

## EXPLANATORY MEMORANDUM TO

### THE SOCIAL SECURITY (DISABILITY LIVING ALLOWANCE, ATTENDANCE ALLOWANCE AND CARER'S ALLOWANCE) (AMENDMENT) REGULATIONS 2013

2013 No. 389

1. This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.
2. **Purpose of the instrument**
  - 2.1 This instrument amends Disability Living Allowance (DLA), Attendance Allowance (AA) and Carers Allowance (CA) Regulations relating to residence and presence; temporary absence rules in AA and DLA; upper age limit for claiming DLA and rules relating to the payment of AA and DLA in hospitals and care homes.
  - 2.2 The changes are designed to align the existing rules with those being proposed for Personal Independence Payment (PIP), avoid duplication of Government provision and introduce a new provision, a genuine and sufficient link with the UK social security system for cases affected by European legislation.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
  - 3.1 None
4. **Legislative Context**
  - 4.1 This instrument aligns DLA, AA and CA rules relating to residence and presence and temporary absence with the rules proposed for Personal Independence Payment. These are set out in The Social Security (Personal Independence Payment) Regulations 2013, which were laid before Parliament on 13 December 2012. In addition, following a ruling on a European Court of Justice case<sup>1</sup>, this instrument introduces a genuine and sufficient link provision that will also be replicated in PIP.
  - 4.2 This instrument also implements a Spending Review 2010 decision concerning the removal of an existing extension of payment of Disability Living Allowance (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

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<sup>1</sup> Case C-503/09, Lucy Stewart v Secretary of State for Work and Pensions, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0503:EN:HTML>

avoid a duplication of provision in care homes following a Court of Appeal ruling.<sup>2</sup>

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

This instrument applies to Great Britain.

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

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**

#### *Residence and presence rules*

- 7.1 These regulations amend existing regulations to provide the disability and carer benefits with the same residence and presence provisions as Personal Independence Payment. (PIP). To receive one of the benefits, people will need to:
- be present in Great Britain
  - be habitually resident in the Common Travel Area<sup>3</sup>
  - have been present in Great Britain for 104 weeks out of the last 156 weeks
- We have also introduced a provision in DLA and Attendance Allowance (AA) so that serving member of the armed forces are treated as being habitually resident in Great Britain when they are serving and stationed abroad. Current legislation requires a claimant to be ordinarily resident in Great Britain and to have been present in Great Britain for 26 weeks out of the last 52 weeks.
- 7.2 We have 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 carer benefit. The increase in the length of the past presence test will mean that claimants will have to demonstrate a substantial link with Great Britain which we consider will deliver fairness for the taxpayer as the benefits are non-contributory, non means-tested and paid for out of general taxation.
- 7.3 Currently DLA and Attendance Allowance (AA) claimants are able to go abroad for up to 26 weeks without their benefit being affected. We intend to reduce this period to 13 weeks, which is more appropriate and should prevent people spending half the year living in other countries at the British tax payers' expense.

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<sup>2</sup> Secretary of State for Work and Pensions v Slavin [2011] EWCA Civ 1515 (CDLA/3638/2008)  
<http://www.bailii.org/ew/cases/EWCA/Civ/2011/1515.html>

<sup>3</sup> Common Travel Area comprises United Kingdom, the Republic of Ireland, the Isle of Man or the Channel Islands

- 7.4 Under existing rules Disability Living Allowance (DLA) and Attendance Allowance (AA) can remain in payment indefinitely if a claimant is receiving medical treatment abroad. These regulations will reduce this period to 26 weeks. In relation to that amendment, we will put in place a saving provision to the effect that people who are abroad on or before 08 April 2013 for medical treatment will move to the new rule only if they return to Great Britain or if the decision governing their current award is revised or superseded.

### ***Genuine and Sufficient Link (GSL) to the United Kingdom's social security system***

- 7.5 The concept of GSL was introduced following the European Court of Justice judgment in the case of *Lucy Stewart*<sup>4</sup> in July 2011. We had previously applied the past presence test 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.
- 7.6 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 we could not restrict entitlement to a test such as the past presence test. The genuine and sufficient link test has now been included in these draft regulations as well as in the Personal Independence Payment regulations.
- 7.7 As well as applying the test to people claiming from another EEA state or Switzerland we will also apply this test to people arriving from or moving permanently to these locations. People who pass this test will be able to receive benefit in each of these circumstances, as long as they satisfy all other entitlement criteria.

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

- 7.8 Under the current DLA regulations, although payment of both the care and mobility component of DLA to hospital in-patients stops after 28 days (84 days for a child under 16), if an in-patient has a current Motability vehicle contract<sup>5</sup> 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.

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<sup>4</sup> Case C-503/09, *Lucy Stewart v Secretary of State for Work and Pensions*, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0503:EN:HTML>

<sup>5</sup> The Motability scheme enables recipients of DLA higher rate mobility and War Pensioners Mobility Supplement to exchange their benefit to buy or lease a car, powered wheelchair or scooter.

Any lease held by someone when the rules changed in 1996 will have long expired but new in-patients have still been benefiting from this provision.

- 7.9 The Government announced in the 2010 Spending Review that it would be removing the above (see paragraph 7.8) exemption to the usual Disability Living Allowance (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.
- 7.10 The Motability scheme has stated that they would aim to avoid recovering vehicles from hospital in-patients affected by this change. They also said that where a vehicle is returned early because of this change any advance payment<sup>6</sup> will be returned on a pro rata basis and the customer will not face any early termination penalties, subject to the vehicle being returned in a good condition. In addition, after listening to people's concerns the Government has decided to allow transitional protection for customers 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 rule, 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 08<sup>th</sup> April 2016.
- 7.11 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.
- 7.12 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.

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<sup>6</sup> Where the amount of DLA higher rate mobility is in itself insufficient to lease a car, scheme customers can pay an Advance Payment – lump sum of money which is generally £2,000 or less - on top of their allowance which is non-fundable at the end of the lease.

- 7.13 The rules described in paragraphs 7.11 and 7.12:-
- (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 Disability Living Allowance (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.
- 7.14 All in all, the 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 08<sup>th</sup> April 2016, on which all transitional protection ends.

***Addressing an anomaly in the Disability Living Allowance (DLA) and Attendance Allowance (AA) payment rules resulting from a recent court judgement***

- 7.15 In general terms, payment of AA and both components of DLA stop after 28 days (84 days in the case of children under the age of 16) for in-patients of hospitals and similar institutions.
- 7.16 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”<sup>7</sup> (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.
- 7.17 The rules relating to payment of benefit in hospitals and care homes outlined in paragraphs 7.15 and 7.16 are primarily designed to avoid duplication of public funding.
- 7.18 Current DLA and AA regulations<sup>8</sup> provide that NHS services<sup>9</sup> given to care home residents do not count as “qualifying services”. This is intended to achieve the effect that **NHS 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.
- 7.19 A recent Court of Appeal decision in December 2011, highlighted that regulation 9(6)(f) of the DLA Regulations and regulation 7(3)(f) of the AA Regulations have

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<sup>7</sup> “Qualifying services” for the purposes of AA and DLA are defined terms – Social Security Contributions and Benefits Act 1992 (1992 c.4), section 67(4) in relation to AA and section 72(8) in relation to DLA.

<sup>8</sup> Section 9(6)(f) of the DLA Regulation and section 7(3)(f) of the AA Regulations.

<sup>9</sup> This means services provided under the National Health Service Act 2006, the National Health Service (Wales) Act 2006 and the National Health Service (Scotland) Act 1978.

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 the NHS Acts. 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 NHS 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 7.15.

- 7.20 Since “qualifying services” are defined by primary legislation<sup>10</sup> and that definition does not encompass **nursing care**, section 9(6)(f) of the DLA Regulations and 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 sections give rise to, and which was recently identified by the Court of Appeal, was clearly never intended. The Government intends, therefore, to remedy that duplication of funding by revoking the sections of the DLA and AA regulations referred to above.

### **Equalisation of pension age**

- 7.21 The Pensions Act 1995 equalised pensionable age for men and women. The Pensions Act 2007 increased pensionable age for both men and women. The Pensions Act 2011 extended the date by which men’s and women’s pensionable age will have been equalised, to 6<sup>th</sup> December 2018.
- 7.22 The Pensions Act 2007 altered the reference in primary legislation to the upper age limit (65 years old<sup>11</sup>) for claims to Disability Living Allowance (DLA) to a reference to “pensionable age”, and the Pensions Act 2011 brings that amendment into effect from 06 December 2018. Thus far, the DLA regulations have not been amended to reflect future equalisation. We therefore intend to amend them now so that the upper age limit for claims to DLA reflects the future equalisation of pensionable age for men and 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 06 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 Disability Living Allowance (DLA).

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<sup>10</sup> See Social Security Contributions and Benefits Act 1992 (1992 c.4), sections 67(4) and 72(8).

<sup>11</sup> A claim for DLA can only be made before you reach the age of 65. Awards of DLA made before age 65 can continue past this age as long as entitlement conditions continue to be met. A claim made after age 65 must be in respect of AA.

## Consolidation

- 7.23 Informal consolidation will be included in due course in the Department's "The Law Relating to Social Security" (the Blue Volumes) which is available on the internet at no cost to the public. <http://www.dwp.gov.uk/publications/specialist-guides/law-volumes/the-law-relating-to-social-security/>

## 8. Consultation outcome

- 8.1 The Government undertook a three month consultation on the detailed design of Personal Independence Payment which closed on 30 June 2012: [DLA reform and Personal Independence Payment – completing the detailed design – consultation](http://www.dwp.gov.uk/docs/pip-detailed-design-consultation.pdf) <http://www.dwp.gov.uk/docs/pip-detailed-design-consultation.pdf>  
The consultation included eligibility, payability and reassessment as well as these associated changes for DLA, Attendance Allowance (AA) and Carers Allowance (CA). The consultation covered most of the amendments suggested in these draft regulations. The department received more than 1,600 responses to the detailed design including nearly 1,500 from individuals and over 100 from disability organisations.
- 8.2 The responses provided constructive feedback and insight concerning the proposals, there was a wide variety of views on what works well and what respondents felt ought to change. Following analysis of the response 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 Ministers decided to increase this to 13 weeks. The Government's response to the consultation was published on 13 December 2012. <http://www.dwp.gov.uk/docs/pip-assessment-thresholds-and-consultation-response.pdf>
- 8.3 While the following changes were included in the consultation for information we did not formally consult on them. 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 decisions made in Spending Review 2010. However, some of the responses its inclusion generated helped inform the Government's decision to introduce an adjustment period. Changes to the payment of DLA and AA in care homes address an anomaly as a result of a Court of Appeal judgment<sup>12</sup> and simply remove an unintended duplication of provision. The amendment to "pensionable age" reflects pension legislation to equalise pensionable ages for men and women.

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<sup>12</sup> CDLA/3638/2008- Secretary of State for Work and Pensions v Slavin [2011] EWCA Civ 1515  
<http://www.bailii.org/ew/cases/EWCA/Civ/2011/1515.html>

The introduction of a Genuine Sufficient link enables the Government to comply with European legislation and case law.<sup>13</sup>

8.4 The Department has consulted the Social Security Advisory Committee about these regulations. The Committee decided they didn't need to refer these regulations out for further consultation with stakeholders.

## **9. Guidance**

9.1 A Decision Maker's memorandum will be published on the Department's internet site [www.dwp.gov.uk](http://www.dwp.gov.uk) once the Regulations receive parliamentary approval.

## **10. Impact**

10.1 The impact on business and civil society organisations is negligible.

10.2 The impact on the public sector is negligible.

10.3 An Impact Assessment has not been prepared for this instrument.

## **11. Regulating small business**

11.1 The legislation does not apply to small business.

## **12. Monitoring & review**

12.1 The following changes simply:

- implement a Spending review decision taken in 2010;
- address an unintended duplication of provision arising from a Court of Appeal judgement;
- introduce a Genuine and Sufficient Link test to comply with European legislation and case law; and
- amend the upper age limit for claiming Disability Living Allowance to be consistent with the forthcoming changes to State Pension age.

12.2 Officials within DWP are developing proposals for a programme of monitoring, evaluation and analysis for the new disability benefit for people of working age, Personal Independence payment (PIP). We will consider the results of that evaluation to see if they have an effect on the changes detailed above which align DLA, Attendance Allowance (AA) and Carers Allowance (CA) residence and presence rules with those being introduced in Personal Independence Payment (PIP). <http://www.dwp.gov.uk/docs/pip-evaluation-proposals.pdf>

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<sup>13</sup>Case C-503/09 - Lucy Stewart v Secretary of State for Work and Pensions <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0503:EN:HTML>



### **13. Contact**

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