

POLICY NOTE

THE DISABILITY ASSISTANCE FOR WORKING AGE PEOPLE (TRANSITIONAL PROVISIONS AND MISCELLANEOUS AMENDMENT) (SCOTLAND) REGULATIONS 2022

SSI 2022/XXX

The above instrument will, if approved by the Scottish Parliament, be made in exercise of the powers conferred by sections 31, 36, 43(5), 52 and 95 of the Social Security (Scotland) Act 2018. Some of those powers are subject to negative procedure and others to affirmative procedure. The powers are exercised together by virtue of section 33(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 and section 33(3) of that Act makes the instrument subject to the affirmative procedure.

This instrument sets out provisions for transferring the awards of individuals in Scotland and currently in receipt of Disability Living Allowance, who were over 16 and under 65 and in receipt of Disability Living Allowance at the introduction of Personal Independence Payment on 08 April 2013, to Social Security Scotland and onto Adult Disability Payment.

It also makes miscellaneous amendments to the Personal Independence Payment (Transitional Provisions) Regulations 2013, the Disability Assistance for Children and Young People (Scotland) Regulations 2021, and the Disability Assistance for Working Age People (Scotland) Regulations 2022.

Policy Objectives

These regulations make provision for the transfer of awards, in certain circumstances, of individuals who live in Scotland and who are currently, and were while aged between 16 and 65 on 08 April 2013, receiving Disability Living Allowance (currently administered by the Department for Work and Pensions on behalf of Scottish Ministers) to Adult Disability Payment (administered by Social Security Scotland on behalf of the Scottish Ministers). These individuals' awards are referred to as 'Working Age Disability Living Allowance' awards, due to the individual's age at the time Personal Independence Payment was introduced even though some of these individuals may now be over the state pension age.

The eligibility criteria for Adult Disability Payment differs from the eligibility criteria for Disability Living Allowance and broadly aligns with the eligibility criteria for Personal Independence Payment. The Scottish Government has, however, made improvements to the application process mainly to the way in which awards are made and to the collection of supporting information about an individual's disability or health condition. These improvements will make the processes involved in assessing entitlement for Adult Disability Payment less onerous and improve decision-making. The Scottish Government has also introduced a new individual consultation service to aid the decision making process. This will be substantially different from the assessments used to determine entitlement to Personal Independence Payment by the Department for Work and Pensions.

The Scottish Ministers have developed a safe and secure process for these individuals' awards, which will require no action on behalf of the individual wherever possible, and has been designed in line with the following case transfer principles:

- no individual will be required to re-apply for their benefit;
- after Adult Disability Payment is launched nationally individuals will, wherever possible, be transferred before they are required to undergo a DWP face-to-face assessment
- individuals will continue to receive the right payment, at the right time; and
- the case transfer process will be completed as soon as possible whilst ensuring that it is safe and secure.

In Part 4, the regulations also make miscellaneous amendments to the Personal Independence Payment (Transitional Provisions) Regulations 2013, the Disability Assistance for Children and Young People (Scotland) Regulations 2021, and the Disability Assistance for Working Age People (Scotland) Regulations 2022.

Circumstances in which individuals' awards will transfer

At the transfer of executive competence for disability benefits from the Secretary of State for Work and Pensions to Scottish Ministers on 1 April 2020, the Department for Work and Pensions agreed to continue to deliver Working Age Disability Living Allowance in Scotland on behalf of Scottish Ministers under an agency agreement. It was also agreed that the Department for Work and Pensions would halt the programme of managed migration onto Personal Independence Payment for individuals in receipt of Working Age Disability Living Allowance. However, until such times as Adult Disability Payment was launched in Scotland, individuals will still be required to apply for Personal Independence Payment if they:

- report a relevant change of circumstances;
- are due an award renewal;
- otherwise require an award review; or
- request to move to Personal Independence Payment.

It is, therefore, Scottish Ministers intention that the provision in these regulations should facilitate the transfer of the award of any individual in receipt Working Age Disability Living Allowance to Adult Disability Payment, where an individual wishes to move to Adult Disability Payment or would otherwise be required to apply for Personal Independence Payment.

The notice of intention to transfer

When an individual's disability benefit has been selected for transfer, Scottish Ministers will receive from the Department for Work and Pensions data relevant to the individual's current Disability Living Allowance award. Once Scottish Ministers have received this data, the regulations make provision for the Scottish Ministers to notify the individual of the intention to transfer them to Adult Disability Payment. This notice will set out the process for that transfer and how long the process will take. This period can be extended if both Scottish Ministers and the Secretary of State for Work and Pensions agree there is good reason to do so. The individual will be notified of any extension of the period and the reasons for it.

The transfer determination

Scottish Ministers will use the data from the Department for Work and Pensions to make a determination without application of the individual's entitlement to Adult Disability Payment within a fixed period set out in the notice of intention to transfer. This determination is referred to as the 'transfer determination' within the regulations.

To facilitate a safe and secure transfer, the regulations provide that the transfer determination must set the individual's award level for Adult Disability Payment at the equivalent rate as they are currently receiving for Disability Living Allowance. This applies regardless of whether the individual would otherwise meet the eligibility rules for those components of the Adult Disability Payment mobility and daily living components. Since there are three rates of care component for Disability Living Allowance but only two for Adult Disability Payment, the regulations also make provision for the introduction of a transitional daily living component within Adult Disability Payment for the purposes of these transfer determinations only. The determination of the individual's entitlement to Adult Disability Payment will also end the corresponding award of Personal Independence Payment.

The review determination

Since the eligibility criteria for Adult Disability Payment differ from the eligibility criteria for Disability Living Allowance, a further review determination will be made of an individual's entitlement to Adult Disability Payment after the individual has been transferred onto Adult Disability Payment. This review will consider the individual's entitlement against the usual criteria for the mobility and daily living components of Adult Disability Payment and take into consideration any relevant change of circumstance that triggered the transfer or was reported to the Department of Work and Pensions during the transfer window. This process will likely require the gathering of additional evidence and information from the individual and supporting sources. This is because of the differing eligibility criteria and because records for these transferring individuals are all paper based and have not been reviewed since prior to 08 April 2013.

This review determination will occur as soon as is reasonably practicable after the transfer process is completed, and within 12 months of the issue of the notice of intention to transfer. It is anticipated that the majority of individuals will see their award increase or remain the same as a result of this review. If an individual's award increases, the increase will be applied from the date of the transfer determination. If an individual's award is decreased following the review, the change will only take effect from the date the decision is made. There will, therefore, be no overpayment the person could be asked to repay. Short-term assistance will be available to individuals during the re-determination and appeals process, where they have had a decrease or nil award, to avoid financial hardship.

Terminal illness

Where Social Security Scotland have identified a terminally ill individual, either from the information provided by the Department for Work and Pensions or additional information from the individual, provision has been made to ensure that they will be entitled to both components of Adult Disability Payment at the enhanced rate from the date of transfer and no review determination will be required.

Relevant age

The relevant age rule in regulation 22(1)(b) of the Disability Assistance for Working Age People (Scotland) Regulations 2022 provides that an individual in receipt of just the care component of Disability Living Allowance cannot be awarded the mobility component after reaching pensionable age even if their mobility deteriorates. This same rule applies to Disability Living Allowance and to Personal Independence Payment. Transitional provision was made in the Personal Independence Payment (Transitional) Provision Regulations 2013 to dis-apply this rule for any person on Disability Living Allowance that applied for Personal Independence Payment.

To ensure that all individuals transferring from Disability Living Allowance are able to be paid the full range of daily living and mobility components for Adult Disability Payment on transfer, the relevant age rule in regulation 22(1)(b) of the Disability Assistance for Working Age People (Scotland) Regulations 2022 is amended so that it does not apply to these transferring individuals.

Residency

Scottish Ministers will identify individuals who will have their awards transferred from Working Age Disability Living Allowance to Adult Disability Payment using the residential address held by the Department for Work and Pensions in the individual's Disability Living Allowance record. An individual will be assumed to meet the residence and presence conditions for Adult Disability Payment at the point of transfer if they have a Scottish postcode.

If Scottish Ministers determine after transfer that an individual should not have transferred because they fail to meet the residence and presence conditions, a further determination without application will be made that will nullify the case transfer Adult Disability Payment determination and the resulting entitlement. This will also nullify the termination of the Disability Living Allowance award.

Appointees

All individuals appointed by the Department for Work and Pensions in respect of a Disability Living Allowance award will be temporarily treated as an appointee for the purposes of Adult Disability Payment until it is reasonably practicable for Scottish Ministers to consider whether to make an appointment under the Social Security (Scotland) Act 2018.

Re-determinations, appeals and short term assistance

The transfer determination and review determinations made as a result of the case transfer process comes with the same rights to re-determination and appeal as any other determination made under section 52 of the Social Security (Scotland) Act 2018.

Where an individual sees a reduction in award or nil award as a result of the review determination and seeks a re-determination, or as a result of the re-determination of the transfer determination deciding a lower amount than the transfer determination and seeks to appeal, then the individual will be able to access short-term assistance.

If an individual wishes to seek a re-determination of the transfer determination rather than wait for the review determination, the re-determination will consider their entitlement against the usual daily living and mobility component criteria for Adult Disability Payment. Since there are differences in eligibility criteria between Disability Living Allowance and Adult Disability Payment, there will need to be a more substantive re-consideration of the individuals entitlement than would normally be the case for a request for a re-determination. Therefore, the regulations provide for a longer time period for undertaking a re-determination in these particular circumstances.

Frequency of payments

Disability Living Allowance is currently paid on a weekly in advance, 4 weekly in arrears or 3 weekly in arrears and 1 week in advance payment cycle. Adult Disability Payment is only paid 4 weekly in arrears, unless an individual meets the special rules for terminal illness when they will be paid weekly in advance. To address these differences, provision is made in these regulations to allow for any individual currently paid Disability Living Allowance weekly in advance to also be paid Adult Disability Payment weekly in advance once they have transferred. Further provision is made to maintain an individual's payment schedule as they move from a 3+1 to a 4 weekly in arrears payment cycle, by providing for a week of overlapping entitlement to both Disability Living Allowance and Adult Disability Payment, at the end of the individual's Disability Living Allowance award.

It is not anticipated that any individual in receipt of Personal Independence Payment is currently paid in the 3 weekly in arrears and 1 week in advance payment cycle. However, as this cannot be confirmed Scottish Ministers intend, as a precaution, to make provision through these regulations for the same solution as for those transferring from Working Age Disability Living Allowance.

Regulation 4 of the ADP Regulations (SSI 2022/54), section 77 of the Welfare Reform Act and section 2012, and (a) section 71(7) of the Social Security Contributions and Benefits Act 1992 which states that an individual is not entitled to ADP while they are entitled to Personal Independence Payment and Disability Living Allowance, are also disapplied for the overlapping week.

Part 4 - Miscellaneous amendments

Amendments to the Disability Assistance for Working Age People (Scotland) Regulations 2022

Persons who have reached the relevant age: other exceptions

The amendment to include regulation 24(e) ensures that the age limit provided for at regulation 22(1)(b) is not applied to individuals transferring from Working Age Disability Living Allowance to Adult Disability Payment.

Mobility criteria over the relevant age

The policy intent across disability assistance is that financial assistance is not provided to meet the mobility needs of individuals arising once they are over state pension age. This is due to

the reasonable expectation that everyone's mobility is likely to become limited at some point once they have reached this stage of life.

To that end, regulation 25 of the Disability Assistance for Working Age People (Scotland) Regulations 2022, places limitations upon the mobility component that an individual in receipt of Adult Disability Payment can receive once they have reached the relevant age, such that they will not be able to become entitled to that component at a higher rate than they have already been receiving for a pre-existing condition, and may only continue to receive that rate where it results from substantially the same condition or conditions in respect of which it was previously received.

The amendment made to regulation 25 puts beyond doubt that individuals who are only in receipt of the daily living component of Adult Disability Payment may not begin to receive the mobility component for a new condition once they reach the relevant age.

Entitlement under special rules for terminal illness

The amendment to regulation 26 clarifies that terminally ill individuals should be recognised as having obtained maximum points for all activities, and having satisfied the conditions for the enhanced rates of both components in terms of regulations 5(3) and 6(3).

When an increase in entitlement should take effect

Regulation 45 of the Disability Assistance for Working Age People (Scotland) Regulations 2022 provides for when an increase in an individual's entitlement should take effect. It is intended that when someone has had in the payment of some or all of their award reduced to £0 as a result of being in alternative accommodation, they should be put back into payment from on the day that they leave the alternative accommodation. The amendments to 45(1)(a) to extends this provision to regulation 48(e) which has been added for transferees in receipt of Working Age Disability Living Allowance to receive a determination without application if the Disability Living Allowance they were receiving before they transferred changes once they are in receipt of Adult Disability Payment.

The amendment made to include regulation 45(1)(ca) provides clarity on when payment should begin again when an individual leaves alternative accommodation.

When a decrease in level or cessation of entitlement takes effect

The amendment to regulation 46(1)(a) extends this provision to regulation 48(e) which has been added to provide for transferees in receipt of Working Age Disability Living Allowance to receive a determination without application if the Disability Living Allowance they were receiving before they transferred changes once they are in receipt of Adult Disability Payment.

The amendment to regulation 46(1)(c) removes "or error" to ensure consistency with regulation 49.

Determination following change of circumstances etc.

The amendment to include regulation 48(e) ensures that a determination without application will occur when the rate of Working Age Disability Living Allowance that an individual was receiving before they are moved onto Adult Disability Payment changes.

Child Disability Payment to Adult Disability Payment

Individuals moving from Child Disability Payment to Adult Disability Payment have their entitlement to Adult Disability Payment begin on the date their determination of entitlement is made, unlike other applicants, for whom entitlement begins in terms of the principles set out at regulation 35(4) to (6).

Regulation 58(3) of the Disability Assistance for Working Age People (Scotland) Regulations 2022 makes provision for individuals who become entitled to Adult Disability Payment, having up until that time to Child Disability Payment, to receive a payment of the value of Adult Payment that they would have received for the period between when their entitlement would have begun under regulation 35(4) to (6), and when their entitlement in fact begins (being the date of their determination for Adult Disability Payment).

The amendments to regulation 58(3) have the effect that if an individual's entitlement to Adult Disability Payment is higher than their entitlement to Child Disability Payment has been, the additional payment will be reduced by the Child Disability Payment they were entitled to during the period.

Short-term Assistance

The short-term assistance provisions in the Disability Assistance for Working Age People (Scotland) Regulations 2022 are amended to clarify the off-setting of that will occur when short-term assistance has been paid for a period during which entitlement to Adult Disability Payment is subsequently determined. Individuals who are to be paid Adult Disability Payment for the same period as they have already received short-term assistance, at the same or a lower rate than the short-term assistance and Adult Disability Payment already paid for that period, will see the Adult Disability Payment that they are to be paid for that period reduced to £0. This is due to their already having received payment for that period. In all other cases, the Adult Disability Payment to be paid will be reduced by the sum of short-term assistance and Adult Disability Payment that has already been received for that period.

DPLR Committee recommendations

The following amendments address recommendations made by the Delegated Powers and Law Reform Committee in January 2022 in their scrutiny of the Disability Assistance for Working Age People (Scotland) Regulations 2022. Amendments are made to the following:

- regulation 7(2), which sets out how an individual's ability to carry out both daily living and mobility activities is to be determined, to add a reference to column 2 of the table in Part 3 of schedule 1;
- regulation 2, to omit the definition of "medical treatment", to put beyond doubt that the definition at regulation 16 will apply;
- regulation 2, remove an unnecessary definition of "EU withdrawal agreement";

- regulation 17(4), to remove the unnecessary definitions of “civil partnership” and “person who is living with another person as if they were in a civil partnership”; and
- regulation 2, to include a definition of “qualifying services” on the face of the Regulations.

Amendments to the Disability Assistance for Children and Young People (Scotland) Regulations 2021

DPLR Committee Recommendations

The amendment at regulation 6 the definitions of “civil partnership” and “person who is living with another person as if they were in a civil partnership” are removed. This aligns with changes made to the Disability Assistance for Working Age People Regulations (Scotland) 2022 as a result of recommendations made by the DPLR Committee.

When an increase in level of entitlement takes effect

The amendments made to include regulation 28(1)(ca) provides clarity on when payment should begin again when an individual leaves alternative accommodation.

Short-term Assistance

The short-term assistance provisions in the Disability Assistance for Children and Young People (Scotland) Regulations 2021 are amended to clarify the off-setting of that will occur when short-term assistance has been paid for a period during which entitlement to Child Disability Payment is subsequently determined. Individuals who are to be paid Child Disability Payment for the same period as they have already received short-term assistance, at the same or a lower rate than the short-term assistance and Child Disability Payment already paid for that period, will see the Child Disability Payment that they are to be paid for that period reduced to £0. This is due to their already having received payment for that period. In all other cases, the Child Disability Payment to be paid will be reduced by the sum of short-term assistance and Child Disability Payment that has already been received for that period.

Frequency of payments

Amendment is made to the Disability Assistance for Children and Young People (Scotland) Regulations 2021 regulation 25 to provide for weekly in advance payment cycles, mirroring the changes described above to the Disability Assistance for Working Age People (Scotland) Regulations 2022.

Amendments to the Personal Independence Payment (Transitional Provisions) Regulations 2013

The amendment removes Paragraphs at regulation 3 which provides for invitations to individuals entitled to Disability Living Allowance to apply for Personal Independence Payment.

The amendment removes regulation 20(5) which provides for invitations to individuals entitled to Disability Living Allowance to apply for Personal Independence Payment following a change of circumstance.

Public Consultation

In January and February 2019, two surveys regarding the case transfer process for disability assistance were sent out to Experience Panel members. 404 and 559 responses were received respectively. A series of individual and group interviews were also conducted. Results from both surveys and the interviews were published in 2019. These surveys confirmed that the most important issue for panel members was that they continue to receive the correct payment at the correct time.

Additionally, the Scottish Government has been working with relevant stakeholders to specifically engage with disabled people from seldom-heard groups as part of its ongoing wider case transfer strategy. This research and engagement with stakeholders has been key to developing a set of case transfer principles to guide the development of the approach to case transfer.

A policy position paper on case transfer was published in February 2019.¹

Officials met with the Disability and Carers Benefits Expert Advisory Group to discuss case transfer in June 2020. The Group provided their full advice in July. This advice along with further engagement with individuals currently in receipt of Disability Living Allowance who were between 16 and 65 on 08 April 2013, through the Social Security Scotland experience panels, has informed the detailed development of the policy provided for in these regulations.

Scottish Commission on Social Security - scrutiny of the draft Regulations

The majority of the case transfer provisions within these regulations are made under section 95 of the Social Security (Scotland) Act 2018. As such, Scottish Ministers are not required to refer them to the Scottish Commission on Social Security (the Commission) for formal scrutiny. However, some of the case transfer provisions, specifically those creating a lowest rate daily living component for Adult Disability Payment for the purposes of the transfer determination, are made under section 31 of the 2018 Act and do need to be referred to the Commission under sections 22 and 97 of the Social Security (Scotland) Act 2018. The Commission was, therefore, asked on 10 February 2022 to provide a scrutiny report on the provisions within parts 1, 2 and 3 of these draft regulations. A draft policy note was provided alongside the draft regulations.

The Commission published its scrutiny report on 23 March 2022, making 8 recommendations and 4 observations in relation to the draft regulations. The Scottish Government will publish its formal response to the report when laying these regulations before the Scottish Parliament.

Additional provisions – the miscellaneous amendments described above – were identified after the Commission had published its report. The miscellaneous amendments are to be made using the regulation making powers in section 31(2), 36(2) and 52 of the 2018 Act and were therefore referred to the Commission on 12 April 2022. The Commission wrote to the

¹ [Social security case transfer: policy position paper - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/policy-position-papers/pages/1.aspx)

Scottish Government on 04 May 2022 following initial consideration of these additional provisions. The Commission noted they accept the need to have complete, robust regulations in place before the national roll-out of Adult Disability Payment, and that incorporating these additional provisions into these regulations is the most time-efficient way to achieve this. The Commission made one further recommendation on a technical point, which the Scottish Government has addressed as part of its formal response to the Commission's 23 March report.

Provisions for transferring individuals in receipt of Personal Independence Payment on a 3+1 payment cycle – these were introduced as a precaution after the Commission had published its report. As these are transitional provisions made under section 95 of the 2018 Act they do not need to be referred to the Commission.

Impact Assessments

A Business and Regulatory Impact Assessment (BRIA) Equalities Impact Assessment, Island Communities Impact Assessment, Fairer Scotland Duty Impact Assessment, Data Protection Impact Assessment and a Children's Rights and Wellbeing Impact Assessment were all produced for the Disability Assistance for Working Age People (Scotland) Regulations 2022.

It is anticipated from the analysis in these impact assessments that Adult Disability Payment will have a broadly positive impact on a range of equalities groups, island communities and in relation to the realisation of children's rights and improving their wellbeing. There were no significant equalities or rights impacts that required further consideration in relation to the commencement of those regulations. We have reviewed the impact assessments from the perspective of this specific cohort of individuals transferring onto Adult Disability Payment and consider there is potential for similar positive impacts, that some mitigations are necessary and have already been provided for in light of potential negative impacts to some individuals that may face barriers to engaging in the transfer and review process, and that otherwise there are no significant equalities or rights impacts that require further consideration in relation to the commencement of these regulations.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) was completed for the Disability Assistance for Working Age People (Scotland) Regulations 2022. The Scottish Government does not believe that Adult Disability Payment will have an adverse impact on the competitiveness of Scottish companies or the third sector within Scotland, the UK, or elsewhere in Europe or the rest of the world. On reviewing the Business and Regulatory Impact Assessment, we noted the potential limited impact on the operational business of local authorities or health boards, principally because Social Security Scotland may seek to obtain (with the individual's consent) information held by public sector bodies about the individual's disability to make the review determinations provided for in these regulations. However, given the small volumes of individuals transferring under these regulations this potential increase to the limited impact is not considered material.

The right to appeal to a First-tier Tribunal is provided for in the Social Security (Scotland) Act 2018. Legal Assistance will continue to be available to individuals to appeal an entitlement decision to the Upper Tribunal, Court of Appeal or Supreme Court. As with the Disability Assistance for Working Age People (Scotland) Regulations 2022, the Scottish Government

does not expect any adverse impact to the Legal Aid budget as a result of the introduction of provisions for the transfer of individuals from Disability Living Allowance to Adult Disability Payment. Current recipients of Disability Living Allowance are already able to access legal aid to appeal entitlement decisions.

The Scottish Fiscal Commission (SFC) has a statutory duty to provide independent and official forecasts of Scottish GDP, devolved tax revenues and devolved social security expenditure. Under the Scottish Fiscal Commission Act 2016, the SFC may also produce forecasts on other “fiscal factors”, defined as “anything which the Scottish Ministers use to ascertain the amount of resources likely to be available for the purposes of sections 1 to 3 of the Public Finance and Accountability (Scotland) Act 2000”. The Protocol for engagement between the Scottish Fiscal Commission and the Scottish Government notes that the SFC may produce forecasts where it considers the policy, or policies, to have a “non-negligible impact on receipts or expenditure”.

The Scottish Fiscal Commission is responsible for forecasting spending on Disability Living Allowance and Adult Disability Payment. The overall cost of the provisions within these regulations are expected to be below the Scottish Fiscal Commission’s £5 million materiality threshold for small measures and a supplementary costing has therefore not been prepared to accompany these regulations.

To estimate the cost of this policy, the Commission considered the reduction in Working Age Disability Living Allowance spending, and the increase in Adult Disability Payment spending because of the case transfer. Their estimate reflects that Working Age Disability Living Allowance individuals would have an incentive to request a relevant change of circumstances or voluntarily request a transfer to Adult Disability Payment. While some individuals may not receive an Adult Disability Payment award when their award is reviewed; the Commission expect that the individuals who receive an award will be entitled to a higher payment in Adult Disability Payment.

The new voluntary and natural case transfer policy will be included in the Scottish Fiscal Commission’s forecasts due to be published on 31 May.

Scottish Government
Social Security Directorate
May 2022