

## EXPLANATORY MEMORANDUM

### THE SOCIAL SECURITY (PERSONAL INDEPENDENCE PAYMENT) (AMENDMENT) REGULATIONS 2017

2017 No. 194

#### 1. Introduction

- 1.1 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 Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (“the PIP Regulations”)<sup>1</sup>, in order to clarify the drafting and reverse the effect of two recent judgments of the Upper Tribunal, which interpreted that Schedule in ways which the Government did not intend.

#### 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 As explained above, this instrument clarifies the drafting of Schedule 1 to the PIP Regulations (which sets out the way in which claimants are assessed against a series of activities) and reverses the effect of two recent Upper Tribunal judgments. In both cases the Secretary of State considers that the Upper Tribunal judgment departs from the intended meaning of the PIP Regulations, and that it is necessary to reverse the effect of the decision in order to restore the original policy intention, provide clarity for all users of the legislation (claimants and advisers, assessors and decision makers), and avoid inappropriate increases in public expenditure.

#### 5. Extent and Territorial Application

- 5.1 The extent of this instrument is Great Britain
- 5.2 The territorial application of this instrument is Great Britain.

#### 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.

---

<sup>1</sup> [www.legislation.gov.uk/uksi/2013/377](http://www.legislation.gov.uk/uksi/2013/377)

## 7. Policy background

### *What is being done and why*

#### Personal Independence Payment

- 7.1 Personal Independence Payment (PIP) was introduced under Part 4 of the Welfare Reform Act 2012, and since April 2013 has replaced Disability Living Allowance (DLA) for new claimants aged 16 to 64. Existing DLA claimants who were aged 16 to 64 on 8 April 2013, or who reach age 16 after that date, are gradually being invited to claim PIP.

#### Assessment of daily living and mobility activities

- 7.2 Schedule 1 to the PIP Regulations sets out the activities which are to be assessed in order to determine a claimant's eligibility for the daily living and mobility components of PIP. It prescribes 10 daily living activities relevant to entitlement to the daily living component, and 2 mobility activities relevant to entitlement to the mobility component. Each component may be awarded at standard or enhanced rate.
- 7.3 All activities have a series of descriptors, each with a score attached. A claimant's entitlement is determined by identifying the descriptor which best describes their level of need for assistance with the activity in question, and then aggregating their scores for all daily living activities or all mobility activities.

#### Daily living activity 3

- 7.4 Daily living activity 3 ("managing therapy or monitoring a health condition") assesses a claimant's ability to manage medication, monitor a health condition or manage therapy. In particular it looks at whether they can do so unaided or whether they require any aid or appliance, or any supervision, prompting or assistance.
- 7.5 In the case of *Secretary of State for Work and Pensions v LB (PIP)* [2016] UKUT 0530 (AAC)<sup>2</sup> (judgment dated 28 November 2016 and published 20 December 2016) the Upper Tribunal held that supervision, prompting or assistance to manage medication or monitor a health condition (which scores 1 point) *may* amount to supervision, prompting or assistance to manage therapy (which scores 2 to 8 points, depending on the number of hours support required), and in particular *will* do so where a claimant needs supervision, prompting or assistance *both* to manage medication *and* to monitor a health condition.
- 7.6 Regulations 2(2) and (3) clarify the drafting of Schedule 1 to the PIP Regulations to reverse these aspects of the ruling and more clearly reinstate the Government's originally intended meaning. They do so by separating out the definitions of "manage medication" and "monitor therapy" and making it clear that "monitor therapy" does not include receiving or administering medication (by any means), or any action which (in the case of the particular claimant being assessed) falls within the definition of "manage medication" or "monitor a health condition". They also make it clear that the 1 point score applies even if two or more elements of the descriptor are met.

#### Mobility activity 1

- 7.7 Mobility activity 1 ("planning and following journeys") assesses a claimant's ability to plan and follow the route of a journey.

---

<sup>2</sup> [www.gov.uk/administrative-appeals-tribunal-decisions/secretary-of-state-for-work-and-pensions-v-lb-pip-2016-ukut-0530-aac](http://www.gov.uk/administrative-appeals-tribunal-decisions/secretary-of-state-for-work-and-pensions-v-lb-pip-2016-ukut-0530-aac)

- 7.8 In the case of *MH v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 0531 (AAC)<sup>3</sup> (judgment dated 28 November 2016 and published 20 December 2016) the Upper Tribunal held that psychological distress can be taken into account in descriptors c, d and f, even though it is only mentioned in descriptors b and e.
- 7.9 Regulation 2(4) clarifies the drafting of the descriptors for mobility activity 1 so as to reverse the effect of this ruling and more clearly reinstate the originally intended meaning. It does so by inserting words into descriptors c, d and f to exclude the effects of psychological distress.

### ***Consolidation***

- 7.10 The consolidated text of the PIP Regulations will in due course be available to the public free of charge on the National Archives website [www.legislation.gov.uk](http://www.legislation.gov.uk).

## **8. Consultation outcome**

- 8.1 The Secretary of State has decided pursuant to section 173(1)(a) of the Social Security Administration Act 1992 that, by virtue of the urgency of the matter, it is inexpedient to consult the Social Security Advisory Committee until after these Regulations are made. This is because of the need to ensure clarity for all users of the legislation (claimants and advisers, assessors and decision makers), and because of the estimated likely cost if the effect of the rulings is not reversed speedily. In the case of MH the annual costs (rounded to nearest £10 million) are estimated to be: £550m for 2017/18; £640m for 2018/19; £750m for 2019/20; £820m for 2020/21; and £900m for 2021/22.<sup>4</sup> In the case of LB the annual costs (rounded to nearest £10 million) are estimated to be: £10m for 2017/18; £10m for 2018/19; £10m for 2019/20; £10m for 2020/21; and £10m for 2021/22.<sup>5</sup> However, LB involves much greater complexities and so there is a significant risk that these costs could be much higher than estimated, posing a substantial fiscal risk. There is also an urgent need to restore clarity; the interpretation of the judgments affects not only the outcome for claimants but also the assessment process carried out by the Department's contracted healthcare providers. If not urgently addressed, the complexities involved could undermine the consistency of assessments, leading to confusion for all concerned, increased requests for mandatory reconsideration, and increased numbers of appeals.
- 8.2 The two judgments were first received by the Department for Work and Pensions on 8 and 9 December. This instrument has been made as soon as reasonably practicable after that, bearing in mind that careful consideration and analysis was required by the Department and Ministers to understand the implications and impacts fully before making any decision on whether to reverse the effect of the judgments.
- 8.3 The department initially consulted on DLA reform and the introduction of PIP between December 2010 and February 2011<sup>6</sup> and the design of the PIP assessment was subject to extensive consultation over the course of 2011 and 2012. The Department for Work and Pensions set up an independent Assessment Development Group to advise on the development of the activities and descriptors. Members were chosen to encompass a wide variety of relevant expertise and included individuals

---

<sup>3</sup> [www.gov.uk/administrative-appeals-tribunal-decisions/mh-v-secretary-of-state-for-work-and-pensions-pip-2016-ukut-0531-aac](http://www.gov.uk/administrative-appeals-tribunal-decisions/mh-v-secretary-of-state-for-work-and-pensions-pip-2016-ukut-0531-aac)

<sup>4</sup> These figures reflect costs for Great Britain.

<sup>5</sup> These figures reflect costs for Great Britain.

<sup>6</sup> [www.gov.uk/government/consultations/disability-living-allowance-reform](http://www.gov.uk/government/consultations/disability-living-allowance-reform)

from the fields of occupational therapy, psychiatry, physiotherapy, social work, general practice and community psychiatric nursing, as well as representatives from RADAR (Royal Association for Disability Rights), an umbrella organisation working with and for disabled people, and Equality 2025, a non-departmental public body set up to advise government on disability equality.

- 8.4 Throughout the development of the assessment, the Department and the Group considered various options for determining entitlement, including whether it would be feasible to assess the actual extra costs incurred by individual claimants as a result of their health condition or impairment. This approach was not deemed to be practical as it would be expensive and difficult to administer and lead to inconsistent outcomes. However Disability Living Allowance had measured care and mobility needs as a proxy for the extra costs disabled people face, and PIP was intended to continue to provide a cash contribution towards those costs. The Government therefore proposed a new assessment for PIP, looking at an individual's ability to carry out key day-to-day activities. The assessment was intended to meet "the aims of prioritising support to individuals who face the greatest challenges and expense".<sup>7</sup>
- 8.5 In May 2011 the Department published an initial draft of the assessment criteria, and over the summer of 2011 informally consulted on this draft<sup>8</sup>, undertaking meetings and seeking written feedback, to hear the views of disabled people and their representative organisations on these early proposals. The Department published a second draft of the assessment criteria in November 2011, and launched a 15 week formal consultation on them on 16 January 2012. The consultation ran until 30 April 2012 and received over 1,000 responses, with the final assessment criteria and the thresholds for entitlement being published on 13 December 2012<sup>9</sup>.
- 8.6 The activities to be assessed, along with the descriptors and scores to be considered in the assessment, were set out in Schedule 1 to the PIP Regulations, which were subject to affirmative resolution debate in the House of Commons on 5 February 2013<sup>10</sup> and House of Lords on 13 February 2013<sup>11</sup>.
- 8.7 Bearing in mind this history of extensive consultation, the fact that the present instrument is intended purely to reinstate the original policy intention, and the urgency as explained at paragraph 8.1 above, the Secretary of State decided not to undertake further public consultation before making the present instrument.

## 9. Guidance

- 9.1 Relevant guidance can be found in the PIP Assessment Guide (guidance for providers carrying out PIP assessments)<sup>12</sup> and the Department's Advice for Decision Makers (which deals with PIP assessments in chapter P2).<sup>13</sup>
- 9.2 Since this instrument clarifies the PIP Regulations so as to reverse the effect of the two Upper Tribunal judgments and reinstate the originally intended meaning, no changes are required to this guidance.

---

<sup>7</sup> [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/181637/dla-reform-response.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181637/dla-reform-response.pdf) – see summary of response to Question 3, paragraphs 8-11

<sup>8</sup> [www.gov.uk/government/publications/personal-independence-payment-initial-draft-assessment-criteria](http://www.gov.uk/government/publications/personal-independence-payment-initial-draft-assessment-criteria)

<sup>9</sup> [www.gov.uk/government/consultations/personal-independence-payment-assessment-thresholds](http://www.gov.uk/government/consultations/personal-independence-payment-assessment-thresholds)

<sup>10</sup> <https://www.publications.parliament.uk/pa/cm201213/cmgeneral/deleg11/130205/130205s01.htm>

<sup>11</sup> <https://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/130213-0002.htm#13021378000090>

<sup>12</sup> [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/547146/pip-assessment-guide.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/547146/pip-assessment-guide.pdf)

<sup>13</sup> [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/585844/admp2.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/585844/admp2.pdf)

## **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 An Impact Assessment has not been prepared for this instrument. An Impact Assessment was published in May 2012 for the original change from DLA to PIP<sup>14</sup>, but since this instrument reinstates the originally intended meaning of the PIP Regulations, there are no new impacts.
- 10.4 An Equality Analysis has been prepared and is submitted with this Memorandum.

## **11. Regulating small business**

- 11.1 The legislation does not apply to activities that are undertaken by small businesses.

## **12. Monitoring & review**

- 12.1 This instrument reinstates the originally intended meaning of the PIP Regulations. However the Department will continue monitor those Regulations and the PIP assessment process through established customer feedback processes.

## **13. Contact**

- 13.1 Jane Porter at the Department for Work and Pensions, Telephone: 020 7449 5663 or email: jane.porter1@dwp.gsi.gov.uk can answer any queries regarding the instrument.

---

<sup>14</sup> <https://www.gov.uk/government/publications/disability-living-allowance-reform-personal-independence-payment-impact-assessment>