

EXPLANATORY MEMORANDUM TO
THE SOCIAL SECURITY (PERSONS SERVING A SENTENCE OF
IMPRISONMENT DETAINED IN HOSPITAL) REGULATIONS 2010

2010 No. 442

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**

These regulations are being introduced to correct drafting which has been held by the Court of Appeal in R (on the application of D & M) v Secretary of State for Work and Pensions [2010] EWCA Civ 18 to be defective. A link to this case is at <http://www.bailii.org/ew/cases/EWCA/Civ/2010/18.html>.

The Court of Appeal held that the wording of the existing provisions required an interpretation which meant that a person subject to an indeterminate sentence of imprisonment who was being detained in hospital for treatment for mental disorder would be eligible for DWP benefits when the tariff part of the sentence had been served. This is contrary to Government policy. These regulations provide a revised form of words in the relevant legislative provisions to ensure that such a person continues to be excluded from benefits when the tariff date has passed.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

None

4. **Legislative Context**

4.1 When the Social Security (Hospital In-Patients) Regulations 2005 (SI 2005 No 3360) were introduced, the accompanying explanatory memorandum presented to the Parliamentary scrutiny committees set out the changes that were being made in legislation affecting contributory and non-contributory benefits that were not income-related. Of regulations 4 and 8 of those Regulations the memorandum stated that they-

“make equivalent amendments for Income Support and State Pension Credit, removing benefit entitlement from prisoners subsequently detained in hospital.”

4.2 In its judgment however, the Court of Appeal has found that in one important matter the amendments made to income support and state pension credit legislation by the hospital in-patients regulations 2005 are not equivalent to other provisions. Instead a different meaning is conveyed. This measure ensures that equivalence is established as originally intended.

5. Territorial Extent and Application

5.1 This instrument applies to Great Britain. Mental health legislation and procedures differ in Scotland. It will be seen from the amending Regulations that changes have been made to four different sets of legislation which affect different DWP benefits. In each case the same basic pattern is being followed; the individual is either disqualified for receipt of benefit or disentitled to benefit if one of two conditions are satisfied. The first condition applies in England and Wales. The second condition applies in Scotland. The need for a different provision in Scotland has arisen because, although the existing legislation refers to the Secretary of State or Scottish Ministers certifying either “the earliest date on which that person would have been expected to be discharged” or “the earliest date on which he could have been released”, no such certificate is in practice issued by Scottish Ministers. This aspect of Scottish procedure was highlighted in a decision of the Upper Tribunal Judge in CSS 239/07.

5.2 Equivalent provision will be made for Northern Ireland by statutory rules.

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*

7.1 From April 2006 changes were introduced to abolish the ‘hospital pocket money rate’ of benefit for personal and incidental expenses. It was payable after 52 weeks of continuous hospital in-patient treatment, although a person sent from prison to psychiatric hospital for treatment received the pocket money rate immediately. This meant that patients who were in receipt of the pocket money rate at April 2006 began receiving full-rate benefit. An exception was made however for any patient who was subject to a current term of imprisonment. Such a patient became ineligible for DWP benefits, although able to receive discretionary payments for personal expenses from the Department of Health or the relevant Scottish authority.

7.2 The central issue for anyone continuing to receive treatment in hospital was in identifying the date at which non-eligibility for DWP benefits should end. It was not enough to refer to the sentence itself since the vast majority of prisoners are released before the full terms of the sentence have been served. The policy has always been, and continues to be, that the period of non-eligibility ends on the earliest date the person would expect to have been discharged from prison if they had not needed hospital treatment. However, in introducing amendments affecting entitlement to income support and state pension credit from April 2006, reference was made to the “earliest date on which [the person] could have been released”. The Court of Appeal held that this form of words meant that a patient who was subject to a sentence of indeterminate length, such as a life sentence, effectively became eligible for benefit as soon as the tariff part of the sentence had been served.

7.3 The Court of Appeal made it clear that the problem “arises from the use of different statutory language to describe what apparently were intended to be analogous concepts”. The Government’s approach in revising the legislation has therefore been to aim for consistency across all the relevant sets of regulations. Moreover the Court of Appeal considered that “the natural starting-point” was the formulation used in section 50 of the Mental Health Act 1983 which, for patients being detained for treatment for mental disorder and who are subject to a prison sentence, defines their release date. Rather than describe the same concept in different language we have followed the lead of the Court of Appeal and adopted section 50 as our starting point. The amending regulations amend all the relevant benefit regulations to ensure they adopt this same approach.

7.4 Amendments have therefore been made to legislation to ensure that patients with a prison sentence of indeterminate length, whether a mandatory or discretionary life sentence or an indeterminate sentence for public protection, should not become eligible for DWP benefits when the tariff part of the sentence expires. This restores the position to that previously understood by the Department, and upheld by the High Court at an earlier stage of the same proceedings. What it means is that a release date for benefit purposes can only be identified where the prison sentence is of a fixed length.

- ***Consolidation***

7.5 Informal consolidation of this instrument will be included in due course in the Department’s “the law relating to Social Security” (the Blue Volumes) which are available at no cost to the public on the internet at:
<http://www.dwp.gov.uk/publications/specialist-guides/law-volumes/the-law-relating-to-social-security/>

8. Consultation outcome

8.1 This instrument contains no policy shift. It simply rephrases the wording of a provision which occurs in a number of different places in legislation, in order to clarify, and remove doubt about, its meaning. The meaning itself is not changed. In these circumstances, a formal public consultation is not necessary.

8.2 It was scrutinised by the Social Security Advisory Committee under the provisions of section 173 of the Social Security Administration Act 1992. The Committee decided that it did not require the instrument to be formally referred to it for the preparation of a report to the Secretary of State for Work and Pensions and, accordingly, it did not conduct a public consultation exercise upon the proposals.

9. Guidance

As these amendments do no more than restore the position as it was previously understood to be (and as it had been held to be by the High Court at an earlier stage in the proceedings), no change in guidance is required. Guidance to decision-makers in relation to the Scottish procedure referred to in paragraph 5.1 above has already been issued.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

10.3 A full impact assessment has not been prepared for this instrument.

11. Regulating small business

The legislation does not apply to small business.

12. Monitoring & review

In the light of the fact that these amendments are correcting defective wording in existing legislation the Department for Work and Pensions has no plans to monitor and review the effect of the legislation being introduced.

13. Contact

Paul Mackrell at the Department for Work and Pensions (tel: 020 7962 8021 or email: Paul.Mackrell@dwp.gsi.gov.uk) can answer any queries regarding the instrument.