EXPLANATORY MEMORANDUM TO

THE SOCIAL SECURITY (SCOTLAND) ACT 2018 (DISABILITY ASSISTANCE) (CONSEQUENTIAL MODIFICATIONS) ORDER 2024

2024 No. [XXXX]

1 Introduction

1.1 This explanatory memorandum has been prepared by the Office of the Secretary of State for Scotland and is laid before Parliament by Command of His Majesty.

2 Declaration

2.1 Ian Murray, Secretary of State at the Scotland Office confirms that this Explanatory Memorandum meets the required standard.

2.2 Louise Nicholls, Deputy Director for Constitutional Policy at the Scotland Office confirms that this Explanatory Memorandum meets the required standard.

3 Contact

3.1 Cat Carrigan at the Scotland Office Telephone: 07731 348478 or email: cat.carrigan1@ukgovscotland.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4 Overview of the Instrument

4.1 The Social Security (Scotland) Act 2018 (Disability Assistance) (Consequential Modifications) Order 2024 (S.I. 2024/XXX) makes consequential amendments to legislation in Great Britain and Northern Ireland to reflect the introduction of Pension Age Disability Payment (PADP) which will replace Attendance Allowance (AA) in Scotland. It also includes consequential amendments to Northern Ireland legislation regarding Child Disability Payment (CDP) and Adult Disability Payment (ADP).

4.2 This instrument makes consequential amendments to legislation in respect of extra-needs disability benefits in England and Wales, and Northern Ireland, to prevent entitlement to AA, Disability Living Allowance (DLA), Personal Independence Payment (PIP) and Armed Forces Independence Payment overlapping with PADP. Other UK legislation is amended in order to ensure that recipients of PADP are treated in the same way as those in receipt of AA in respect of reserved benefits and for tax purposes.

Where does the legislation extend to, and apply?

4.3 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales, and Scotland in respect of Part 2, England and Wales in respect of Part 3, Northern Ireland in respect of Part 4 and England and Wales, Scotland and Northern Ireland in respect of Parts 1 and 5.

4.4 The territorial application of this instrument (that is, where the instrument produces a practical effect) is as above.

5 Policy Context

5.1 The Scotland Act 2016[1] devolved responsibility for certain social security benefits to the Scottish Parliament. Section 31 of the Social Security (Scotland) Act 2018[2] (the 2018 Act) confers powers on the Scottish Ministers to introduce new forms of disability assistance through regulations which will replace the disability benefits currently being paid in Scotland, on behalf of Scottish Ministers, by the Department for Work and Pensions (DWP) under Agency Agreements.

5.2 The Scottish Government is introducing PADP which will replace AA in Scotland. Given that at its introduction, PADP will operate in broadly the same way as the AA it will replace, the UK Government has agreed that those in receipt of PADP in Scotland will have the same access to additional payments and exemptions in reserved benefits and the same tax treatments as those in receipt of AA in England and Wales. This instrument provides the legislative basis for this treatment.

5.3 This instrument also provides that PIP, AA and DLA will not be paid at the same time as PADP, in the same way that DLA and PIP are not payable to people in receipt of AA. Equivalent provision is being made in Northern Ireland in respect of PADP and additionally to prevent dual entitlement to CDP and ADP, and with certain Northern Ireland disability benefits. CDP and ADP are forms of disability assistance paid in Scotland, introduced by Scottish Ministers under section 31 of the 2018 Act.

What was the previous policy, how is this different?

5.4 Following the devolution of responsibility for certain social security benefits under the Scotland Act 2016, provision of AA in Scotland has been a matter for Scottish Ministers. Scottish Ministers subsequently entered into a temporary Agency Agreement with the DWP to deliver AA on their behalf whilst the Scottish Government developed its own delivery infrastructure and a replacement benefit. The Scottish Ministers are now using their powers under section 31 of the 2018 Act to replace AA with PADP, which will be administered directly by Social Security Scotland.

6 Legislative and Legal Context

6.1 Section 31of the 2018 Act allows the Scottish Ministers to provide disability assistance. This is the legislative basis for PADP which will replace AA in Scotland. AA interacts with other benefits in a number of ways, including with benefits that are reserved in Scotland. For example, it gives rise to additional amounts payable in reserved income-related benefits such as Pension Credit. DWP Ministers have agreed that while PADP operates in a broadly similar way to AA, it should interact with reserved social security benefits in the same way as AA.

Provisions in respect of preventing dual entitlement to PADP with UKG and Northern Ireland benefits paid for the same need

6.2 Articles 2 and 3 of this instrument, amend the Social Security Contributions and Benefits Act 1992[3] and Welfare Reform Act 2012[4] respectively, setting out that a person cannot be entitled to receive DLA, PIP and AA in England and Wales if they are entitled to PADP, in order to prevent duplicate payment for the same need in separate legal jurisdictions.

[1] 2016 c. 11, www.legislation.gov.uk/ukpga/2016/11/contents/enacted

[2] 2018 asp 9, www.legislation.gov.uk/asp/2018/9/contents/enacted

[3] 1992 c. 4, https://www.legislation.gov.uk/ukpga/1992/4/contents

[4] 2012 c. 5, https://www.legislation.gov.uk/ukpga/2012/5/contents

6.3 Article 5 amends the Social Security Contributions and Benefits (Northern Ireland) Act 1992[5] to provide that a person cannot be entitled to a Northern Ireland disability benefit if they are entitled to PADP. Similar amendments are also being made in respect of CDP and ADP.

6.4 Article 6 amends the Welfare Reform (Northern Ireland) Order 2015[6] to provide that a person cannot be entitled to PIP if they are entitled to CDP, ADP or PADP.

Provision in respect of entitlement to Carer's Allowance

6.5 The eligibility for Carer's Allowance (CA) is extended to include someone in England and Wales who is caring for someone in Scotland who is in receipt of PADP and who meets the other CA entitlement conditions. Amendment is also made to ensure that PADP is treated as a qualifying benefit for CA in Northern Ireland for the 13-week run-on period only. CA is a devolved benefit in Scotland.

Provision in respect of eligibility to the Christmas Bonus

6.6 The 'Christmas Bonus' provides an annual one-off tax-free payment to people who receive a qualifying benefit in the qualifying week. The eligibility for a Christmas Bonus is extended to include someone receiving PADP.

Provision in respect of the Inheritance Tax Act 1984

6.7 Article 7 makes amendments for the purposes of Inheritance Tax to include within the definition of "disabled person", for the purposes of pre-1981 trusts for disabled persons, somebody who is in receipt of PADP.

6.8 Article 7 also makes amendments for the purposes of Inheritance Tax so that, in the context of self-settlements by those expected to meet the definition of "disabled person" in the future, when such a person is receiving treatment for renal failure in a hospital or similar institution, other than as an in- patient, an assumption is to be made that no provisions made under section 31 of the 2018 Act will remove eligibility to PADP.

Provision in respect of the Finance Act 2005

6.9 Article 8 amends the meaning of "disabled person" for the purposes of Schedule 1A to the Finance Act 2005[7] to include a person in receipt of PADP. Article 8 also includes amendments so that a person is to be treated as a "disabled person" if they satisfy HMRC that they would be entitled to receive PADP but for failing to meet residence and presence conditions, eligibility conditions when undergoing renal failure treatment in hospital, or the zero rating of PADP payments when they are resident in a care home, detained in legal custody or they are in hospital or a similar institution.

Provision in respect of the Armed Forces Independence Payment legislation

6.10 Article 9 amends the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011[8] to include PADP within the definition of "extra-costs disability benefit" so that, where a person receives PADP in a given period, the value of the PADP will be deducted from the value of the Armed Forces Independence Payment.

[5] 1992 c. 7 (NI), https://www.legislation.gov.uk/ukpga/1992/7/contents
[6] 2005 No. 2006 (N.I. 1), https://www.legislation.gov.uk/nisi/2015/2006/contents
[7] 2005 c. 7, https://www.legislation.gov.uk/ukpga/2005/7/contents
[8] 2011 No. 517, https://www.legislation.gov.uk/uksi/2011/517/contents

Why was this approach taken to change the law?

6.11 Section 104 of the Scotland Act 1998[9] (the 1998 Act) allows consequential modifications to be made to UK legislation where necessary or expedient in consequence of any provision made by or under an Act of the Scottish Parliament.

6.12 These amendments are in direct consequence of devolution and the introduction PADP and other forms of disability assistance under section 31 of the 2018 Act. A Section 104 Scotland Act Order is the most appropriate way to legislate for such changes.

7 Consultation

7.1 As amendments in this Order are consequential and seek to maintain similar treatment for those in receipt of PADP in the reserved social security and tax systems as those in receipt of AA a formal consultation on the draft Order was not considered necessary.

7.2 However, in 2019, the Scottish Government carried out a consultation on disability assistance.[10] There has been no separate consultation on the amendments in this order as they ensure that people in receipt of PADP in Scotland are treated in a similar way in reserved benefits as people in England and Wales who are receiving AA.

8 Applicable Guidance

8.1 The respective operational guidance for DWP and Department for Communities (DfC) staff will be updated in due course to include the introduction of PADP and explain how it affects other entitlements. In addition, the respective Decision Makers' Guide and Advice for Decision Makers will be updated and available on the guidance for decision makers section of Gov.UK and DfC websites. Relevant guidance will be updated to include the introduction of PADP and explain how it affects other entitlements. Social Security Scotland will be responsible for providing guidance to its own staff.

Part Two: Impact and the Better Regulation Framework

9 Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument because no impact on business is expected.

Impact on businesses, charities and voluntary bodies

9.2 There is no, or no significant, impact on business, charities or voluntary bodies because this instrument seeks to maintain equitable treatment of those in receipt of PADP in reserved social security and tax legislation as those in receipt of AA.

9.3 The legislation does not impact small or micro businesses.

9.4 There is no, or no significant, impact on the public sector because this maintains treatment for PADP recipients in Scotland that is similar to AA claimants in England and Wales in respect of interactions with reserved social security and tax legislation.

[9] 1998 c. 46, http://www.legislation.gov.uk/ukpga/1998/46/contents

[10] Disability assistance in Scotland: analysis of consultation responses - gov.scot (www.gov.scot): https://www.gov.scot/publications/consultation-disability-assistance-scotland-analysis-responses/

10 Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The approach to monitoring this legislation is through normal business accuracy and assurance processes. These amendments will be considered again should changes to PADP or the reserved legislation be made in the future.

Part Three: Statements and Matters of Particular Interest to Parliament

11 Matters of special interest to Parliament

11.1 None.

12 European Convention on Human Rights

12.1 The Secretary of State for Scotland has made the following statement regarding Human Rights:

"In my view the provisions of the Social Security (Scotland) Act 2018 (Disability Assistance) (Consequential Modifications) Order 2024 are compatible with the Convention rights."

13 The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").