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The Social Security (Personal Independence Payment) (Amendment) Regulations 2017

Thank you for your letter of 24 February to Paul Gray informing the Committee that the above regulations had been laid the previous day and setting out the reasons why the urgency provision¹ had been invoked on this occasion.

As you will be aware, Paul Gray has been appointed to lead the second independent review of the Personal Independence Payment (PIP), and he is undertaking this role independently of his SSAC responsibilities. In order to keep a transparent separation between Paul's two roles, he has stepped aside for the consideration of these regulations.² As Vice Chair, I led the Committee throughout the scrutiny process on this occasion. Accordingly I am responding to your letter on behalf of the Committee.

The Department presented the regulations to the Committee at our meeting on 8 March. After careful consideration the Committee concluded that, given the particular circumstances of these proposals, it would not take the regulations on formal reference. However, having considered the evidence presented to us by your officials, the Committee has a number of observations and recommendations to offer, and I set these out below.

Recognising the significant public interest in these regulations, it may be helpful to make clear at the outset that our scrutiny process did not revisit the policy intent, which has been established by Parliament. Accordingly, the principle of using activities and descriptors as *proxies* for claimant need was outside of the Committee's remit.

I should also emphasise that, as is the case for all of our advice to the Secretary of State, the Committee sought to consider the regulations from a wide range of perspectives, including:

¹ Social Security Administration Act 1992, section 173(1)(a) refers.

² Liz Sayce, SSAC Member and CEO of Disability Rights UK, also declared a conflict of interest and played no part in the scrutiny of *The Social Security (Personal Independence Payment) (Amendment) Regulations 2017*.

- the need for clarity and consistency for claimants, assessors and decision-makers;
- the requirement for robust data to gain an accurate picture of the existing position and the impact the revised legislation would have; and
- the importance of managing public expenditure prudently.

Planning and following a journey: psychological distress

At the Committee's meeting on 8 March, the Department's officials advised us that a clear and definitive reference to the policy intent³ - based on expert input to the original design of the Personal Independence Payment (PIP) - could be found in the PIP Assessment Guide. We were informed that evidence available to the Department confirmed that PIP assessments were being undertaken in accordance with that policy intent.

The Committee looks forward to receiving a copy of the Guide from officials, but in the meantime it is clear that, outside of the Department at least, there is some confusion regarding the policy intent. We would point to the differences in judicial opinion - and the fact that the Department itself made an error in making a concession about the policy intention in a previous submission to an Upper Tribunal⁴ - as evidence that **the Department must be clearer in its articulation of policy intent in the future.**

The Committee is particularly concerned that there may be unintended operational and legal consequences arising from the changes to the mobility descriptors in these regulations.

Officials advised the Committee that existing claimants would not see a reduction in the amount of PIP awarded by the Department as a result of these changes. This was based on evidence available to the Department that suggested assessors and Decision Makers had followed the PIP Assessment Guide. However, the Committee believes it is possible that some claimants may have been awarded the mobility component or a higher rate of mobility component by Decision Makers and First-Tier Tribunals following earlier decisions of the Upper Tribunal⁵ on this issue.

We therefore recommend that the Department should explore further the impact of these regulations on existing awards, where there is a risk that previous decisions may not be consistent with the original policy intent.

³ 'That people who cannot follow a journey because of a visual or cognitive impairment are likely to need more support (in their lives generally) than someone who experiences psychological distress, for example as a result of a social phobia or anxiety, when they undertake a journey'. Letter from the Minister for Disabled People, Health and Work to SSAC. 24 February 2017

⁴ HL v Secretary of State for Work and Pensions (PIP) [2015] UKUT 694 (AAC)

⁵ RC v Secretary of State [2015] UKUT 386 (AAC); and HL v Secretary of State for Work and Pensions (PIP) [2015] UKUT 694 (AAC)

We are also particularly concerned that, where there are multiple reasons why someone cannot ‘*follow a familiar journey without another person, an assistance dog, or an orientation aid*’, the new wording, and any changes to the guidance, may not simply return current decision making practice to the status quo. While officials suggested to us that the amendments to the regulations would simply reinforce current guidance and practice, it is not clear how tribunals, decision makers, or health care professionals conducting assessments will respond to changes in descriptors to exclude “psychological distress” altogether where this is a symptom of a condition, for example an intellectual or cognitive impairment which would generally result in a higher level of need.

It seemed to us that where multiple factors made it impossible for someone to follow a journey without help, it would be difficult in practice to strip out the element of psychological distress from the other factors when making a decision. As a result it may well be that it is not consistently treated in these circumstances.

We therefore recommend that the Department considers:

- a) testing the proposed changes with health care professionals and decision makers to ensure the policy intent behind the regulation is clearly understood; and**
- b) reviewing the descriptors to make sure they are clearly defined and remove ambiguity, for example making explicit reference to “for reasons such as psychological distress alone”.**

Managing therapy

Turning to the issue of managing therapy, the Department’s equality analysis acknowledges that “*the impact of this judgment⁶ is complex to predict and so there is a significant risk that these costs could be much higher than estimated, posing a substantial fiscal risk*”. This is a clear indication that a better understanding of impact is needed.

However as the number of cases and projected costs are so significantly lower, the case for invoking the urgency procedures seems less obvious.

We therefore recommend that the Department should both (a) consult more widely with representative bodies and health care professionals; and (b) improve the estimate of likely impact before the changes are introduced.

Lessons for the future

The Committee was advised by officials that the assessment criteria for PIP was set out in secondary legislation in order to give the Department the flexibility to make revisions relatively quickly to reflect operational experience and tribunal decisions.

⁶ Secretary of State for Work and Pensions v LB (PIP) [2016] UKUT 0530 (AAC)
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Building on this intention, **we recommend that the Department considers what lessons can be learned from the current exercise, for example including:**

- a) establishing a clear definition of the intended policy principles behind the design of the PIP assessment;**
- b) strengthening the data available to the Department so it has a better understanding of the potential impacts of future changes.**

For completeness, I attach a copy of the relevant extract from the minutes of our meeting on 8 March.

In closing, I would like to thank James Bolton and his team for presenting the regulations to the Committee and responding to its questions during an extended evidence session.

I am copying this letter to the Secretary of State, Lord Henley, Paul Gray, Robert Devereux, Jeremy Moore, and James Bolton.

Colin Godbold
Vice Chair

An extract from the minutes of the Social Security Advisory Committee meeting held on 8 March 2017

4. The Social Security (Personal Independence Payment) (Amendment) Regulations 2017

4.1 The vice-Chair welcomed James Bolton (Deputy Director Disability Benefit, Decision Making and Appeals), Kerstin Parker (Head of PIP Policy) and Tom Foster (PIP Programme Deputy-Director) to the meeting.

4.2 Opening the discussion, the vice-Chair explained that Paul Gray, the Committee Chair, would take no part in the scrutiny of the regulations, either in private with Committee members or in this meeting, on the grounds that his role in conducting a second review of the Personal Independent Payment (PIP) would present a conflict of interest. On the same grounds Liz Sayce, as CEO of Disability Rights UK, had also decided that she should similarly absent herself from any part of the Committee's deliberations. Victoria Todd had also declared that, as a member of the First-tier Tribunal, she was regularly involved in determining PIP appeals, but confirmed that had not been involved in any of the cases which provided the background to these regulations. The vice-Chair confirmed that no conflict of interest arose in Victoria's case, and that she would therefore participate in the scrutiny process. While it was, in particular, unfortunate that Liz Sayce was unable to participate in the scrutiny of these regulations given her particular focus on issues affecting disabled people and those with chronic health conditions, the vice-Chair emphasised that other Members had considerable knowledge and experience on these issues.

4.3 Introducing the regulations, James Bolton set out the context in which the amendments were being made. The two separate judgments of the Upper Tribunal had both been received by the Department on 28 November 2016. Since that date DWP had estimated that there may be up to 50,000 new or reassessed awards to claimants whose entitlement would be affected by the judgments. On the Department's calculations, at the time of the judgments there could be around 165,000 existing cases where PIP could be awarded or increased on the basis of the judgment in MH¹ (the case involving the planning and following of journeys). The estimated cost to the Department over the forecast period up to 2021/22 was £3.7bn. The scale of the potential financial implications led the Secretary of State to lay the regulations in Parliament before presenting them to the Committee for scrutiny. In

¹ MH v Secretary of State for Work and Pensions (PIP) [2016] UKUT 0531 (AAC)

doing so he determined that, in the terms of the legislation,² it was expedient to do so by reason of urgency.

4.4 James Bolton also advised the Committee that, alongside several consultations on the reform of Disability Living Allowance (DLA), there had originally been a number of large consultation exercises in relation to the structure of PIP and the assessment criteria. This process had led to the refining of the different activities – two relating to mobility and ten relating to daily living. Each substantive version of the assessment had been rigorously tested before being incorporated into the final version of the PIP Regulations which Parliament had approved. Like DLA, PIP was a benefit which recognised the extra costs associated with disability, both physical and psychological, and sought to make a contribution towards them. Any national system which sought to ascertain each individual's extra costs and award benefit to meet them was felt to be impractical when PIP was originally designed. The activities set out in legislation were therefore designed to serve as proxies which determined an overall level of need. Each activity was set out in a way that represented an ascending scale of need, with a higher number of points being scored as the need increased. Such an approach would inevitably mean compromises, but overall it was believed that a fair and reasonable approach had been developed and this was demonstrated through the testing that had been undertaken.

4.5 PIP had never been based on a person's individual health condition, but on the limitation in function caused by a particular condition or conditions. Unlike DLA, the assessment criteria were set out in secondary legislation precisely because it would give greater flexibility in amending the wording, as the need arose. Since being introduced, there had been the development of case-law as judges of the Upper Tribunal determined appeals from the First-tier Tribunal. Some of those decisions had agreed with the Department's position and others had not. However this set of regulations would represent the first occasion on which the Department would have acted to amend and clarify the wording of a descriptor on the basis of a legal judgment. In fact the amendments being introduced by these regulations would be the first substantial changes to the PIP regulations since their introduction.

4.6 Turning to the first of two particular judgments that led to these regulations, James explained that daily living activity 3 (managing therapy or monitoring a health condition) and its point-scoring descriptors had been framed on the general proposition that assistance with the management of therapy at home, including supervision or prompting, indicated a higher level of need than assistance with managing medication or monitoring a health condition. This was the issue central to the judgment in LB.³ James assured the Committee that the Department had always

² Section 173(1)(a) of the Social Security Administration Act 1992 c.5

³ Secretary of State for Work and Pensions v LB (PIP) [2016] UKUT 0530 (AAC)

been clear, both in its published response to the consultation on the PIP assessment criteria and regulations (dated 13 December 2013) and in the guidance provided for decision makers and others, that there should be a distinct demarcation between medication/monitoring a health condition and therapy. In determining a case where the assistance given to the claimant in monitoring their health condition was demanding and fairly time-consuming, the Upper Tribunal judge had held that a fairer way of interpreting the legislation was to classify the help being given as 'therapy'. Effectively he blurred the boundary between two categories which the Government had always intended, and interpreted, as being distinct. The amendment was being made to restore the original policy intention. The annual cost of leaving the judge's decision to stand was estimated to be £10m a year.

4.7 The second judgment (ie MH) concerned mobility activity 1 (planning and following a journey). Of the six descriptors in that category two included a reference to "overwhelming psychological distress". The issue for consideration was whether or not it was valid to include psychological factors in interpreting the other descriptors. Different judges of the Upper Tribunal had reached different decisions on that point and a tribunal of judges had been convened to settle the issue. Their decision was for a broader interpretation. Since this decision also contravened the original policy intention, the Department had decided to amend the regulations in order to clarify the wording to ensure that the other descriptors within mobility activity 1 could only be satisfied for reasons other than psychological distress. This second judgment had far greater cost significance for the Government than the first judgment, but the same principle applied in both cases – the Department sought to respond quickly in order to restore the original policy intention.

4.8 James further advised the Committee that the Secretary of State had sought leave to appeal against both decisions. Leave had been granted in MH and a decision was awaited in LB. There had also been an Early Day Motion put down by the Liberal Democrats which sought the annulment of the regulations. No date in the Parliamentary timetable had yet been determined for that debate.

4.9 The following main questions were raised by Committee members in discussion:

- (a) Although the Department's position was that the original policy intention had been clear from the outset and understood, the judges in the mobility case evidently took a different view. What was the Department's best evidence as to the policy intention?**

In its published response to the consultation exercise the Department had explained its position on mobility activity 1. That position was also set out in the PIP Assessment Guide, the relevant section of which would be sent to the Committee for information. The Department further believed that the legislation itself had always been clear, although the court had disagreed.

- (b) The judges in the mobility case had looked at the documentation on mobility activity 1 and said that they could not discern the original intent from it.**

It was true that the legislation was complex and that the interpretation favoured by the judges was one they were entitled to reach, even though the Department disagreed with it. The interpretation intended by the Government had been consistently applied by decision makers from the inception of PIP. It was also the prevailing view adopted by First-tier Tribunals.

- (c) If the policy intention had always been clear, why had the Secretary of State made the concession in HL that psychological distress was a valid factor in determining whether mobility activity descriptor 1f was satisfied?**

That concession had been a mistake. In the hearing involving MH the Department explained to the court that that concession had been erroneously made.

- (d) The Equality Analysis stated that, in addition to wider data analysis, a small in-depth exercise had looked at actual cases where claimants with a psychological health condition were assessed as meeting mobility activity descriptor 1b before the judgment (ie needing prompting to be able to undertake any journey to avoid overwhelming psychological distress and scoring 4 points) and who might benefit from the judgment. How many cases were examined?**

The Department had reviewed 64 cases to assess the likely impact of the judgment. Within the Equality Analysis, the Department reflected work that had also been undertaken to identify the most likely primary disability or health condition experienced by those who would be affected by the judgment (or by any decision to reverse its effect).

- (e) How did the Department identify particular conditions in cases where claimants had multiple psychological health conditions which might produce a cumulative effect but which were difficult to isolate?**

A common sense approach had been adopted which identified the main disabling condition. As a benefit PIP targeted help on those with mental health conditions far more effectively than DLA had done. Of those with mental health conditions receiving the mobility component within DLA, only nine per cent had been entitled to the higher rate. With PIP, 27 per cent of claimants received the enhanced mobility rate. That proportion would be unchanged as a result of the new legislation. The Department had undertaken tests to ensure that the benefit was going to the right people and was confident that the system was working as intended.

- (f) How precise was the 27 per cent as a group? Would it include claimants who had a combination of physical and mental impairments?**

Because the Department only recorded and published details relating to a person's primary health condition, it was somewhat imprecise, although based on the best information available.

- (g) The new form of wording in descriptor mobility activities 1c, 1d and 1f would require a decision maker to ignore any psychological distress experienced by the claimant. How confident was the Department that that was possible in practice when for some claimants, their physical and psychological impairments were closely linked?**

Healthcare professionals were doing that already. Quality testing showed that correct advice was being given – not in every case, but broadly so – and, where any errors had been identified, they were corrected. Case managers also undertook standard sampling to ensure that guidance was being followed.

- (h) Part of the stated rationale for according higher points for someone unable to follow a familiar route without another person because of a physical health condition was that psychological health conditions tended to fluctuate more. Given that PIP was structured to accommodate health fluctuations, and the fact that the Secretary of State has the discretion to make a fixed term award of benefit if he considered the person's condition might improve, could the Department not have allowed the judgment to stand and coped with the issue of fluctuations in its normal way?**

The descriptors were set out in a way that prescribed a hierarchy of need. Claimants were then scored on the basis of the highest descriptor which applied. In the MH judgment the judges had effectively broken down that hierarchy, and the regulations would simply restore it.

- (i) If a person was partially sighted, but not to a level which satisfied descriptor 1f, and was also agoraphobic (which, on the basis of the Upper Tribunal judgment, would attract 12 points) would the Department expect the health care professional to separate out the different conditions?**

Health professionals were experienced in undertaking PIP assessments having undergone comprehensive training and being put through an approval process. Part of their role was carefully drawing out the relevant factors when considering any activity and consequent descriptor.

- (j) The cost estimates provided in relation to the judgment in LB were that it would be about £10m a year but could be higher. Did that mean that the £10m figure was the minimum cost?**

The Department's costings had taken account of the possible increases in the number of claimants in receipt of the Employment Support Allowance and Carer's Allowance who would qualify for the disability premium, but had not included an amount for the disability premium in other benefits nor of possible exemptions from the benefit cap.

- (k) In LB, where the cost implications were far less significant, why did the Department not defer legislating until it had taken soundings from stakeholders, and come to a more considered position? Why was 'urgency' invoked in overturning LB?**

Although the point about costs was acknowledged, the principle of restoring the policy intention was applicable in both cases.

- (l) In suggesting a more considered approach to revisiting the wording in daily living descriptor 3, was there scope for incorporating the use of digital intervention in prompting people in remote areas to take medication?**

The Department would respond separately to the Committee on that point.

- (m) Why appeal the decision of the Upper Tribunal in both cases when the Department was legislating to overturn their effect?**

Without a favourable decision in the Court of Appeal the Department would be obliged to identify individuals whose entitlement would have been affected between the day of the judgment and the date the legislation came into effect.

- (n) In the case of LB the demarcation between therapy and medication/monitoring a health condition had been deliberately blurred because, in that case the claimant's needs were higher and it was a way of interpreting the legislation that recognised her needs appropriately. Was that not the policy intention?**

In that particular case it was possible to see why the judge took the approach he did, but overall, it meant that a reinterpretation of 'therapy' introduces a new level of need that was never intended. It would also bring a large number of claimants within its scope when it was broadly inappropriate to do so. The criteria set out in the existing legislation had all been tested and found to be both a reliable and valid indicator. A changed approach following the two judgments would lack that testing and validation.

(o) Was it correct that the Department's approach set people in coherent groups and that something had to be found which set a line of delineation between them?

Yes.

4.10 After a time of private discussion the vice-Chair confirmed that the Committee did not intend to take the regulations on formal reference. Nonetheless the Committee had a number of concerns which it would express in writing to the Minister for Disabled People, Health and Work.

4.11 The vice-Chair thanked the officials for attending and addressing the Committee's questions.