

EXPLANATORY MEMORANDUM TO
THE SOCIAL SECURITY (DISABILITY LIVING
ALLOWANCE, ATTENDANCE ALLOWANCE AND CARER'S ALLOWANCE)
(AMENDMENT) REGULATIONS
(NORTHERN IRELAND)
2016

S.R. 2016 No. 229

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Social Development (Northern Ireland) (“The Department”) on behalf of the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 These Regulations amend existing rules in Disability Living Allowance (DLA), Attendance Allowance (AA) and Carer’s Allowance (CA) relating to:

- residence and presence conditions for all three benefits;
- temporary absence rules for DLA and AA;
- payability of benefit for certain DLA and AA claimants in hospitals and care homes;
- the upper age limit for claiming DLA with effect from 6 December 2018; and
- the introduction of a “genuine and sufficient link” provision for claimants subject to certain EU co-ordination Regulations.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 As this instrument is subject to the negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 [Section 87 of the Northern Ireland Act 1998](#) places a statutory duty on the Minister for Social Development and the Secretary of State for Work and Pensions to consult with one another with a view to securing a single social security system for the United Kingdom. Section 88 of the 1998 Act makes provision for financial adjustments to support the maintenance of these parity arrangements.

4.2 Underpinning the parity principle is the argument that, as people in Northern Ireland pay the same rates of income tax and National Insurance contributions as people in Great Britain, they are entitled to the same rights and benefits paid at the same rates.

- 4.3 [The Welfare Reform Act 2012](#) introduced a number of reforms including Universal Credit, Personal Independence Payment, the Jobseeker’s Allowance Claimant Commitment and a cap on the amount of benefits working age people can receive..
- 4.4 On 17 November 2015 “[A Fresh Start: The Stormont Agreement and Implementation Plan](#)” was agreed by the main political parties in Northern Ireland. Included in this agreement was the approach agreed by the Executive and HM Government to implementing welfare reform in Northern Ireland. [The Northern Ireland \(Welfare Reform\) Act 2015](#) provides a power for Her Majesty to legislate on social security, child support and certain matters related to employment and training in Northern Ireland by Order in Council. Any such Order in Council may then confer power on the Secretary of State or a Northern Ireland department to make further provision regarding these matters by regulations or order. [The Welfare Reform \(Northern Ireland\) Order 2015](#) (“the 2015 Order”) was made on 9 December 2015 and regulations stemming from the Order, to implement in Northern Ireland an equivalent to the various welfare reforms set out in the Welfare Reform Act 2012 , are now being brought forward.

These Regulations amend the [Social Security \(Invalid Care Allowance\) Regulations \(Northern Ireland\) 1976](#) (“CA Regulations”), [the Social Security \(Attendance Allowance\) Regulations \(Northern Ireland\) 1992](#) (“AA Regulations”) and the [Social Security \(Disability Living Allowance\) Regulations \(Northern Ireland\) 1992](#) (“DLA Regulations”).

- 4.6 This instrument is required to align DLA, AA and CA rules relating to residence and presence and temporary absence with the rules for Personal Independence Payment (PIP). These are set out in the Personal Independence Payment Regulations (Northern Ireland) 2016, which are being made and laid concurrently with this instrument. In addition, following a ruling on a European Court of Justice case,¹ this instrument introduces a genuine and sufficient link provision that is replicated in PIP.
- 4.7 This instrument also implements a Spending Review 2010 decision concerning the removal of an existing extension of payment of DLA higher rate mobility that is only granted to hospital in-patients with a Motability vehicle. Additionally, it amends the upper age limit for claiming DLA to be consistent with the forthcoming changes to State Pension age and seeks to avoid a duplication of provision in care homes following a Court of Appeal ruling.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is to Northern Ireland only.
- 5.2 The territorial application of this instrument is Northern Ireland.
- 5.3 These changes restore parity between social security systems in Northern Ireland and Great Britain as the instrument makes the equivalent changes for the social security system in Northern Ireland that were made in Great Britain by [the Social Security \(Disability Living Allowance, Attendance Allowance and Carer's Allowance\) \(Amendment\) Regulations 2013](#) (S.I. 2013/389).

¹ Case C-503/09, Lucy Stewart v Secretary of State for Work and Pensions, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri=true&uri=CELEX:62009CJ0503>

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

What is being done and why

7.1 These Regulations make changes to:

- align DLA, AA and CA residence and presence rules with those being introduced in PIP;
- introduce a genuine and sufficient link provision for claimants affected by EU co-ordination legislation following a European Court of Justice ruling;
- implement a Spending Review decision taken in 2010 in relation to the payment of DLA in hospitals;
- address an unintended duplication of provision arising from a Court of Appeal judgment in relation to DLA and CA claimants in a care home; and
- amend the upper age limit for claiming DLA to be consistent with the forthcoming changes to State Pension age.

Residence and presence rules

7.2 These Regulations amend the rules in existing disability and carers' benefits (DLA, AA and CA) to provide for the same residence and presence provisions as applicable in PIP. To receive one of the benefits, a claimant will need to:

- be present in Northern Ireland;
- be habitually resident in the Common Travel Area;²
- have been present in Northern Ireland for 104 weeks out of the last 156 weeks; and
- not be subject to immigration control.

7.3 Provision is being introduced into DLA, AA and CA so that serving members of the armed forces are treated as being habitually resident in Northern Ireland when they are serving and stationed abroad.

7.4 Current legislation requires a claimant to be ordinarily resident in Northern Ireland and to have been present in Northern Ireland for 26 out of the last 52 weeks. Under changes introduced by these Regulations, to align with the rules introduced in PIP, a claimant is required to be habitually resident in Northern Ireland and to have been present in Northern Ireland for 104 weeks out of the last 156 weeks.

7.5 It has been decided to adopt the habitual residence test so that claimants who have already passed the test when claiming an income-related benefit will not then be subject to a different test when claiming a disability or carers' benefit. The increase in the length of the past presence test along with the habitual residence requirement will mean that claimants will have to demonstrate a substantial link with Northern Ireland which is considered to deliver fairness for the taxpayer as the benefits are non-contributory, non means-tested and paid for out of general taxation.

7.6 In DLA a child under two years will not be able to satisfy the new 104 weeks out of 156 weeks past presence test. Therefore it has been decided to retain the modified past

² Common Travel Area comprises United Kingdom, the Republic of Ireland, the Isle of Man or the Channel Islands

presence test for children under 3 years old to receive DLA – this is a 13 week past presence test until the baby’s first birthday (if the baby was entitled prior to reaching the age of 6 months), and a 26 week past presence test thereafter.

- 7.7 Currently DLA and AA claimants are able to go abroad for up to 26 weeks without their benefit being affected. It is considered that continuing to pay benefit for up to six months abroad no longer reflects the original policy intention and provides a loophole whereby people who are mainly resident abroad could continue to claim benefits by claiming they are on extended holidays. Therefore it is intended to reduce this period to 13 weeks, which is deemed more appropriate.
- 7.8 Under existing rules DLA and AA can remain in payment indefinitely if a claimant is receiving medical treatment abroad. These Regulations will set this period at a maximum of 26 weeks. In relation to this amendment, a saving provision will be put in place to the effect that people who are abroad on or before 20 June 2016 for medical treatment will move to the new rule only if they return to Northern Ireland or if the decision governing their current award is revised or superseded.

Genuine and Sufficient Link to the United Kingdom’s social security system

- 7.9 The concept of ‘genuine and sufficient link’ was introduced following the European Court of Justice judgment in the case of *Lucy Stewart* in July 2011. The past presence test previously applied for claims from people living in an European Economic Area (EEA) state or in Switzerland and, because many people had left the UK more than six months earlier, their claims were disallowed.
- 7.10 The Court of Justice did not accept that a past presence condition of entitlement could be used in isolation. The Court did accept that it was legitimate for the competent state to require that there was a genuine and sufficient link between a claimant and that state, but held that if a claimant could show a genuine and sufficient link with the UK’s social security system entitlement could not be restricted to a test such as the past presence test. The requirement to demonstrate a genuine and sufficient link has now been included in these Regulations to apply in DLA, AA and CA mirroring provision in the PIP Regulations.
- 7.11 As well as applying the test to people claiming from another EEA state or Switzerland, this test will also be applied to people arriving from or moving permanently to these locations. People who pass this test will also need to satisfy all other entitlement criteria in order to qualify for a disability or carers’ benefit.

Ending the extension of payment for hospital in-patients with Motability vehicles

- 7.12 Under the current DLA Regulations, although payment of both the care and mobility component of DLA to hospital in-patients stops after 28 days (for those aged 16 and over), if an in-patient has a current Motability vehicle contract³ when they enter hospital, payment of the higher rate mobility component can continue for the duration of the contract, which could be up to 3 years. That exemption to the normal hospital rules was introduced in 1996 when payment of DLA mobility component was removed from hospital in-patients. It represented a reasonable approach at that time since it ensured that in-patients committed to a Motability contract when the rules changed were not disadvantaged financially. Any lease held by someone when the

³ The Motability scheme enables recipients of DLA higher rate mobility component and War Pensioners Mobility Supplement to exchange their benefit to buy or lease a car, powered wheelchair or scooter.

rules changed in 1996 will have long expired but new in-patients have still been benefiting from this provision.

- 7.13 The British Government announced in the 2010 Spending Review that it would be removing the above exemption to the usual DLA hospital payment rules. This change will ensure that all in-patients are treated in the same way, whether they have a Motability vehicle or not.
- 7.14 Transitional protection will apply for claimants who are simultaneously in-patients and users of Motability vehicles on the date that the change comes into force, by providing that those in-patients will continue to be paid their mobility component after the initial 28 days allowed by the current hospital rules, whilst they remain in hospital, and until:
- (a) in the case of hire agreements, the end of the term of hire (or where the vehicle is returned before the expiry of the term of hire or that term is terminated early, the date of return or early termination); or
 - (b) in the case of hire-purchase agreements, the date the purchase is completed (or where the vehicle is returned or repossessed before that date, the date of return or repossession); or, if it occurs earlier,
 - (c) the long-stop date of 20 June 2019.
- 7.15 A Motability vehicle user who is also an in-patient on the date that the change of law comes into force, who is subsequently discharged, and who becomes an in-patient again **more than 28 days** later within the period of the existing Motability contract, will not benefit from the transitional protection on return to hospital.
- 7.16 A Motability vehicle user who is also an in-patient on the date that the change of law comes into force, who is subsequently discharged, and who becomes an in-patient again **under 28 days** later within the period of the same Motability contract, will continue to benefit from the transitional protection, and will do so on each subsequent occasion that they become an in-patient until such time as they have been out of hospital for over 28 days.
- 7.17 The rules described in paragraph 7.15 and 7.16:-
- (a) are consistent with the rule that already exists in relation to the definition of a continuous period of hospitalisation for the purposes of the usual, current hospital rule (namely payment of DLA allowed for the first 28 days of a continuous hospital stay); and
 - (b) establish a fair dividing line between those who are already benefiting from the Motability exemption at the time of the change of law, and those who are not.
- 7.18 Transitional protection that will be put in place ensures that those in-patients with Motability vehicles when the rules change have a generous period of adjustment. There is a long-stop date of 20 June 2019, on which all transitional protection ends.

Addressing an anomaly in the DLA and AA payment rules resulting from a recent court judgement

- 7.19 In general terms, payment of AA and both components of DLA stops after 28 days for in-patients (over the age of 16) of hospitals and similar institutions.
- 7.20 For residents of care homes, payment of AA and DLA care component stops after 28 days (84 days in the case of children under the age of 16) if the cost of any part of

their “qualifying services”⁴ (namely accommodation, board and personal care) is met out of public or local funds, but payment of DLA mobility component continues while the eligibility conditions are met.

- 7.21 The rules relating to payment of benefit in hospitals and care homes outlined in paragraphs 7.19 and 7.20 are primarily designed to avoid duplication of public funding.
- 7.22 Current DLA and AA Regulations⁵ provide that health services⁶ given to care home residents do not count as “qualifying services”. This is intended to achieve the effect that health service nursing care should not disqualify a care home resident from receiving DLA care component, or AA, but that only publicly or locally funded accommodation, board and personal care (namely, “qualifying services” as distinct from nursing care) should disqualify the resident.
- 7.23 A Court of Appeal decision in Great Britain in December 2011 highlighted that regulation 9(6)(f) of the DLA Regulations and regulation 7(3)(f) of the AA Regulations have the effect that care home residents qualify for payment of any DLA care component or AA to which they are entitled if all of the services they are receiving are funded under health service legislation. This represents a clear duplication of funding of “qualifying services”, because the individual’s accommodation, board and personal care costs are being funded twice over - namely by the health service and at the same time by DLA care component (or AA as the case may be) - and as such directly contradicts the policy intent stated in paragraph 7.21.
- 7.24 Since “qualifying services” are defined by primary legislation⁷ and that definition does not encompass nursing care, regulation 9(6)(f) of the DLA Regulations and regulation 7(3)(f) of the AA Regulations are not necessary for the purpose of clarifying that publicly funded nursing care does not disqualify a care home resident from payment of DLA care component, or AA. Moreover, the duplication of funding which those Regulations give rise to, and which was recently identified by the Court of Appeal, was clearly never intended. In order to remedy that duplication of funding the paragraphs of the DLA and AA Regulations referred to above are being revoked.

Amendment of references relating to the upper age limit for claiming DLA

- 7.25 Equalisation of State Pension age at 65 for men and women was introduced by the Pensions (Northern Ireland) Order 1995; the Pensions Act (Northern Ireland) 2008 provided for State Pension age for both men and women to increase; and provision in the Pensions Act (Northern Ireland) 2012 means that pensionable ages for men and women will have become equalised at age 65 by November 2018. From December 2018 there will be a gradual increase in State Pension age for both men and women to reach age 66 by October 2020. The intention is that the upper age limit for claiming DLA (currently age 65) will rise in line with this increase. These Regulations will now amend the DLA Regulations so that the upper age limit for claims to DLA reflects the future equalisation of, and increases in, pensionable age for men and

⁴ “Qualifying services” for the purposes of AA and DLA are defined terms – Social Security Contributions and Benefits (Northern Ireland) Act 1992 (1992 c.7), section 67(4) in relation to AA and section 72(10) in relation to DLA.

⁵ Regulation 9(6)(f) of the DLA Regulations and regulation 7(3)(f) of the AA Regulations.

⁶ This means services provided under the Health and Personal Social Services (Northern Ireland) Order 1972.

⁷ See Social Security Contributions and Benefits (Northern Ireland) Act 1992 (1992 c.7), sections 67(4) and 72(10).

women. The amendment will alter references relating to age 65 to references to “pensionable age”. In order to ensure that women under 65 are not excluded from claiming DLA, that amendment will not have effect until 6 December 2018. This will be in line with the commencement date for the similar amendment that was made by pensions legislation to primary legislation governing DLA.

Consolidation

- 7.26 This instrument will be informally consolidated in the NI equivalent of the GB Law Relating to Social Security (or “Blue Volumes”), as the legislation applies only to Northern Ireland. It will be available to the public at no cost via the internet at: <https://www.dsdni.gov.uk/services/law-relating-social-security>

8. Consultation outcome

- 8.1 Consultation exercises in Great Britain on the reform of DLA and the introduction of PIP have been run concurrently in Northern Ireland and Department for Social Development officials have shared views expressed in Northern Ireland with the Department for Work and Pensions for consideration alongside those received in Great Britain.
- 8.2 Initial consultation on the [reform of DLA](#) ran from 16 December 2010 to 18 February 2011 (40 responses were received in Northern Ireland). The [Westminster government’s response](#) was published on 4 April 2011. A further consultation on the [detailed design of PIP](#), which included changes to DLA, AA and CA, was carried out between 4 April and 30 June 2012 (13 responses were received in Northern Ireland). This consultation included eligibility, payability and reassessment as well as these associated changes for DLA, AA and CA. The [Westminster government’s response](#) was published on 13 December 2012.
- 8.3 The responses to the detailed design consultation provided constructive feedback and insight concerning the proposals. Following analysis of the responses certain beneficial changes were made to the proposals. In the case of these Regulations, the initial proposal was to allow a temporary absence abroad of 4 weeks - following consultation responses it was decided to increase this to 13 weeks.
- 8.4 The decision to remove the extension of payment of DLA beyond 28 days for hospital in-patients with a Motability vehicle was one of the announcements made in the Spending Review 2010. This decision was referenced in the 2012 consultation and following feedback the decision was taken to introduce an adjustment period. As well as replicating this legislation for NI, changes to the payment of DLA and AA in care homes address an anomaly as a result of a Court of Appeal judgment in Great Britain and simply remove an unintended duplication of provision. The amendment to “pensionable age” reflects pension legislation to equalise pensionable ages for men and women. The introduction of a genuine sufficient link enables the UK Government to comply with European legislation and case law.

9. Guidance

- 9.1 Detailed guidance on both regulatory and operational changes will be provided to staff and decision makers within the Northern Ireland Social Security Agency (NI SSA) prior to implementation on 20th June 2016. Procedures will be updated, staff trained and support material amended.

- 9.2 Prior to implementation changes will be made to the Decision Makers Guide (DMG) which is also available free on the DSD internet at:
<https://www.dsdni.gov.uk/articles/decision-makers-guide>.

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies.
- 10.2 The impact on the public sector is negligible. This measure is part of the welfare reform package that will restore parity with the rest of the UK and contribute toward sustainable finances for the Northern Ireland Executive. Administrative arrangements to provide passports to other schemes and benefits are being maintained wherever possible and in line with policy decisions made by the relevant Departments administering those benefits and schemes.
- 10.3 An Impact Assessment has been prepared for this instrument and is submitted with this memorandum and will be published alongside the Explanatory Memorandum on the legislation.gov.uk website. There are currently around 125,170 DLA claimants in Northern Ireland. It is not possible for us to determine the future eligibility of these individuals for Personal Independence Payments. The changes provide a transparent and consistent assessment to ensure support is based on need rather than condition, and reassessment over time will ensure that as people's conditions or health needs change they are more accurately reflected in the support provided.

11. Regulating small business

- 11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

- 12.1 The operation of the Regulations will continue to be reviewed through the normal avenues of guidance enquiries received from the Department's offices and correspondence from members of the public.
- 12.2 In terms of future changes to the legislation, Northern Ireland social security legislation normally maintains parity with changes made by the Department for Work and Pensions.

13. Contact

- 13.1 Anne McCleary at the Department for Social Development can direct any queries regarding the instrument. Telephone: 028 90819973 or email:
caroline.banks@dsdni.gov.uk.