EXPLANATORY MEMORANDUM TO

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

2024 No. 919

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 His Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Declaration

2.1 Andrew Western MP, Minister for Transformation at the Department for Work and Pensions confirms that this Explanatory Memorandum meets the required standard.

2.2 Andrew Latto, Deputy Director for Devolution, Pensioner Benefits and Carer's Allowance at the Department for Work and Pensions confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Yasmin Dalvi at the Department for Work and Pensions email: devolution.scotlandact2016policy@dwp.gov.uk and David Tarr at the Department for Communities in Northern Ireland email: david.tarr@communities-ni.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This instrument 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 makes limited consequential amendments connected to the introduction of Child Disability Payment (CDP) and Adult Disability Payment (ADP) which have already replaced Disability Living Allowance for children (DLAc) and Personal Independence Payment (PIP) respectively in Scotland.

Where does the legislation extend to, and apply?

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

4.3 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales in respect of Part 2, England and Wales and Scotland in respect of Part 3 and Northern Ireland in respect of Part 4.

5. Policy Context

What is being done and why?

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. The Scottish Government is introducing Pension Age Disability Payment (PADP) which will replace Attendance Allowance (AA) in Scotland. Given that, at its introduction, PADP will operate in broadly the same way as the AA it will replace, United Kingdom (UK) Government Ministers have agreed that those in receipt of PADP in Scotland will have the same access to additional payments and exemptions in reserved benefits as those in receipt of AA in England and Wales. This instrument provides the legislative basis for this treatment.

5.2 This instrument makes consequential amendments to social security legislation in Great Britain and Northern Ireland so that PADP will act as a qualifying benefit for certain disability premiums and additions in Income Support, Jobseeker's Allowance (income-based), Employment and Support Allowance (income-related), Pension Credit and Housing Benefit. In Universal Credit, premiums are not paid as in other reserved benefits, but an extra amount is payable to claimants with a health condition or disability. Claimants who have reached state pension age, and are receiving PADP, will be treated as having limited capability for work and work-related activity (LCWRA) and so receive this extra amount. The LCWRA element will also provide an exemption from the benefit cap and work-related conditionality. The instrument will also provide that someone caring for a PADP recipient, for at least 20 hours per week, may be credited with Class 3 National Insurance credits (provided other conditions are met). This instrument also provides that arrears of all forms of Scottish disability assistance will not be counted as a deceased person's assets for Social Fund Funeral Expenses Payments claims. It also removes the 26-week restriction on entitlement to Maternity Allowance and Severe Disablement Allowance during a period of temporary absence from Great Britain or Northern Ireland where someone is in receipt of Scottish disability assistance. The instrument makes some further limited consequential amendments connected to the introduction of Scottish disability assistance.

What was the previous policy, how is this different?

5.3 Until April 2020, support with care needs for new claimants over state pension age was provided throughout Great Britain by the Secretary of State for Work and Pensions through AA. Following the devolution of the relevant powers to the Scottish Parliament under the Scotland Act 2016 and the subsequent transfer of executive competence in April 2020, provision of AA in Scotland has been a matter for Scottish Ministers. They entered into a temporary Agency Agreement with the DWP to deliver it on their behalf whilst the Scottish Government developed its own delivery infrastructure and a replacement benefit. The Scottish Government is now using its powers under Section 31 of the Social Security (Scotland) Act 2018 to replace AA

[1] https://www.legislation.gov.uk/ukpga/2016/11/contents/enacted

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

with Pension Age Disability Payment (PADP) which will be administered directly by Social Security Scotland.

6. Legislative and Legal Context

How has the law changed?

6.1 This Order is made in exercise of the powers conferred by section 104 of the Scotland Act 1998[3] ("the 1998 Act"). Section 104 of the 1998 Act allows consequential provision to be made where necessary or expedient in consequence of any provision made by or under an Act of the Scottish Parliament.

6.2 Section 31 of the Social Security (Scotland) Act 2018[4] allows the Scottish Ministers to provide disability assistance in Scotland. This is the legislative basis for PADP which will replace Attendance Allowance (AA) in Scotland.

6.3 ***Provisions***

6.4 The effect of the provisions in this instrument (The Social Security (Scotland) Act 2018 (Disability Assistance) (Consequential Amendments Order 2024)) are as follows:

Articles 2 and 19

Ensure that Carer's Allowance can continue to be paid during a carer's temporary absence from Great Britain, or Northern Ireland, where that absence is to provide care to a person who is entitled to PADP.

Articles 3 and 20

Allows the extension of entitlement to Maternity Allowance and Severe Disablement Allowance beyond the first 26 weeks of a period of temporary absence from Great Britain or Northern Ireland, where a person is also in receipt of Scottish disability assistance. This is to align the position with that applying to extra needs disability benefits that are reserved to the UK Government.

Articles 4, 6, 9, 11, 12, 13, 14, 21, 22, 25, 27, 28, 29, 30

These articles amend the income related benefit regulations so that PADP (like AA) is treated as a qualifying benefit for the applicable rates of carer, disability and severe disability premiums and /or additions in Income Support, Jobseeker's Allowance (income-based), Employment and Support Allowance (income-related), Pension Credit (PC) and Housing Benefit (HB). In addition, receipt of PADP will exempt a household from the benefit cap and enable Universal Credit (UC) claimants over the age for state pension credit to claim the Limited Capability for Work Related Activity (LCWRA) addition. These articles also ensure that when assessing housing costs no non-dependant deductions are made where a claimant or, if applicable, their partner is getting PADP. Where a non-dependant is in remunerative work and is getting PADP then the amount of PADP paid will be deducted from the non-dependant's gross income.

In PC and pension age HB where an earnings disregard is appropriate for the claimant or their partner, receipt of PADP will allow the higher weekly earnings disregard of £20 to apply.

[3] https://www.legislation.gov.uk/ukpga/1998/46/section/104

[4] https://www.legislation.gov.uk/asp/2018/9/contents/enacted

Amendments are also made to ensure that Pension Age Disability Payment (PADP), like Attendance Allowance (AA), is considered when assessing hardship where a claimant's benefit has been reduced as result of a sanction having been imposed, in Jobseeker's Allowance (income-based) and Employment and Support Allowance (income-related).

Amendments are made to the definition of a person who cannot share a bedroom in Housing Benefit so that receipt of PADP at the higher rate gives entitlement to an additional bedroom to couples who cannot share a bedroom due to one or both members of the couple being disabled. The same amendment is also made to the definition of a person who cannot share a bedroom in relation to the housing cost element of Universal Credit (UC).

The provisions also amend the childcare disregard provisions in Housing Benefit so that receipt of PADP allows the disregard to apply where one member of the couple is unable to work and is receiving PADP.

Article 5

This amends the date of claim where entitlement to one benefit is linked to entitlement to another benefit to ensure that, as is currently the case with AA, where changes to PADP affect any other benefits that the claimant is receiving, the claimant is not penalised should they later need to re-claim the other benefit. The changes include the claimant going into residential accommodation, or a hospital or similar institution.

Article 7

These amendments reflect the introduction in Scotland of Adult Disability Payment (ADP) and PADP.

Currently, where a Pension Credit (PC) claimant or their partner has entitlement to a disability benefit such as Personal Independence Payment (PIP) or AA then this may lead to their award of PC being increased to provide for an additional amount to be included in respect of severe disability. This amendment ensures the same rules in relation to the date from which any such increased PC entitlement comes into effect are applied where a PC claimant or their partner becomes entitled to PADP or ADP.

Articles 8 and 20

These amendments ensure that the Scottish disability benefits are, like their equivalent DWP and Northern Ireland benefits, considered when assessing hardship where a claimant's benefit has been reduced on conviction for fraud.

Articles 10 and 26

These articles amend the Social Fund Maternity and Funeral Expenses (General) Regulations 2005[5] and the Social Fund Maternity and Funeral Expenses (General) Regulations (Northern Ireland) 2005[6], which prescribe when benefit arrears will not count as a deceased person's assets for Social Fund Funeral Expenses Payments claims. Articles 10 and 26 add equivalent Scottish disability benefits to the respective lists.

[5] www.legislation.gov.uk/uksi/2005/3061/contents/made

[6] https://www.communities-ni.gov.uk/services/law-relating-social-security-northern-ireland-blue-volumes

Articles 15 and 31
These amendments are in respect of New Style Jobseeker's Allowance such that hours spent caring for someone in receipt of/who has claimed Pension Age Disability Payment (PADP) are not treated as being in remunerative work, in the same way as happens for Attendance Allowance (AA).

Articles 16 and 32
These amendments are in respect of New Style/contributory Employment and Support Allowance (ESA), to ensure that PADP, like AA, is considered when assessing hardship where a claimant's benefit has been reduced as the result of a sanction having been imposed.

Articles 17, 23 and 33
These amendments add PADP to the definition of "Scottish disability benefit", and update references to that definition as relevant.

Article 18
Amendments are made so that a person can apply to be credited with a Class 3 National Insurance credit for any week in which they are providing care for at least 20 hours for someone who is entitled to a payment of PADP.

Regulations to be amended:

The Social Security (Invalid Care Allowance Regulations) 1976[7]

Social Security Benefit (Persons Abroad) Regulations 1975[8]

The Income Support (General) Regulations 1987[9]

The Social Security (Claims and Payments) Regulations 1987[10]

The Jobseeker's Allowance Regulations 1996[11]

The Social Security and Child Support (Decisions and Appeals) Regulations 1999[12]

The Social Security (Loss of Benefit) Regulations 2001[13]

The State Pension Credit Regulations 2002[14]

The Social Fund Maternity and Funeral Expenses (General) Regulations 2005[15]

The Housing Benefit Regulations 2006[16]

The Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006[17]

The Employment and Support Allowance Regulations 2008[18]

[7] https://www.legislation.gov.uk/uksi/1976/409
[8] https://www.legislation.gov.uk/uksi/1975/563/made
[9] https://www.legislation.gov.uk/uksi/1987/1967/contents/made
[10] https://www.legislation.gov.uk/uksi/1987/1968/contents/made
[11] https://www.legislation.gov.uk/uksi/1996/207/contents/made
[12] https://www.legislation.gov.uk/uksi/1999/991/contents
[13] https://www.legislation.gov.uk/uksi/2001/4022/contents/made
[14] https://www.legislation.gov.uk/uksi/2002/1792/contents/made
[15] https://www.legislation.gov.uk/uksi/2005/3061/contents/made
[16] https://www.legislation.gov.uk/uksi/2006/213/contents/made
[17] https://www.legislation.gov.uk/uksi/2006/214/contents/made
[18] https://www.legislation.gov.uk/uksi/2008/794/contents/made

The Universal Credit Regulations 2013[19]

The Jobseeker's Allowance Regulations 2013[20]

The Employment and Support Allowance Regulations 2013[21]

The Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013[22]

The State Pension Regulations 2015[23]

Northern Ireland

Social security is a transferred matter in Northern Ireland, however an Order under section 104 of the Scotland Act 1998[24] allows for amendments to be made by the UK Government on behalf of the Northern Ireland Assembly. The relevant Northern Ireland Minister has asked that the UK Government make such provision. This instrument therefore makes corresponding changes, where applicable, to legislation in Northern Ireland to those changes being made for England and Wales.

Regulations to be amended[25]:

The Social Security (Invalid Care Allowance) Regulations (Northern Ireland) 1976

The Social Security Benefit (Persons Abroad) Regulations (Northern Ireland) 1978

The Income Support (General) Regulations (Northern Ireland) 1987

The Jobseeker's Allowance Regulations (Northern Ireland) 1996

The Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999

The Social Security (Loss of Benefit) Regulations (Northern Ireland) 2002

The State Pension Credit Regulations (Northern Ireland) 2003

The Social Fund Maternity and Funeral Expenses (General) Regulations (Northern Ireland) 2005

The Housing Benefit Regulations (Northern Ireland) 2006

The Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations (Northern Ireland) 2006

The Employment and Support Allowance Regulations (Northern Ireland) 2008

The Universal Credit Regulations (Northern Ireland) 2016

The Jobseeker's Allowance Regulations (Northern Ireland) 2016

The Employment and Support Allowance Regulations (Northern Ireland) 2016

[19] https://www.legislation.gov.uk/uksi/2013/376/contents
[20] https://www.legislation.gov.uk/uksi/2013/378/contents/made
[21] https://www.legislation.gov.uk/uksi/2013/379/contents
[22] https://www.legislation.gov.uk/uksi/2013/381/contents
[23] https://www.legislation.gov.uk/uksi/2015/173/contents
[24] https://www.legislation.gov.uk/ukpga/1998/46/section/104

[25]https://www.communities-ni.gov.uk/services/law-relating-social-security-northern-ireland-blue-volumes

The Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations (Northern Ireland) 2016

Why was this approach taken to change the law?

6.5 Section 104 of the Scotland Act 1998[26] ("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.

6.6 These amendments are in direct consequence of devolution and the introduction of disability assistance, particularly in regard to this statutory instrument, Pension Age Disability Payment (PADP) under Section 31 of the Social Security (Scotland) Act 2018.[27] An order under section 104 of the 1998 Act is the appropriate way to legislate for such changes.

7. Consultation

Summary of consultation outcome and methodology

7.1 As amendments in this Order are consequential, 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[28]. There has been no separate consultation on the amendments in this order as they ensure that claimants in Scotland are treated in a similar way in reserved benefits as people in England and Wales who are receiving equivalent disability benefits.

7.3 There is no requirement to submit section 104 orders to the Social Security Advisory Committee (SSAC) for scrutiny or to consult with the Local Authority Associations (LAAs), although a copy of this order has been shared with both SSAC and the LAAs for information.

8. Applicable Guidance

8.1 Operational guidance for Department for Work and Pensions and Department for Communities staff will be updated by each respective department by 21 October 2024 to include the introduction of PADP and explain how it affects other entitlements within its own area of operation. 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[29].

8.2 The guidance about the changes to Housing Benefit will be available on the "Housing Benefit for local authorities" section of Gov.UK[30].

8.1 Social Security Scotland will be responsible for providing guidance to its own staff.

[26] https://www.legislation.gov.uk/ukpga/1998/46/section/104
[27] https://www.legislation.gov.uk/asp/2018/9/contents/enacted
[28] https://www.gov.scot/publications/consultation-disability-assistance-scotland-analysis-responses/
[29] https://www.gov.uk/government/collections/decision-makers-guide-staff-guide
[30] https://www.gov.uk/government/collections/housing-benefit-for-local-authorities-circulars

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, or no significant, impact on business is expected because these changes maintain a broadly analogous position for those in receipt of Pension Age Disability Payment (PADP) as those on Attendance Allowance (AA) in regard to reserved benefits.

Impact on businesses, charities and voluntary bodies

9.2 There is no, or no significant, impact on business, charities or voluntary bodies because these changes maintain a broadly analogous position for those in receipt of PADP as those on AA in regard to reserved benefits.

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 these changes maintain a broadly analogous position for those in receipt of PADP as those on AA in regard to reserved benefits.

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 the relevant legislation (devolved or reserved) be made in the future.

10.2 The instrument does not include a statutory review clause.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 Article 17(3) of this instrument corrects reference to "Scottish disability payment" in the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment Support Allowance (Decisions and Appeals) Regulations 2013[31] so that the correct defined term, "Scottish disability benefit" is used instead. The incorrect wording was inserted by the Social Security (Disability Assistance for Working Age People (Consequential Amendments) Order 2022[32].

11.2 Having consulted the SI Registrar, the Department takes the view that the instrument would qualify for the proportionality exemption and the free issue procedure does not apply.

12. European Convention on Human Rights

12.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

[31] https://www.legislation.gov.uk/uksi/2013/381/contents

[32] https://www.legislation.gov.uk/uksi/2022/177/contents/made

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").