

EXPLANATORY MEMORANDUM

THE SOCIAL SECURITY (DISABILITY LIVING ALLOWANCE AND PERSONAL INDEPENDENCE PAYMENT) (AMENDMENT) REGULATIONS 2016

2016 No. 556

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 removes the hospitalisation rules in Disability Living Allowance (DLA) and Personal Independence Payment (PIP) for persons who enter hospital or another similar institution under the age of 18 years until they are discharged from hospital. This means that DLA and PIP can be paid in those circumstances.
- 2.2 This instrument also makes provision for children who remain in hospital beyond their sixteenth birthday to continue receiving DLA whilst in hospital and not to be required to claim PIP, and for their DLA award to be extended.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instrument

- 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 On 8 July 2015, the Supreme Court handed down a judgment in the case of *Cameron Mathieson v Secretary of State for Work and Pensions*. Cameron's father had challenged the DLA hospitalisation rules for children through the appeal system. The Supreme Court unanimously allowed the appeal and set aside the Secretary of State's decision to stop payments of Cameron's DLA after 84 days in hospital. Currently the Social Security (Disability Living Allowance) Regulations 1991¹ (regulations 8, 10, 12A and 12B) and the Social Security (Personal Independence Payment) Regulations 2013² (regulations 29 and 30) make it a requirement that these benefits are not payable in general while claimants are undergoing medical or other treatment as an in-patient in a National Health Service hospital or other similar institution. However, for children under 16 years who are entitled to DLA when they enter hospital, payment of that benefit will continue for 84 days only and will then stop until such time as they are discharged from hospital. For persons aged 16 years and over who are entitled to either DLA or PIP when they enter hospital, payment of that benefit

¹ <http://lawvolumes.dwp.gov.uk/docs/a3-2701.pdf>

² <http://www.legislation.gov.uk/ukdsi/2013/9780111532072/contents>

will continue for 28 days only and will then stop until such time as they are discharged from hospital.

- 4.2 The Personal Independence Payment (Transitional Provisions) Regulations 2013³ contains transitional provisions for the phasing out of DLA and replacing it with PIP for persons aged 16 to 64 years. For children who are entitled to DLA and reach 16 years there is a mandatory requirement that they are sent an invite to claim PIP, which starts the process of the transfer from DLA to PIP (regulation 3(3)).

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.
- 5.3 Subject to the agreement of the Northern Ireland Assembly, the Department for Social Development in Northern Ireland will be producing corresponding legislation for Northern Ireland.

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.

7. Policy background

What is being done and why

- 7.1 The Secretary of State for Work and Pensions proposes to amend legislation so that benefit can continue to be paid to people in hospital if at the time of admission they were a child under the age of 18 years. This applies whether they are in receipt of DLA or PIP before admission to hospital or first become entitled to those benefits whilst in hospital, provided they meet the other entitlement conditions.
- 7.2 The proposed changes are being introduced following a Supreme Court judgment in the case of *Cameron Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47. Cameron had been diagnosed soon after he was born with cystic fibrosis and Duchenne muscular dystrophy. He was three years old when he was admitted to hospital in 2010 and at that point he was in receipt of the DLA mobility component and care component. After he had spent 84 days in hospital his DLA payment stopped on the basis that he was being fully maintained by the National Health Service.
- 7.3 Cameron's parents challenged the initial decision to stop his DLA payments on the basis that they remained his primary caregivers whilst he was in hospital, they carried out medical procedures just as they had at home, they provided 24 hour care and attention to him and they supported his emotional wellbeing.
- 7.4 An appeal was lodged against this decision. The First-tier Tribunal dismissed the appeal in 2012 and shortly thereafter Cameron sadly died aged 5. His father appealed the decision of the First-tier Tribunal but was unsuccessful before the Upper Tribunal and the Court of Appeal. He was granted permission to appeal to the Supreme Court on the basis that the withdrawal of DLA after 84 days was incompatible with Article 14 (prohibition of discrimination) of the European Convention on Human Rights

³ <http://www.legislation.gov.uk/ukxi/2013/387/made>

(ECHR), taken together with Article 1 of Protocol 1 (protection of property) and/or Article 8 (right to respect for private and family life).

- 7.5 The Supreme Court held that the application of the hospitalisation rule was not justified in this case, and therefore breached Article 14. In essence, they found that the withdrawal of DLA was not justified because the family “attended no less to his bodily functions than when he had been at home”. In addition they faced increased rather than decreased costs in order to provide that care. In support of their finding in relation to Article 14 ECHR, four of the five judges also considered that the rule breached international law (the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and the United Nations Convention on the Rights of the Child (UNCRC)) on the basis that they were not satisfied that the Government had given sufficient consideration to the needs of disabled children to satisfy article 3(1) of the UNCRC and article 7(2) of the UNCRPD. The Supreme Court concluded that Cameron had been entitled to continued payment of DLA whilst in hospital.
- 7.6 The Supreme Court left it to the Secretary of State to decide what measures should be taken to avoid a similar breach in the case of other disabled children who could be considered comparable to Cameron. The Secretary of State has carefully considered the terms of the judgment and the evidence contained within an equality analysis and has decided that the hospitalisation rule to withdraw payment of DLA and PIP should no longer apply to children who are under the age of 18 when they are admitted to hospital.
- 7.7 The hospitalisation provisions in the Social Security (Disability Living Allowance) Regulations 1991 (DLA Regulations), which were the subject of the Supreme Court’s judgment are amended by regulation 2(2) and (4) of these Regulations. The equivalent provision in the Social Security (Personal Independence Payment) Regulations 2013 is amended by regulation 3 of these Regulations. The effect is that they will no longer apply to any person who was under the age of 18 on the day on which they entered the hospital or other similar institution, for the duration of their stay. Regulation 2(3) and (5) of these Regulations make consequential amendments to regulations 10 and 12B of the DLA Regulations, in particular to remove the current exemptions for persons under 16, that is, that DLA can be paid for only 84 days after admission to hospital.
- 7.8 Regulation 4 of these Regulations amends the Personal Independence Payment (Transitional Provisions) Regulations 2013⁴ to make sure that a child under the age of 16 who is admitted to hospital and is entitled to DLA while in hospital, can continue to receive DLA payments if they remain in hospital after they reach age 16 and will not be required to apply for PIP until they are discharged from hospital.

Consolidation

- 7.9 Informal consolidated text of instruments is available to the public free of charge via ‘The Law Relating to Social Security’ (Blue Volumes) on the Department for Work and Pensions website at <http://www.dwp.gov.uk/publications/specialist-guides/law-volumes/the-law-relating-to-social-security/> or the National Archive website [legislation.gov.uk](http://www.legislation.gov.uk). An explanation as to which instruments are maintained on each site is available from <http://www.dwp.gov.uk/docs/lawvolnews.pdf>.

<http://www.legislation.gov.uk/ukxi/2013/387/made>⁴

8. Consultation outcome

- 8.1 No consultation has been carried out. The judgment was specific to Cameron's circumstances. The Supreme Court left it to the Secretary of State to decide what measures should be taken to avoid a similar breach of human rights in the case of other disabled children, such as Cameron, following their 84th day in hospital. The Secretary of State has decided that the hospitalisation rule should be removed for **all** children who enter hospital under the age of 18. These changes are beneficial to all children in these circumstances.
- 8.2 In addition, DWP presented the proposals for these Regulations to the Social Security Advisory Committee (SSAC) on 3 September 2015 and again on 27 January 2016. The Regulations were presented twice as the original regulations limited the changes to children under 16. Following completion of an equality analysis, the Secretary of State decided to extend the new provisions to children under the age of 18 years. SSAC have confirmed in writing that they do not wish to take these Regulations on formal reference and they are content for these Regulations to proceed accordingly.

9. Guidance

- 9.1 Operational guidance for DWP has been revised to take account of the changes. The changes will also be mirrored within the Decision Makers Guide that provides guidance for DWP decision makers and is published at www.gov.uk. <https://www.gov.uk/government/collections/decision-makers-guide-staff-guide>. However, interim guidance has already been given to operational teams pending the coming into force of this legislation.

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies.
- 10.2 There is a minimal impact on the public sector as around 100 children a year may be affected.
- 10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

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

12. Monitoring & review

- 12.1 We will monitor the impact of this change through established customer feedback processes however it is wholly beneficial for those in the target group of children who are under the age of 18.

13. Contact

- 13.1 Geraldine D'Arcy at the Department for Work and Pensions, Telephone: 020 7449 5283 or email: Geraldine.D'Arcy@dwp.gsi.gov.uk can answer any queries regarding the instrument.