EXPLANATORY MEMORANDUM TO

THE PERSONAL INDEPENDENCE PAYMENT (AMENDMENT) REGULATIONS (NORTHERN IRELAND) 2017

2017 No. 69

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Communities (Northern Ireland) on behalf of the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The purpose of this instrument is to amend Schedule 1 to the Personal Independence Payment Regulations (Northern Ireland) 2016 (SR 2016/217) ("the PIP Regulations"), in order to clarify the drafting and reverse the effect of two recent judgments of the Upper Tribunal in Great Britain. The judgments interpreted the Schedule in the corresponding Great Britain regulations (the Social Security (Personal Independence Payment) Regulations 2013) 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 Section 87 of the Northern Ireland Act 1998 ("the 1998 Act") places a statutory duty on the Minister for Communities and the Secretary of State for Work and Pensions to consult with one another with a view to securing a single social security system for the United Kingdom. Section 88 of the 1998 Act makes provision for financial adjustments to support the maintenance of these parity arrangements.

4.2 Underpinning the parity principle is the argument that, as people in Northern Ireland pay the same rates of income tax and National Insurance contributions as people in Great Britain, they are entitled to the same rights and benefits paid at the same rates.

4.3 The Welfare Reform Act 2012 ("the 2012 Act") introduced a number of reforms which included a cap on the amount of benefits working age people can receive. This was to restrict the total amount of money a non-working household can receive to broadly the level of the average earned income of working households after tax and national insurance contributions are deducted.

4.4 On 17 November 2015 "A Fresh Start: The Stormont Agreement and Implementation Plan" was agreed by the main political parties in Northern Ireland. Included in this agreement was the approach agreed by the Executive and HM Government to

implementing welfare reform in Northern Ireland. The Northern Ireland (Welfare Reform) Act 2015 provides a power for Her Majesty to legislate on social security, child support and certain matters related to employment and training in Northern Ireland by Order in Council. Any such Order in Council may then confer power on the Secretary of State or a Northern Ireland department to make further provision regarding these matters by regulations or order. The Welfare Reform (Northern Ireland) Order 2015 ("the 2015 Order") was made on 9 December 2015 making provision corresponding to the 2012 Act. The Welfare Reform and Work (Northern Ireland) Order 2016 ("the 2016 Order") was made on 12th October 2016 making provision corresponding to the social security provisions of the Welfare Reform and Work Act 2016, and regulations stemming from the 2016 Order are now being brought forward.

4.5 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.

4.6 The changes maintain parity between social security systems in Northern Ireland and Great Britain as this instrument makes the equivalent changes for the social security system in Northern Ireland that were made in Great Britain by the Social Security (Personal Independence Payment) (Amendment) Regulations 2017 (S.I. 2017/194).

5. Extent and Territorial Application

5.1 The extent of this instrument is Northern Ireland only.

5.2 The territorial application of this instrument is 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

Background

Personal Independence Payment

7.1 Personal Independence Payment (PIP) was introduced in Northern Ireland under Part 5 of the Welfare Reform (Northern Ireland) Order 2015, and since June 2016 has replaced Disability Living Allowance (DLA) for new claimants aged 16 to 64. Existing DLA claimants who were aged 16 to 64 on 20 June 2016, 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) (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.

7.8 In the case of MH v Secretary of State for Work and Pensions (PIP) [2016] UKUT 0531 (AAC) (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 This instrument will be informally consolidated in the Law Relating to Social Security Northern Ireland (or "Blue Volumes"). It will be available to the public at no cost via the internet at: https://www.communities-ni.gov.uk/services/law-relating-social-security .

8. Consultation outcome

8.1 The Department for Communities (previously the Department for Social Development) in Northern Ireland has worked closely with the Department for Work and Pensions since 2010 on the reform of DLA and introduction of PIP.

8.2 The design of the PIP assessment was subject to extensive consultation in both Northern Ireland and Great Britain during 2011/2012 and the Department for Communities was involved with the Assessment Development group which was set up to advise on the development of the activities and descriptors.

8.3 In 2011/12 the Department for Communities consulted on the implications of the wider reforms (including PIP) as part of the Welfare Reform Bill consultation process, including a public consultation on the equality impact assessment. Initial proposals for the reform of DLA, including the high-level principles of the PIP assessment criteria, were first consulted on between December 2010 and February 2011. A first draft of the detailed proposals for the assessment criteria and regulations was published in May 2011 and was subject to informal consultation until August 2011. A second draft of the assessment criteria was published in November 2011 and a formal consultation on the criteria followed from January to April 2012.

8.4 Given this extensive history of consultation and the fact that this instrument and the corresponding Great Britain instrument are intended to purely reinstate the original policy intention, the Secretary of State has decided not to undertake further public consultation.

9. Guidance

9.1 Relevant guidance can be found in the PIP Assessment Guide (guidance for providers carrying out PIP assessments) and the Decision Makers Guide (DMG) which is also available free on the internet at https://www.communities-ni.gov.uk/articles/decision-makers-guide.

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. However, if necessary, we will further clarify the policy intent in the next version of the PIP Assessment Guide which is scheduled for the Spring.

10. Impact

10.1 An Impact Assessment has not been prepared for this instrument.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument, however an Impact Assessment was prepared for the Personal Independence Payment Regulations (Northern Ireland) 2016 (SI 2016/217) which introduced PIP in Northern Ireland. As this instrument reinstates the originally intended meaning of the PIP Regulations, there are no new impacts. A proportionate impact in Great Britain where the policy has been implemented can be found https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/593392/pip-assessment-criteria-equality-analysis.pdf.

11. Regulating small business

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

12. Monitoring & review

12.1 The operation of the Regulations will continue to be reviewed through the normal avenues of guidance enquiries received from the Department's offices and correspondence from members of the public.

12.2 Northern Ireland social security legislation normally retains parity with changes made by the Department for Work and Pensions.

13. Contact

13.1 Anne McCleary at the Department for Communities Telephone: 028 9081 9984 or email: anne.mccleary@communities-ni.gov.uk can answer any queries regarding the instrument.