.

7. The beneficiaries of these changes will be users of social care services who either lack capacity or are subject to provisions of mental health or criminal justice legislation. It will also benefit carers and families.

Benefits

8. Giving councils a duty or a power to offer direct payments to service users currently unable to receive them would give those users greater choice and control over the way the services they receive are delivered.
9. We expect benefits to individuals and families to outweigh costs. Individuals (or individuals acting on their behalf) who opt for direct payments may expect to receive greater benefits in terms of independence, choice and control, for the same public expenditure.
10. The main group likely to benefit from extending the availability of direct payments to those lacking the capacity to consent are severely disabled children approaching adulthood. Currently, parents of disabled children are able to receive and manage a direct payment on their child's behalf. However, children who turn 18 and still lack the mental capacity to consent to a direct payment cannot currently retain their direct payment following transition to adult services. We want to change this so these individuals can remain in receipt of their direct payments upon turning 18 and their families can continue to arrange care in the way that suits them best. At 31 March 2008, there were reported to be 10,200 carers of disabled children receiving direct payments. However, we do not know how many of these children will lack capacity to make decisions for themselves upon turning 18, especially as capacity is fluctuating and decision specific.
11. The removal of the blanket exclusion for people subject to certain provisions of mental health and criminal justice legislation will make it possible for people in that position to benefit from direct payments in the same way as other people. The current exclusions mean that no one in these groups, whatever their circumstances, can benefit from a direct payment. We believe this can work against the interests of those individuals where a direct payment could help them to regain their independence and to re-integrate into society after a period of detention in hospital. Problems are known to have arisen where a person receiving a direct payment becomes detained under the Mental Health Act, recovers sufficiently to return to the community but needs to remain under the Act for the time being, and so loses their direct payment. We want to change this so that where possible, people who can benefit from direct payments should be allowed the chance to do so.
12. It is assumed that promoting choice and independence through direct payments will result in:
 - Increased consumer satisfaction with the services that they are provided with;
 - Greater consumer participation in and ownership of care;
 - Improved health and wellbeing outcomes.
13. These benefits are backed up by research. A study of direct payments has been conducted by three research teams from the London School of Economics; the Universities of Leeds, Edinburgh and Glasgow, and the Health and Social Care Advisory Service, the Mental Health Foundation and the University of Birmingham. Two reports have been published – Direct Payments: A National Survey of Direct Payments Policy and Practice (Davey et al, 2007) and Schemes Providing Support to People Using Direct Payments (Davey et al, 2007) – and are available at www.pssru.ac.uk

14. It is not possible to monetise benefits. For service users, it is likely that only those people who expect to benefit from direct payments (or people acting on behalf of those lacking capacity) will seek direct payments under the wider scheme. However for local authorities, evidence does suggest that direct payments have the potential to be as, if not more, cost-effective in comparison to services directly provided by a council. A study in 2006 by the Audit Commission found that the benefits of direct payments for local authorities include lower administration costs (since much of the administration is handled directly by users) and lower overall costs of provision in cases where prices for direct payments are set at lower rate than for domiciliary home care.⁷ These benefits are relatively small given the relatively low take-up of direct payments, but we would expect to them increase over time as take-up increases. Such a conclusion is also supported by the evaluation report of the individual budget pilots which found evidence to suggest that across all the different user groups involved in the pilots, individual budgets are more cost-effective in achieving overall social care outcomes.⁸ A report by Care Services Efficiency & Delivery suggests that in order for savings to be realised, direct payments must be embraced as a core component of delivering support— not as an exception or incremental process.⁹ Extending direct payments to previously excluded groups would support this objective.
15. In theory, there is a risk that individuals acting on behalf of those lacking capacity will not act in the best interests of the person lacking in capacity. However, we have included various provisions in the legislation to mitigate this risk. This includes the obligation for anyone receiving a direct payment on behalf of someone lacking capacity to act with regard to the best interests of that person, within the meaning of the Mental Capacity Act 2005.

Costs

16. Any additional costs associated with the extension of direct payments would fall on local authorities. We would expect one-off set-up costs to be minimal given that the systems to administer and support direct payments are already in place in local authorities, who have had a duty to make direct payments since 2003. Furthermore, we would expect on-going costs per client week to be similar for direct payment users and users of council-provided care services.
17. Most individuals who are currently excluded from receiving direct payments will be in receipt of alternative packages of care at broadly equivalent cost. There may, however, be a small increase in demand as a result of these legislative changes. Currently, a small number of people assessed as needing social care services refuse packages of care because the package they are offered does not suit their individual requirements. Widening the scope of direct payments may increase demand from newly eligible service users (or, rather, their agents) as direct payments will allow for greater flexibility to design personalised packages of care. It seems likely that such increase in demand will be small. We allow for an estimated increase in demand of 200 – 500 people across 150 councils with social services responsibilities.¹⁰
18. The local authority allocations for 2008/09 to 2010/11 take account of the additional cost pressures arising from the extension of the direct payment scheme.
19. If an increase in direct payments alters the pattern of demand for services, it is possible that some small providers may suffer financially as a result. For example, it is possible that the extension of direct payments will reduce demand for more traditional social care services,

⁷ Audit Commission, *Choosing well: analysing the costs and benefits of choice in local public services* (2006)

⁸ *Evaluation of the individual budgets pilot programme: final report* (2008)

⁹ Care Services Efficiency & Delivery, *Cost-effective implementation of direct payments* (2007)

¹⁰ These figures represent a 'best estimate' of numbers likely to seek direct payments as a result of widening the scheme.

such as day care, and increase demand for personalised services that are provided closer to home. This possibility and the potential impact are discussed further in the *Competition Assessment* and *Small Firms Impact Test* (see annex). However, we should place this impact within the wider context of increasing numbers of direct payments being made year on year, in keeping with the Government's drive towards greater choice and control for public service users.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	No	Yes
Small Firms Impact Test	No	Yes
Legal Aid	No	Yes
Sustainable Development	No	Yes
Carbon Assessment	No	Yes
Other Environment	No	Yes
Health Impact Assessment	No	Yes
Race Equality	No	Yes
Disability Equality	No	Yes
Gender Equality	No	Yes
Human Rights	No	Yes
Rural Proofing	No	Yes

Equality Impact Assessment

By increasing choice and control for people who receive social care services, direct payments help maintain independence and reduce the risk of social exclusion for recipients.

Anecdotal evidence suggests that extending direct payments to those without capacity and removing exclusions imposed by restrictions under mental health legislation may benefit those from ethnic minority backgrounds. By enabling more freedom and control over the way in which services are delivered, it will be possible for care to be adapted to suit the social and cultural needs of the user and their carers. For example, the flexibility of a direct payment can enable better compatibility between users and care assistants.

The extension of direct payments to groups currently excluded by mental health or criminal justice provisions relating to mental disorder will mean that there is no longer a need to treat these groups differently from other users of community services. Local authorities will have a duty to make direct payments to this group unless they are conditionally discharged or required by mental health legislation to receive a particular service, in which case local authorities will have a power to offer a direct payment.

The extension of direct payments to people who lack capacity or who fall under mental health legislation should help promote social inclusion and facilitate greater involvement within the local community. This is of particular significance for people from black and minority ethnic communities, where there is some evidence of inequalities in the way services are accessed and experienced.

A full Equality Impact Assessment has been completed for direct payments as a policy tool, although it should be noted that the changes to the regulations simply extend the scope of direct payments, they do not put a new policy tool in place. The amendments to the regulations seek to address problems in the initial policy around the exclusion of certain groups from the benefits of direct payments, including adults with head injuries, some people with dementia and severely disabled children, who cannot receive a direct payment once they reach the age of 18 if they do not have capacity to consent.

Small Firms Impact Test

Many small businesses operate in the market for social care services. The extension of direct payments will not lead to an increase in regulatory burden faced by small businesses operating in the market for adult social care services. As outlined in the competition assessment below, there is a possibility that giving more choice and control to previously excluded service users will lead to changes in the pattern of demand for social care services. However, we have already identified that the number of people newly entering the social care system as a result of this extension will be small – 200 – 500 service users. This figure should be placed within the wider trend for increasing the uptake of direct payments. It is therefore likely that extending direct payments will have at most a small, gradual impact on the small business sector.

Competition Assessment

The market for care services can be broadly divided into two: the market for domiciliary care services and the market for residential care services. In 2007-08 gross expenditure by councils with social services responsibilities on residential services for adults was £7.4 billion

(48% of their total adult spend). Gross expenditure on day and domiciliary care for adults was £6 billion (39% of their total adult spend).

Enabling service users to assume greater choice and control and to access information to support their choices may reduce the demand for traditional services such as residential care or day care and increase demand for new and more personalised services that allow users to be supported closer to home. Equally, it may well provide opportunities for smaller independent and voluntary organisations to enter the social care provider market, with the ability to offer tailored and flexible solutions according to the individual needs of the direct payment recipient. Commissioning staff within councils will need to work with both providers and service users to shape local markets so that new services develop and existing services adapt to meet individual needs in more person-centred ways.

We estimate that the extension of direct payments described in this impact assessment will have a negligible effect on the social care market as it merely extends a scheme already in place and expanding. Any impact on providers will be indirect and will depend on the decisions of service users as to how they spend their direct payments. The increase of users receiving direct payments as a result of this extension is likely to be small and occurs against a backdrop of gradually increasing uptake of direct payments.

By improving choice for users and by providing better information to facilitate those choices, the amendments to the direct payment regulations should support the move towards a more dynamic and efficient social care market. Increased choice and control for users should provide incentives for new providers to enter the market and current providers to adapt if they are able to supply affordable services that meet the needs of users.

Legal Aid

It is not anticipated this proposal will have any impact on legal aid.

Sustainable Development, Carbon Assessment and Other Environment

No impact has been identified

Health Impact Test

Direct payments are intended give service users more choice and control over their care and support, enabling people to decide how to meet their needs according to their own wishes and preferences. However, there is no obligation for service users to take up direct payments if they decide that they would prefer their council to retain control over the resources for their care and support. Therefore, it does not appear that the extension of direct payments to people lacking mental capacity and those subject to mental health legislation would bring about any negative effects on health. There were some concerns raised in the most recent consultation about the additional burden potentially placed on a “suitable person” managing a direct payment on behalf of someone else lacking capacity. However, the regulations specify that direct payments can only be made in this way with the express consent of the “suitable person”. In addition, the accompanying guidance to local authorities will specify the importance of support being in place for all direct payment recipients, to enable them to reap the greatest benefits from the scheme.

Rural Proofing

We have considered the likely effects of these changes on rural populations and do not believe that the impact will be disproportionate or disadvantageous. Indeed, the extension of

choice and control to more service users may well be of benefit to users who are then able to choose packages of care delivered in, or closer to, their homes. Direct payments have been shown to make provision of care and support easier and more convenient for users and carers in rural areas, for whom accessing traditional services can sometimes be most problematic.