

## EXPLANATORY MEMORANDUM TO

### THE SOCIAL SECURITY (DISABILITY LIVING ALLOWANCE AND PERSONAL INDEPENDENCE PAYMENT) (AMENDMENT) REGULATIONS (NORTHERN IRELAND) 2016

2016 No. 235

#### 1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Communities (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 The purpose of this instrument is to address the issues highlighted in the 2015 Supreme Court judgment in the case of Cameron Mathieson vs. Secretary of State for Work and Pensions, which found that ceasing to pay Cameron, a five year old child, Disability Living Allowance (DLA) after he spent 84 days in hospital was a contravention of his human rights.
- 2.2 The instrument removes the rules in DLA and Personal Independence Payment (PIP) that would otherwise prevent persons under the age of 18 years who are in hospital or another similar institution from receiving DLA or PIP (‘hospitalisation’ rules). Removing these rules means that DLA and PIP can be paid in those circumstances, until the person is discharged.
- 2.3 This instrument also makes consequential provision so that children who remain in hospital beyond their sixteenth birthday may continue to receive DLA and will not be required to claim PIP until they are discharged. Provision is also made to extend a fixed term DLA award for a person who remains in hospital in these circumstances.

#### 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 Northern Ireland Minister with responsibility for social security 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, PIP, the Jobseeker's Allowance Claimant Commitment and a cap on the amount of benefits working age people can receive. It also reassessed incapacity benefits claimants for Employment and Support Allowance, improved the Work Capability Assessment and made sure housing support is fair.
- 4.4 On 17 November 2015 "[A Fresh Start: The Stormont House 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 Order) was made on 9 December 2015 and regulations stemming from the Order to implement the various welfare reforms set out in the [Welfare Reform Act 2012](#) in Northern Ireland are now being brought forward.
- 4.5 Regulations introducing PIP in Northern Ireland, to replace DLA for those of working age, are due to come into operation from 20 June 2016. This instrument brings forward changes to certain rules in PIP and DLA to correspond to those made in Great Britain following a Supreme Court judgment. They ensure that these disability benefits in Northern Ireland continue to be maintained in parity with Great Britain.
- 4.6 On 8 July 2015, the Supreme Court handed down a judgment in the case of *Cameron Mathieson v Secretary of State for Work and Pensions [2015] UKSC 47*. Cameron's father had challenged the DLA hospitalisation rules for children through the appeal system. The Supreme Court unanimously allowed the appeal and set aside the Secretary of State's decision to stop payments of Cameron's DLA after 84 days in hospital. Currently the Social Security (Disability Living Allowance) Regulations (Northern Ireland) 1992<sup>1</sup> (regulations 8, 10, 12A and 12B) and the Personal Independence Payment Regulations (Northern Ireland) 2016<sup>2</sup> (regulations 29 and 30) make it a requirement that these benefits are not payable in general while claimants are undergoing medical or other treatment as an in-patient in a Health Service hospital or other similar institution. However, for children under 16 years who are entitled to DLA when they enter hospital, payment of that benefit will continue for 84 days only and will then stop until such time as they are discharged from hospital. For persons aged 16 years and over who are entitled to either DLA or PIP when they enter hospital, payment of that benefit will continue for 28 days only and will then stop until such time as they are discharged from hospital.
- 4.7 The Personal Independence Payment (Transitional Provisions) Regulations (Northern Ireland) 2016<sup>3</sup> contain transitional provisions for the phasing out of DLA and replacing it with PIP for persons aged 16 to 64 years. For children who are entitled to DLA and reach 16 years there is a mandatory requirement that the child is sent an invitation to claim PIP, which starts the process of the transfer from DLA to PIP (regulation 3(3)).

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<sup>1</sup> <https://www.communities-ni.gov.uk/services/law-relating-social-security>

<sup>2</sup> <http://www.legislation.gov.uk/nisr/2016/217/contents/made>

<sup>3</sup> <http://www.legislation.gov.uk/nisr/2016/227/contents/made>

## **5. Extent and Territorial Application**

- 5.1 The extent of this instrument is Northern Ireland only.
- 5.2 The territorial application of this instrument is Northern Ireland.
- 5.3 These Regulations replicate for Northern Ireland the legislation that applies to Great Britain. The corresponding Great Britain instrument is [the Social Security \(Disability Living Allowance and Personal Independence Payment\) \(Amendment\) Regulations 2016 \(S.I. 2016/556\)](#).

## **6. European Convention on Human Rights**

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

## **7. Policy background**

### *What is being done and why*

- 7.1 Amendments are being brought forward to DLA and PIP so that benefit can continue to be paid to people in hospital if at the time of admission they were a child under the age of 18 years. This applies whether they are in receipt of DLA or PIP before admission to hospital or first become entitled to those benefits whilst in hospital, provided they meet the other entitlement conditions.
- 7.2 The proposed changes are being introduced following a Supreme Court judgment in the case of *Cameron Mathieson v Secretary of State for Work and Pensions [2015] UKSC 47*. Cameron had been diagnosed soon after he was born with cystic fibrosis and Duchenne muscular dystrophy. He was three years old when he was admitted to hospital in 2010 and at that point he was in receipt of the DLA mobility component and care component. After he had spent 84 days in hospital his DLA payment stopped on the basis that he was being fully maintained by the National Health Service.
- 7.3 Cameron's parents challenged the initial decision to stop his DLA payments on the basis that they remained his primary caregivers whilst he was in hospital, they carried out medical procedures just as they had at home, they provided 24-hour care and attention to him and they supported his emotional wellbeing.
- 7.4 An appeal was lodged against this decision. The First-tier Tribunal dismissed the appeal in 2012 and shortly thereafter Cameron sadly died aged 5. His father appealed the decision of the First-tier Tribunal but was unsuccessful before the Upper Tribunal and the Court of Appeal. He was granted permission to appeal to the Supreme Court on the basis that the withdrawal of DLA after 84 days was incompatible with Article 14 (prohibition of discrimination) of the European Convention on Human Rights (ECHR), taken together with Article 1 of Protocol 1 (protection of property) and/or Article 8 (right to respect for private and family life).
- 7.5 The Supreme Court held that the application of the hospitalisation rule was not justified in this case, and therefore breached Article 14. In essence, they found that the withdrawal of DLA was not justified because the family "attended no less to his bodily functions than when he had been at home". In addition they faced increased rather than decreased costs in order to provide that care. In support of their finding in relation to Article 14 ECHR, four of the five judges also considered that the rule breached international law (the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and the United Nations Convention on the Rights of the

Child (UNCRC)) on the basis that they were not satisfied that the Government had given sufficient consideration to the needs of disabled children to satisfy article 3(1) of the UNCRC and article 7(2) of the UNCRPD. The Supreme Court concluded that Cameron had been entitled to continued payment of DLA whilst in hospital.

- 7.6 The Supreme Court left it to the Secretary of State to decide what measures should be taken to avoid a similar breach in the case of other disabled children who could be considered comparable to Cameron. The Secretary of State carefully considered the terms of the judgment and the evidence contained within an equality analysis and decided that the hospitalisation rule to withdraw payment of DLA and PIP should no longer apply to children who are under the age of 18 when they are admitted to hospital. The legislation for DLA and PIP has now been amended to provide for this change in Great Britain and these Regulations make corresponding provision for Northern Ireland. This will ensure that children in Northern Ireland in receipt of DLA or PIP who are aged under 18 on the date of admission to hospital are treated in the same manner as children in Great Britain.
- 7.7 The hospitalisation provisions in the Social Security (Disability Living Allowance) Regulations (Northern Ireland) 1992 (“the DLA Regulations”) and the Personal Independence Payment Regulations (Northern Ireland) 2016 are amended by these Regulations. The effect is that they will no longer apply to any person who was under the age of 18 on the day of admittance to hospital or other similar institution for the duration of the person’s stay.
- 7.8 The Personal Independence Payment (Transitional Provisions) Regulations (Northern Ireland) 2016 are also amended to make sure that a child under the age of 16 who is admitted to hospital and is entitled to DLA while in hospital, can continue to receive DLA payments if the child remains in hospital after reaching age 16. There will be no requirement to apply for PIP until the child is discharged from hospital.

#### *Consolidation*

- 7.9 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.communities-ni.gov.uk/services/law-relating-social-security>.

### **8. Consultation outcome**

- 8.1 No consultation has been carried out. The judgment was specific to Cameron Mathieson’s circumstances. The Supreme Court left it to the Secretary of State to decide what measures should be taken to avoid a similar breach of human rights in the case of other disabled children, such as Cameron, following their 84th day in hospital. The Secretary of State decided that the hospitalisation rule should be removed for **all** children who enter hospital under the age of 18 in Great Britain, and these changes are now being replicated in Northern Ireland. These changes are beneficial to all children in these circumstances.

### **9. Guidance**

- 9.1 Operational guidance for the Department has been revised to take account of the changes. The changes will also be mirrored within the Decision Makers Guide (DMG), which is available free on the Department’s internet at: <https://www.communities-ni.gov.uk/articles/decision-makers-guide>. However,

interim guidance has already been given to operational teams pending the coming into operation of this legislation.

**10. Impact**

- 10.1 There is no impact on business, charities or voluntary bodies.
- 10.2 There is a negligible impact on the public sector due to the small numbers affected by this change.
- 10.3 An Impact Assessment has not been prepared for this instrument. It is estimated that around 10 children per year may be affected in Northern Ireland. No further breakdown analysis has been done on this small number as it would potentially reveal the identities of individuals. The additional support will benefit these families whilst the children are in hospital and enable continued familial support.

**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 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 Communities can direct any queries regarding the instrument. Telephone: 028 90819973 or email: [caroline.banks@communities-ni.gov.uk](mailto:caroline.banks@communities-ni.gov.uk).