

Legal Detention

Index

- Introduction
- Meaning of legal detention in legal custody
- Adults/young people and legal detention
- Legal detention locations
- Legal detention and entitlement to ADP
- Legal detention and short-term assistance
- Types of legal detention
- Leaving legal detention

This content relates to ADP

Introduction

1. This chapter looks at the effects of legal detention on entitlement to, and payment of, Adult Disability Payment (ADP)

2. Individuals, over the age of 18, in receipt of either or both the daily living or mobility components of ADP will be paid £nil for both components after 28 days in legal detention¹

1 ADP regs, reg. 30(3)(a)

3. This is because the cost of meeting the daily living and mobility needs of individuals are met from public funds while they are in legal detention. For the purposes of determining payment of ADP, the first day in legal detention for individuals is the day after the day they enter legal detention, and the last day is the day before the day they are released

4. Ongoing entitlement to, and payment of the mobility component of ADP is unaffected when an individual is in legal detention and aged 16 or 17.¹ However they will be paid £nil for the daily living component after 28 days in legal detention.

1 ADP regs, reg. 30(3)(b)&32(2)(c)

5. This chapter relates to the unscheduled reviews chapter which explains both:

- when an unscheduled review should take place
- what a determination without application is

Meaning of legal detention in legal custody

6. Legal detention refers to any detention, in Scotland, in the rest of the UK and the rest of the world, within the meaning of section 295 of the Criminal Procedure (Scotland) Act 1995¹. Legal detention does not alter an individual's ordinary residence for the purposes of the residence and presence conditions. For instance, if an individual is detained in a foreign prison abroad, if they are 18 or over, they will be

paid £nil for both components after 28 days in legal detention. Also, if they are aged 16 or 17, they will be paid £nil for the daily living component after 28 days in legal detention.

1 ADP regs, reg. 2

7. An adult or young person in Scotland can be legally detained if they are either:

- detained in legal custody awaiting trial
- sentenced to imprisonment because of court proceedings.

This list is not exhaustive.

Detention in legal custody typically happens before or during legal proceedings. An individual can be taken into legal custody when:

- they are charged with a serious offence such as murder, rape or terrorism
- an individual has a history of offending
- there is the risk of the individual posing a danger to witnesses

This list is not exhaustive.

A custodial sentence may be given to an individual who is convicted of an offence.

8. For the purposes of determining entitlement to ADP, legal detention does not include any day in which an individual is an in-patient in a hospital or a hospice. The relevant rules for these situations can be found in the Decision Making Guidance chapter on care homes, alternative accommodation and hospitals and similar institutions.

1 ADP regs, reg. 30(2)

Example: a young person legally detained in hospital

Julia is 16 and has a significant mental health condition. She is entitled to the standard rate of the daily living component and standard rate of the mobility component of ADP. Julia is convicted of an offence and a custodial sentence was imposed, which means she is subject to legal detention within the meaning of Section 295 of the Criminal Procedure (Scotland) Act 1995. Before entering legal detention, Julia went straight to hospital to have treatment for her mental health condition. Julia will be transferred to legal detention when her treatment is completed.

Julia is still entitled to receive payment of the daily living and mobility components of ADP while in hospital, as she is being treated for her condition. When she is transferred to legal detention, Julia will be paid £nil for the daily living component of ADP after 28 days. As Julia is under 18, the payment of the mobility component will be unaffected throughout this period.

9. For more information on the impact of hospitalisation on ADP entitlement, refer to Decision Making Guidance chapter on care homes, alternative accommodation and hospitals and similar institutions.

Adults/ Young people and legal detention

Young people aged 16-18

10. Young people between the ages of 16 and 18 will usually be prosecuted in court unless they already have an order by a children's hearing.

Individuals over 18

Individuals over 18 will always be prosecuted in court.

Legal detention locations

It is possible to be legally detained:

- in a prison or a detention centre
- in a hospital or similar institution
- at home
- abroad
- in a young offenders' institution.

This list is not exhaustive.

Being legally detained abroad

11. This refers to any legal detention which takes place outside of the United Kingdom.

12. Individuals who are legally detained abroad are subject to the same rules discussed above. If they are over 18 and in receipt of either or both the daily living and mobility components of ADP, they will be paid £nil for both components after 28 days. For 16- and 17-year-olds, the mobility component is unaffected, but they will be paid £nil for the daily living component after 28 days.

13. Being in Legal Detention abroad does not affect an individual satisfying the ordinary and habitual residence requirements for ADP. However, it could impact them being present in the common travel area, depending on how long they will remain in legal detention, and so impact upon their entitlement to ADP.¹

14. Temporary absences from the UK of less than 13 weeks should not affect an individual's entitlement to ADP.² Case managers will have to consider the potential impact on entitlement in all cases involving legal detention outside the UK. For more information on this and temporary absence from the UK, see the Residence and Presence Chapter.

¹ ADP regs, reg. 15(1)(d)

² ADP regs, reg. 16

Example: an individual who is legally detained abroad for 50 days

Lyla is 18 and is entitled to the standard rate of daily living and mobility components of ADP. She enters legal detention on 1 September for 50 days, while visiting Japan.

Lyla's payment of both components is reduced to nil after 28 days. She is released from legal detention on 21 October and returns to Scotland 5 days later. Lyla was not absent from the UK for more than 13 weeks and is still entitled to ADP.

Lyla doesn't have to apply for ADP again. She simply informed Social Security Scotland of the change in her circumstances. The case manager carried out a determination without application and determined she remained entitled to the same level of entitlement.

Example: an individual who is legally detained abroad for 120 days

Tom is 26 and entitled to the standard rate of daily living and mobility components of ADP. He is legally detained for 120 days on 1 April, while visiting Australia. Thomas is released on 30 July and returns to Scotland 2 days later.

Tom's payments of both components is reduced to £nil after 28 days. Also, he was no longer entitled to ADP after 13 weeks spent in Australia. This is because he would be considered absent from the UK after the 13 weeks had elapsed.

On his return to Scotland, Tom had to complete a new application under these circumstances.

Legal detention and entitlement to ADP

The mobility component

Individuals in legal detention and aged over 18 are entitled to be paid £nil for the mobility component, after they have been in legal detention for a full calendar 28 days. This 28-day period begins on the day after the date they enter legal detention. Individuals that are 16 or 17 will continue to be entitled to payment of the mobility component while in legal detention.¹

1 ADP regs, reg. 30(3)(a)

15. This remains the case for 16- and 17-year olds entitled to the enhanced rate of the mobility component of ADP, who have opted into the Accessible Vehicles and Equipment (AVE) scheme. This means that an individual's family or carer will continue to have access to the leased vehicle, powered scooter or wheelchair while the individual is in legal detention.

16. For more information on the AVE scheme please refer to the ADP mobility component chapter and to the Operational Guidance¹.

1 ADP regs, reg. 55&56

17. If an individual turns 18 after having been in legal detention for 28 days, the mobility component ceases to be paid from their 18th birthday and will not recommence until the individual leaves legal detention.¹ However, if an individual turns 18 during the initial 28 days in legal detention, their payment will only reduce to £nil from the day after they have been in legal detention for 28 days.

1 ADP regs, reg. 30(3)

18. Entitlement to the mobility component for those over 18 continues while payment stops. This means that individuals will not need to make a new application when they are released from legal detention, and payment of the mobility component will begin again upon release.

19. When an individual is aged 16 or 17, entitled to the mobility component of Personal Independence Payment and in legal detention on the date they transfer from Personal Independence Payment to ADP, the case manager should complete a determination without application. Entitlement to the mobility component should begin before the date of the determination, but not before 13 June 2022.

20. If the individual has received payment for the mobility component of Personal Independence Payment for any period after the date their ADP entitlement commences, any amount of ADP should be reduced by the amount the individual has already received for the mobility component of Personal Independence Payment.¹

1 ADP regs, sch2,part3, para 13

21. For more information on this, refer to the case transfer Decision Making Guidance.

The daily living component

22. Individuals in legal detention are entitled to be paid £nil of the daily living component from the day after they have been in legal detention for a full 28 days, regardless of their age¹. This 28-day period begins on the day after the date they enter legal detention². Refer to paragraph 30 below for more information on what happens when entitlement to ADP begins while in Legal Detention.

1 ADP regs, reg. 30(3)

2 ADP regs, reg. 31(2)(a)

23. Entitlement to the daily living component continues while payment stops. This means that individuals will not need to make a new application when they are released from legal detention, and payment of the daily living component of ADP will begin again upon release.

Example 1: an individual enters legal detention after legal proceedings

Callum is 17 and entitled to the standard rate of the daily living and mobility components of ADP. He is charged with a crime but is not taken into legal custody before or during legal proceedings. This means he is still entitled to be paid the daily living component and mobility components of ADP.

Callum is sentenced to prison for 6 months. He is no longer entitled to be paid the daily living component of ADP after he spends 28 days in prison, after being sentenced. As Callum is under 18, he remains entitled to payment for the mobility component of ADP.

Example 2:

Janine is 18 and entitled to the enhanced rate of the daily living component and the standard rate mobility component. She isn't taken into legal custody during her trial and as a result, remains entitled to payment for both components of ADP.

Janine is sentenced to prison for 1 year. As Janine is 18, she is no longer entitled to payment of either component of ADP after she spends 28 days in prison.

24. The Scottish Prison Service will inform Social Security Scotland when an individual has entered, or is released from, legal detention. For more information on this process, please see the *Unscheduled Reviews* chapter.

25. A review will need to be carried out at the earliest opportunity if the scheduled review date passes while the individual is in legal detention.

26. An individual entering or leaving legal detention is regarded as a change of circumstances, if it will likely lead to a change in entitlement. A case manager should complete a determination without application in these circumstances.

27. Individuals may be overpaid ADP if Social Security Scotland is not notified of a change¹. For more information on what to do if there has been an overpayment, see the *Overpayments* section of the *Payments* chapter.

1 SS Act 2018, s. 56

Example: an individual whose award of ADP remains the same after being released from legal detention

Paul is 19 and entitled to the standard rate of the daily living and mobility components of ADP. He is sentenced and legally detained in prison on 25 March and is no longer paid for either component after 28 days, from 23 April. He is released after 85 days on 18 June. Social Security Scotland are informed promptly when he enters and is released from legal detention.

Paul remains entitled to both components during his legal detention, even though payments have stopped after 28 days. Upon release, he will not need to make a new application, and payment of both components of ADP will begin again following a determination without application that will be carried out once Social Security Scotland are notified.

Social Security Scotland confirm that Paul's circumstances remain the same and he is entitled to payment of the daily living and mobility components of ADP again from 18 June.

Example: an award of ADP is reviewed after an individual is released from legal detention

Charlie is 20 and is entitled to the standard rate of living component of ADP. She is legally detained on 1 April for 8 months. Charlie is no longer paid the daily living component of ADP while in legal detention after 28 days.

Charlie informs Social Security Scotland when she is released from legal detention in November. This means there is a change of circumstances concerning her award. The case manager will need to make a determination without application before Charlie's payments of the daily living component of ADP can begin again.¹

1 ADP regs, reg. 48(a)

28. It is possible to make an application for ADP while in legal detention. An individual's entitlement to ADP may begin when they are in legal detention.¹ The effect of legal detention is to reduce the individual's payments to £0, when they are 18 or over for both ADP components, and when they are 16 or 17, for the daily living component. When an individual's entitlement starts whilst they are in legal detention, this will occur on the first day of their entitlement until the day they leave legal detention.

1 ADP regs, reg. 32

Example: an application for ADP is made when an individual is in legal detention

Isla is 16. She enters legal detention on 1 April and will be released from legal detention on 1 June. Isla applies for ADP while she is in legal detention on 12 April.

The case manager determines that Isla meets the eligibility criteria to be entitled to the daily living and mobility component of ADP at the standard rate. Payment of the daily living component of ADP is set at £0 whilst Isla is in legal detention. As Isla is under 18, however, she is entitled to payment of the mobility component while she remains in legal detention.

Social Security Scotland is informed of Isla's release on 1 June. She is now entitled to be paid at the standard rate for the daily living component of ADP from 1 June onwards.¹

1 ADP regs, reg. 32(2)(c)(ii)

Legal detention and short-term assistance

29. Short-term assistance is a payment available to individuals challenging a determination on an ongoing award of assistance. This includes re-determinations and appeals.

30. The value of short-term assistance is the difference between the value of assistance before the determination and the current rate. Payment of short-term assistance lasts for the duration of the re-determination or appeal.

- An individual whose daily living or mobility component payments have been reduced to £nil because they are in legal detention is not entitled to short-term assistance¹.

1 ADP regs, par 1(6), part 1, schedule 2

Types of legal detention

Custodial sentences

31. A custodial sentence is a sentence of imprisonment or detention either:

- of a person (between the ages of 15 and 20) in a young offender's institution
- of an adult offender

32. The term 'custodial sentence' includes a deferred sentence of imprisonment at the end of criminal proceedings in Scotland. This is also known as a suspended sentence in the rest of the UK.

33. A deferred sentence is when the individual is not in prison but can be sent to prison if they commit an offence during a period of time determined by a judge. This is normally between 3 to 12 months.

Individuals who are given a deferred sentence are still entitled to be paid for entitlement to ADP components, unless they enter legal detention during this time. If this happens, the normal rules above apply for individuals in legal detention after 28 days for 16- and 17-year-olds, and for those aged 18 and over respectively.

Example: an individual commits an offence during a deferred sentence and enters legal detention

David, who is 19, is entitled to the mobility component of ADP at the standard rate. A judge rules during legal proceedings that he should be given a deferred sentence of 8 months. David is still entitled to be paid for the mobility component of ADP, because he is not in legal detention.

However, 6 months later, David commits a second offence and is taken into legal detention. His entitlement to payment of the mobility component of ADP should stop after 28 days in legal detention.

34. When a sentence has been imposed, a higher court can later either:

- quash or cancel the conviction

- substitute the sentence with an order such as a community pay back order or a fine

35. An individual's payments of the daily living component and/or mobility components of ADP should begin again once they are released from legal detention, so long as they still meet the eligibility criteria.

36. An individual cannot receive backdated payment of ADP for the time they were in legal detention.

Leaving legal detention

37. The date that an individual leaves legal detention is not counted as a day in legal detention¹.

1 ADP regs, reg. 31(2)(b)

38. The 28 days of continued entitlement to payment of ADP can comprise of more than one period. If an individual leaves legal detention but enters again in one year or less, those 2 periods can be linked. This means if an individual is in legal detention for at least 28 days, is released and convicted again within a year, their entitlement to payment would stop on the first day of their second period in legal detention.¹

1 ADP regs, reg. 30(4)

Release on license

39. Release on license means an individual leaves prison after completing a specified part of their original sentence. All cases of release on license come with conditions and the individual can be returned to prison if they breach these conditions.

40. An individual released on license, including temporary license, is no longer in legal detention. Upon release, payment of the ADP components can begin again if the individual continues to meet the eligibility criteria.

41. Early release schemes include:

- parole is where the prisoner is released on the recommendation of the Parole Board for Scotland after completing a specified part of their original sentence
- Home Detention Curfew (HDC) is commonly referred to as "tagging". A prisoner is released on license before their release date. They must wear an electronic tag as part of their release conditions and remain at home during agreed periods of the day.
- Supervised Release Order (SRO) is a period of supervision after a sentence of between 12 months and 4 years, where the court determines that there may be a risk to the public

Example: an individual is subject to a Home Detention Curfew

Karen is 19 and entitled to the standard rate of mobility component for ADP. She is taken into legal detention and is no longer entitled to payment of the mobility component after 28 days. She is released 6 months later but must wear an electronic tag and follow a strict curfew, as part of the conditions of her release.

Karen can start to receive payment of the mobility component of ADP now she is no longer in legal detention. This is because she is not imprisoned or held in legal custody. Instead, she is being monitored by an electronic tag to ensure she is at home when she should be.

Release on temporary license

42. In certain circumstances, individuals in legal detention may be allowed short periods of release on temporary license. The purpose of this is either:

- for compassionate reasons - such as terminal illness, bereavement or to support their dependents
- to help the individual improve their chances of resettlement after release.

43. Individuals released on temporary license are not imprisoned or detained in legal custody. This means they can be paid for both components of ADP. Payment of ADP components should resume during any period not spent in legal detention. To ensure this happens, the case manager will need to make a determination without application¹. In calculating an individual's entitlement in these circumstances, the days on which the individual begins the absence from and returns to legal detention are not to be counted as days in legal detention.²

1 ADP regs, reg. 48(a)

2 ADP regs, reg. 31(3)

Example: an individual who is entitled to the daily living component is released from legal detention on temporary licence

Connor is 18 and entitled to the standard rate of the daily living component of ADP. He is legally detained on 1 April and after 28 days, is no longer entitled to payments of the daily living component. He is released from legal detention on temporary licence for 50 days on 1 June.

Connor can start receiving payment of the daily living component of ADP starting from the day he leaves legal detention, because he notified Social Security Scotland within one month of the change of circumstances. Connor re- enters legal detention on 22 July for another 40 days.

Connor is no longer paid for the daily living component of ADP. Connor is released from legal detention permanently on 30 August. He can once again start receiving payment of the daily living component of ADP, because he notified Social Security Scotland within one month of the change of circumstances.

44. Individuals are expected to notify Social Security Scotland of any change in circumstance within one month of the change first occurring. In some circumstances, an individual may have good reason for not notifying within a month. More information on this can be found in the change of circumstances chapter.

Bail

45. Individuals can be released from legal custody on bail before or during legal proceedings. Individuals who are released on bail can be paid for both components of ADP because they are not in legal detention. Individuals who break the conditions of their bail and are legally detained will have:

- payments for both components of ADP stopped if they are over 18, after 28 days
- payment of the daily living component stopped if they are 16 or 17, after 28 days

Example: an individual who is entitled to the daily living component of ADP is released from legal detention on bail

Lizzie is 18 and entitled to the daily living component at the standard rate. She is legally detained on 8 March and awaiting legal proceedings. Lizzie is released on bail after 12 days on 20 March. She can still be paid for the daily living component of ADP because she was not in legal detention for more than 28 days.

Example 2: An individual who is entitled to the daily living component of ADP breaks their bail conditions

Max is 20 and entitled to the standard rate of the daily living component of ADP. He committed an offence and has been released on bail, pending further legal proceedings. Max can still be paid for the daily living component because he is not in legal detention.

Max breaks his bail conditions and is legally detained on 22 August, while he awaits his trial on 1 October. Max's payment for the daily living component is stopped after 28 days in custody because he was legally detained.

Authorised absence

46. An authorised absence is a period when a prisoner is not held in legal detention. An example of this is if a prisoner is released on temporary license to assist with resettlement.

47. Individuals released because of an authorised absence can receive payments of the daily living component of ADP because they are not in legal detention. Individuals who are over 18, and as a result not entitled to payment for the mobility component while legally detained, can also receive the mobility payment again in these circumstances.

48. An individual's entitled to both components of ADP must be considered on each occasion they enter or leave legal detention because of authorised absences. This is because payment of both components can be made for a period not spent in legal detention. Payment will not start until the individual has left legal detention and a determination without application has been made.

49. A prisoner over 18 is not treated as though they are in legal detention on any day on which they are an in-patient in a hospital or in a hospice. If they have already been in prison for 28 days or more, the period in hospital or a hospice is a continuation of the time period spent in prison. However, if they have moved to a hospice and are terminally ill, their payment would recommence, and they would be entitled to payment of the enhanced rate of both components of ADP.

1 ADP regs, reg. 31(5)

52. If a prisoner is aged 16 or 17, they will be entitled to payment of the daily living component of ADP again for the period of time they spend in hospital. Entitlement to payment of the mobility component will be unaffected and continue. For more information on this point, refer to the section on hospital admissions for ADP in the DMG chapter, 'Effect of time spent in care homes, hospitals and residential establishments'.

Example: an individual who is entitled to the daily living component of ADP is released from legal detention because of an authorised absence

Jamie is 17 and entitled to daily living component of ADP at the standard rate. He entered legal detention on 30 April for 32 days. His payment of the daily living component is stopped after 28 days.

Jamie is released and leaves legal detention on 1 June because of an authorised absence. He is entitled to receive payment for the daily living component of ADP from this date because he notifies Social Security Scotland within a month of being released.

Jamie returns to legal detention on 26 June for another 32 days. His payment of the daily living component of ADP is stopped as soon as he returns to legal detention. This is because these 2 periods of legal detention are linked as there is less than one year between them.

Jamie is released on 3 August, having served the remainder of his sentence. He promptly notifies Social Security Scotland about his release and is once again entitled to receive payments of the daily living component of ADP from 3 August onwards.

Pardons

50. Prisoners who are pardoned leave legal detention. Individuals who are pardoned are entitled to receive payments of both components of ADP when they

leave legal detention, if they still meet the eligibility criteria. Individuals in these cases cannot receive a backdated payment of ADP for the time they were in legal detention. This is because the cost of meeting the care needs of individuals are met from public funds while they are in legal detention.

Appeals

51. An individual can appeal a conviction by challenging the decision of the court when in legal detention. If the appeal is successful, the individual both:

- leaves legal detention
- can receive payment of both components of ADP once they have left legal detention following a determination without application.

52. Individuals in these cases cannot receive a backdated payment of ADP for the time they were in legal detention.

End of chapter