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DRAFT SCOTTISH STATUTORY INSTRUMENTS

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**2021 No.**

**The Disability Assistance for Children and  
Young People (Scotland) Regulations 2021**

**PART 3**

**Eligibility**

**Age criteria**

4.—(1) Subject to regulation 15 (entitlement under special rules for terminal illness), Child Disability Payment may be paid in respect of an individual who is aged at least 3 months and is under the age of 18 years.

(2) Child Disability Payment may only be paid in respect of an individual who is under the age of 16 years on the day on which entitlement begins in accordance with regulation 24 (when an application is to be treated as made and beginning of entitlement to assistance).

(3) Where an individual was born on 29 February, the individual's birthday is to be taken to fall on 28 February in a year which is not a leap year.

**Residence and presence conditions**

5.—(1) An individual satisfies the residence and presence conditions where on any day that individual—

- (a) is ordinarily resident in Scotland,
- (b) is habitually resident in the common travel area,
- (c) is not a person to whom section 115(3) of the Immigration and Asylum Act 1999<sup>(1)</sup> applies, within the meaning of section 115(9) of that Act for the purposes of entitlement to Child Disability Payment,
- (d) is present in the common travel area, and
- (e) has been present in the common travel area for a period of, or for periods amounting in the aggregate to, not less than 26 weeks in the 52 weeks immediately preceding that day.

(2) In the case of a child under the age of 6 months, paragraph (1) is to apply as if in subparagraph (e) for the reference to 26 weeks there was substituted a reference to 13 weeks.

(3) Where in any particular case a child has by virtue of paragraph (2) entitlement to the care component immediately before the day the child attains the age of 6 months, then until the child attains the age of 12 months, paragraph (1)(e) shall continue to apply in that child's case as if for the reference to 26 weeks there was substituted a reference to 13 weeks.

(4) The residence condition set out in paragraph (1)(a) does not apply in relation to the care component where on any day the individual—

- (a) is habitually resident in Ireland,

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(1) 1999 c.33.

- (b) has a genuine and sufficient link to Scotland, and
  - (c) is an individual—
    - (i) to whom the Convention on Social Security between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland signed at Dublin on 1 February 2019<sup>(2)</sup>, as modified from time to time in accordance with any provision of it, applies, and
    - (ii) in respect of whom the United Kingdom is, as a result, competent for payment of long term care benefits.
- (5) The reference in paragraph (4)(b) to an individual’s link to Scotland being sufficient is to it being sufficiently close that if the individual were not entitled to Child Disability Payment, paragraph (4) would be incompatible with Convention on Social Security between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland signed at Dublin on 1 February 2019.
- (6) A relevant individual is treated as satisfying the residence and presence conditions set out in paragraph (1)(a), (b), (d) and (e) where on any day that individual is outside the common travel area—
- (a) by reason of their capacity mentioned in paragraph (7)(b) provided that individual satisfied the residence and presence conditions set out in paragraph (1)(a), (b), (d) and (e) immediately prior to the start of their employment mentioned in paragraph (7)(b), or
  - (b) by reason of being a person mentioned in paragraph (7)(a) living with an individual to whom sub-paragraph (a) applies.
- (7) A “relevant individual” in paragraph (6) means an individual who is—
- (a) living with a person mentioned in sub-paragraph (b) and—
    - (i) is the child, step-child or a child in care of that person, or
    - (ii) is married to or in a civil partnership with that person, or is living together with that person as if they were married or in a civil partnership, or
  - (b) outside the common travel area in their capacity as a—
    - (i) serving member of Her Majesty’s forces, or
    - (ii) civil servant.
- (8) An individual is to be treated as meeting the presence conditions set out in paragraphs (1)(d) and (e) for any period where that individual is—
- (a) outside the common travel area in their capacity as an aircraft worker or mariner, or
  - (b) in employment prescribed for the purposes of section 120 (employment at sea (continental shelf operations)) of the Social Security Contributions and Benefits Act 1992<sup>(3)</sup> in connection with continental shelf operations.
- (9) Where an individual—
- (a) does not meet the presence condition set out in paragraph (1)(d) on the date the application is received by the Scottish Ministers, and
  - (b) appears to the Scottish Ministers likely to meet that condition, unless there is a change of circumstances, on a date not later than 3 months after the application was received,

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(2) 2019 CP 49.

(3) 1992 c.4, relevantly amended by paragraph 26(a) and (b) of schedule 3 and paragraph 8 of schedule 7 of the Social Security Contributions (Transfer of Functions, etc.) Act 1999 (c.2), paragraph 70 of schedule 7 of the Social Security Act 1998 (c.14), section 12(2) to (4) of the National Insurance Contributions Act 2014 (c.7) and paragraph 30 of schedule 4 of the Petroleum Act 1998 (c.17).

the Scottish Ministers may choose the date within that 3 month period on which the application is to be treated as being made.

- (10) The past presence condition in paragraph (1)(e) does not apply where an individual—
- (a) has a terminal illness within the meaning of regulation 15, or
  - (b) has—
    - (i) been granted refugee status or humanitarian protection under the immigration rules, or
    - (ii) leave to enter or remain in the United Kingdom as the dependant of a person granted refugee status or humanitarian protection under the immigration rules.

(11) For the purpose of paragraph (10)(b) “immigration rules” means the rules laid before the United Kingdom Parliament under section 3(2) of the Immigration Act 1971<sup>(4)</sup>.

### **Interpretation - residence and presence conditions**

6. In regulation 5—

“aircraft worker” means a person who is, or has been, employed under a contract of service either as a pilot, commander, navigator or other member of the crew of any aircraft, or in any other capacity on board any aircraft where—

- (a) the employment in that other capacity is for the purposes of the aircraft or its crew or of any passengers or cargo or mails carried on that aircraft, and
- (b) the contract is entered into in the United Kingdom with a view to its performance (in whole or in part) while the aircraft is in flight,

but does not include a person in so far as that employment is as a serving member of Her Majesty’s forces,

“child in care” means—

- (a) under the law of Scotland, a child in respect of whom a relevant individual listed in regulation 5(7)(a)—
  - (i) is a foster carer within the meaning of regulation 2 of the Looked After Children (Scotland) Regulations 2009<sup>(5)</sup>,
  - (ii) is a kinship carer within the meaning of regulation 2 of the Looked After Children (Scotland) Regulations 2009,
  - (iii) has a kinship care order within the meaning of section 72 of the Children and Young People (Scotland) Act 2014<sup>(6)</sup>, or
- (b) under the law of England and Wales and Northern Ireland, a child in respect of whom a person listed in regulation 5(7)(a) has a relationship equivalent to those listed in paragraph (a) under the law of Scotland,

“civil partnership” is to be read as including a reference to marriage of a same sex couple and a reference to civil partners or to a person who is in a civil partnership is to be construed accordingly,

“civil servant” has the meaning given by section 1(4) of the Constitutional Reform and Governance Act 2010<sup>(7)</sup>,

“common travel area” has the meaning given in section 1(3) of the Immigration Act 1971,

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(4) 1971 c.77.  
(5) S.S.I. 2009/210.  
(6) 2014 asp 8.  
(7) 2010 c.25.

“mariner” means a person who is, or has been, in employment under a contract of service either as a master or member of the crew of any ship or vessel, or in any other capacity on board any ship or vessel where—

- (a) the employment in that other capacity is for the purposes of that ship or vessel or its crew or any passengers or cargo or mails carried by the ship or vessel, and
- (b) the contract is entered into in the United Kingdom with a view to its performance (in whole or in part) while the ship or vessel is on its voyage,

but does not include a person in so far as that employment is as a serving member of Her Majesty’s forces,

“person who is living with another person as if they were in a civil partnership” is to be read as including a reference to a person who is living with another person of the same sex as if they were married, and

“serving member of Her Majesty’s forces” means a member of a regular force or reserve force (“M”) as defined, in each case, by section 374 (definitions applying for purposes of the whole Act) of the Armed Forces Act 2006<sup>(8)</sup>, unless—

- (a) M is under the age of 16,
- (b) M is committing an offence under section 8 of the Armed Forces Act 2006 (desertion),
- (c) the force concerned is one of Her Majesty’s naval forces which M locally entered at an overseas base without previously being—
  - (i) an insured person under the National Insurance Act 1965<sup>(9)</sup>, or
  - (ii) a contributor under the Act, or
- (d) the force concerned is one of Her Majesty’s military forces or Her Majesty’s air forces which M entered, or was recruited for, outside the United Kingdom and—
  - (i) where that force is one of Her Majesty’s military forces, the depot for M’s unit is outside the United Kingdom, or
  - (ii) where that force is one of Her Majesty’s air forces, M is liable under the terms of M’s engagement to serve only in a specified area outside the United Kingdom.

### **Temporary absence from the common travel area**

7.—(1) Where an individual is temporarily absent from the common travel area, the individual is to be treated as present in the common travel area for—

- (a) the first 13 weeks of that absence for any reason, or
- (b) the first 26 weeks of that absence where—
  - (i) after the first 13 weeks, the absence is in connection with arrangements made for the medical treatment of the individual for a disease or bodily or mental disablement which commenced before leaving the common travel area, and
  - (ii) the arrangements relate to medical treatment—
    - (aa) outside the common travel area,
    - (bb) during the period when the individual is temporarily absent from the common travel area, and
    - (cc) by, or under the supervision of, a person appropriately qualified to carry out that treatment.

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<sup>(8)</sup> 2006 c.52.

<sup>(9)</sup> 1965 c.51.

- (2) For the purposes of paragraph (1)—
- (a) an individual is “temporarily absent” if, at the beginning of the period of absence, that absence is unlikely to exceed 52 weeks, and
  - (b) “medical treatment” means medical, surgical, psychological or rehabilitative treatment (including any course, diet or regimen).

**Persons residing in the United Kingdom to whom a relevant EU regulation applies**

8. The past presence condition set out in regulation 5(1)(e) does not apply where on any day the individual is—

- (a) ordinarily resident in Scotland,
- (b) habitually resident in the United Kingdom,
- (c) an individual—
  - (i) to whom the rules set out in a relevant EU regulation applies by virtue of—
    - (aa) Title III of Part 2 of the EU withdrawal agreement,
    - (bb) Part 3 or Article 23(4) of the Swiss citizens’ rights agreement (as defined in section 39(1) of the European Union (Withdrawal Agreement) Act 2020 (“the 2020 Act”))(10),
    - (cc) Title III of the EEA EFTA separation agreement (as defined in section 39(1) of the 2020 Act), or
    - (dd) the agreement constituted by the exchange of letters set out in the schedule of the Family Allowances, National Insurance and Industrial Injuries (Gibraltar) Order 1974(11),
  - (ii) in respect of whom the United Kingdom is, as a result, competent for payment of sickness benefits in cash.

**Persons residing outside the United Kingdom to whom a relevant EU regulation applies**

9.—(1) The residence and presence conditions set out in regulation 5(1) do not apply in relation to the care component where on any day the individual satisfies the conditions in paragraph (2).

- (2) The conditions referred to in paragraph (1) are that the individual must—
- (a) be an individual—
    - (i) to whom the rules set out in a relevant EU regulation apply by virtue of—
      - (aa) Title III of Part 2 of the EU withdrawal agreement,
      - (bb) Part 3 or Article 23(4) of the Swiss citizens’ rights agreement (as defined in section 39(1) of the European Union (Withdrawal Agreement) Act 2020 (“the 2020 Act”)),
      - (cc) Title III of the EEA EFTA separation agreement (as defined in section 39(1) of the 2020 Act), or
      - (dd) the agreement constituted by the exchange of letters set out in the schedule of the Family Allowances, National Insurance and Industrial Injuries (Gibraltar) Order 1974, and
    - (ii) in respect of whom the United Kingdom is, as a result, competent for payment of sickness benefits in cash,

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(10) 2020 c.1.

(11) S.I. 1974/555.

- (b) be habitually resident in—
  - (i) Switzerland,
  - (ii) an EEA state, or
  - (iii) Gibraltar, and
- (c) have a genuine and sufficient link to Scotland.

(3) The reference in paragraph (2)(c) to an individual's link to Scotland being sufficient is to it being sufficiently close that if the individual were not entitled to Child Disability Payment, paragraph (2) would be incompatible with the applicable agreement mentioned in sub-paragraph (a) (i) of that paragraph.

#### **Entitlement to other benefits**

- 10.** An individual is not entitled to Child Disability Payment while they are entitled to—
- (a) Disability Living Allowance,
  - (b) Personal Independence Payment, or
  - (c) armed forces independence payment.

#### **Care component criterion: lowest, middle or highest rate care component**

**11.—(1)** An individual satisfies the care component criterion in respect of any period throughout which at least one of the following conditions is satisfied—

- (a) the individual is so severely disabled physically or mentally that they require in connection with their bodily functions attention from another person for a significant portion of the day (whether during a single period or a number of periods),
  - (b) the individual is 16 years old or older and is so severely disabled physically or mentally that they cannot prepare a cooked main meal for themselves if they have the ingredients,
  - (c) the individual is so severely disabled physically or mentally that they require from another person—
    - (i) frequent attention throughout the day in connection with their bodily functions, or
    - (ii) continual supervision throughout the day in order to avoid substantial danger to the individual or others, or
  - (d) the individual is so severely disabled physically or mentally that they require—
    - (i) prolonged or repeated attention from another person throughout the night in connection with their bodily functions, or
    - (ii) another person to be awake for a prolonged period or at frequent intervals for the purpose of watching over the individual throughout the night in order to avoid substantial danger to the individual or others.
- (2) No condition mentioned in paragraph (1) is to be taken to be satisfied unless—
- (a) the individual has requirements of a description mentioned in the condition substantially in excess of the normal requirements of a person of the same age, or
  - (b) the individual has substantial requirements of such a description which younger persons in normal physical and mental health may also have but which persons of the individual's age and in normal physical and mental health would not have.
- (3) An individual is not entitled to the care component unless—

- (a) throughout the period of 13 weeks immediately preceding the date on which the award of that component would begin, the individual has satisfied or is likely to satisfy at least one of the conditions mentioned in paragraph (1) as read with paragraph (2), and
  - (b) the individual is likely to continue to satisfy at least one of those conditions throughout the period of 26 weeks beginning with that date.
- (4) In the case of an individual who is under the age of 16 on the date on which the award of the care component would begin, paragraph (2) only applies in relation to so much of any period mentioned in that paragraph as falls before the day on which the individual reaches the age of 16.
- (5) The amount of the care component that an individual is entitled to be given for each week in the period for which they are awarded that component is—
- (a) the highest rate (see regulation 23(1)(a)), if the individual falls within paragraph (3) by virtue of having satisfied or being likely to satisfy both the conditions mentioned in paragraph (1)(c) and (d) above throughout both the period mentioned in paragraph (3)(a) and that mentioned in paragraph (3)(b),
  - (b) the middle rate (see regulation 23(1)(b)), if the individual falls within paragraph (3) by virtue of having satisfied or being likely to satisfy one of those conditions mentioned in paragraph (1)(c) or (d) throughout both those periods, and
  - (c) the lowest rate (see regulation 23(1)(c)) in any other case.
- (6) In paragraph (1)—
- (a) references to “day” and “night” are to be construed in relation to the ordinary domestic routine of the household in which the individual lives, and
  - (b) “attention” means the provision of personal care, prompting or motivation in relation to bodily functions or assistance with communication needs.
- (7) In paragraph (1) and regulation 12, “supervision” means the precautionary or anticipatory presence of another person to monitor an individual’s physical, mental or emotional health including monitoring for obstacles or dangerous places or situations.
- (8) In this regulation and regulations 12 and 13, “require” means reasonably require and cognate expressions are to be construed accordingly.

### **Mobility requirements: lower rate mobility component**

**12.**—(1) An individual aged 5 years or more is entitled to be given the mobility component at the lower rate (see regulation 23(2)(b)) if the individual satisfies the condition set out in paragraph (2).

(2) The condition referred to in paragraph (1) is that the individual, though able to walk, cannot move around outdoors without requiring guidance or supervision from another person most of the time as a result of a physical or mental impairment.

(3) The guidance or supervision required must be—

- (a) substantially in excess of the normal requirements of a person of the same age, or
- (b) of such a description which younger persons in normal physical and mental health may also require but which persons of the individual’s age and in normal physical and mental health would not require.

(4) In the case of an individual who is under the age of 16 on the date on which the award of the mobility component would begin, paragraph (3) only applies in relation to so much of any period mentioned in that paragraph as falls before the day on which the individual reaches the age of 16.

(5) Whether the individual satisfies the condition in paragraph (2), no account is to be taken of any ability which the individual has to use routes with which they are familiar, without guidance or supervision from another person.

- (6) An individual is not entitled to the lower rate of the mobility component unless—
- (a) throughout the period of 13 weeks immediately preceding the date on which the award of that component would begin, the individual has satisfied or is likely to satisfy the condition mentioned in paragraph (2), and
  - (b) the individual is likely to continue to satisfy the condition mentioned in paragraph (2) throughout the period of 26 weeks beginning with that date.
- (7) In this regulation, “guidance” means direction or leading by physical means or verbal suggestion or persuasion.

### **Mobility requirements: higher rate mobility component**

**13.**—(1) An individual aged 3 years or more is entitled to be given the mobility component at the higher rate (see regulation 23(2)(a)) if the individual satisfies at least one of the conditions mentioned in paragraph (2).

- (2) The conditions referred to in paragraph (1) are—
- (a) taking account of the individual’s physical condition as a whole, the individual’s condition is such that, without having regard to the nature of the location where the individual resides—
    - (i) the individual is unable to walk,
    - (ii) the individual’s ability to walk out of doors is so limited, as regards the distance over which or the speed at which or the length of time for which or the manner in which the individual can make progress on foot without severe discomfort, that the individual is virtually unable to walk, or
    - (iii) the exertion required to walk would constitute a danger to the individual’s life, or would be likely to lead to a serious deterioration in the individual’s health, from which there would no recovery, or from which recovery would take a significant period of time,
  - (b) the individual has no legs or no feet (regardless of the use of artificial limbs),
  - (c) the individual has a severe visual impairment,
  - (d) the individual is blind and deaf,
  - (e) the individual has a severe mental impairment and severe behavioural difficulties and satisfies both of the conditions mentioned in regulation 11(1)(c) and (d).
- (3) Where paragraph (2)(a) applies in relation to an individual, the test of being unable or virtually unable to walk is not met where the individual—
- (a) is not unable or virtually unable to walk with the use of an artificial limb or artificial aid which the individual normally wears or uses, or
  - (b) would not be unable or virtually unable to walk if the individual wore or used an artificial limb or artificial aid which is suitable to the individual’s circumstances.
- (4) Paragraph (3) is not relevant for the purpose of determining whether an individual is to be taken to satisfy the conditions set out in paragraphs (2)(b) to (e).
- (5) An individual is to be taken to have a severe visual impairment, for the purpose of paragraph (2)(c), if the individual has a severe visual impairment fulfilling the definition given by the Visual Impairment Network for Children and Young People<sup>(12)</sup>.
- (6) An individual is taken to be blind and deaf, for the purpose of paragraph (2)(d), if the individual is—

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(12) A National Managed Clinical Network forming part of NHS Scotland <https://www.vincyp.scot.nhs.uk/vincyp-definition/>.



- (a) blind where the loss of vision amounts to an absolute loss of vision,
  - (b) deaf where loss of hearing when using any artificial aid which they habitually use or which is suitable in their case amounts to not less than 80% on a scale where 100% represents absolute deafness, and
  - (c) unable, without the assistance of another person, to walk to any intended or required destination while out of doors.
- (7) An individual is to be taken to have a severe mental impairment, for the purpose of paragraph (2)(e), if the individual has a severe impairment of intelligence and social functioning resulting from—
- (a) a state of arrested development as a result of a failure of the individual’s brain to grow or develop in the way normally expected, or
  - (b) a deficiency in the functionality of the brain as a result of its incomplete physical development.
- (8) An individual is to be taken to have severe behavioural difficulties, for the purpose of paragraph (2)(e), if the individual exhibits disruptive behaviour which—
- (a) is extreme,
  - (b) regularly requires another person to intervene in order to prevent or reduce the likelihood of physical injury to the individual or another person, and
  - (c) is so unpredictable that another person requires to be awake and watching over the individual while the individual is awake.
- (9) In paragraph (8)(b), reference to another person intervening relates to the provision of care and support of, or treatment provided to, the individual.
- (10) An individual is not entitled to the mobility component unless—
- (a) throughout the period of 13 weeks immediately preceding the date on which the award of that component would begin, the individual has satisfied or is likely to satisfy one of the conditions mentioned in paragraph (2), and
  - (b) the individual is likely to continue to satisfy one of those conditions throughout the period of 26 weeks beginning with that date.

#### **Exclusion of entitlement to mobility component**

**14.** An individual is not entitled to the mobility component of Child Disability Payment for a period unless, during most of that period, the individual’s physical or mental condition is such that they are able, from time to time, to benefit from assistance for movement.