

## Legal Detention

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### Introduction

1. This chapter looks at the effects of legal detention on entitlement to, and payment of, Child Disability Payment (CDP). The main effect is that individuals in receipt of the care component of CDP will be paid £nil for the care component after 28 days in legal detention<sup>1</sup>. The individual remains entitled to the CDP care component.

*1 CDP regs, reg. 19(1) and (2)*

2. This is because the cost of meeting the care needs of individuals are met from public funds while they are in legal detention. For the purposes of determining payment of CDP, the last day in legal detention for individuals is the day before the day they are released.

3. Ongoing entitlement to, and payment of, the mobility component of CDP is unaffected when an individual is in legal detention.

4. 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

5. To determine entitlement to payment of the care component of CDP, legal detention refers to any detention in legal custody, in Scotland or in the rest of the UK within the meaning of section 295 of the Criminal Procedure (Scotland) Act 1995<sup>1</sup>.

*1 CDP regs, reg. 2*

6. A child 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.

7. 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.

8. A custodial sentence may be given to an individual who is convicted of an offence.
9. For the purposes of determining entitlement to CDP, legal detention does not include the following two situations:
- the individual is serving a custodial sentence and has been transferred from legal detention to hospital or hospice to receive treatment for a mental health condition
  - the individual has been sentenced to legal detention, but first must go to hospital to receive treatment for a mental health condition before serving the rest of the custodial sentence.

10. In these situations, the individual should not be treated as being in legal detention. Payment of the care component of CDP should resume during any period spent in hospital or hospice<sup>1</sup>. To ensure this happens the case manager will need to make a determination without application<sup>2</sup>.

*1 CDP amendment regs, reg. 11  
2 CDP regs, reg. 31(a)*

11. Case managers should seek advice if they are unsure whether an individual is in 'legal detention' for the purpose of determining entitlement to payment of the care component of CDP.

### **Example: a young person legally detained in hospital**

Sasha is 17 and has a significant mental health condition. She is entitled to the middle rate of the care component and lower rate of the mobility component of CDP. Sasha is sentenced to a term in legal detention after being convicted of an offence. Before serving her custodial sentence, Sasha went straight to hospital to treat her mental health condition. Sasha will be transferred to legal detention when her treatment is completed.

Sasha is still entitled to receive payment of the care component of CDP while in hospital. When she is transferred to legal detention, Sasha will be paid £nil for the care component of CDP after 28 days.

## **Young people and legal detention**

### **Children under 12**

12. Children under 12 cannot be convicted or have a criminal record in Scotland. They can be referred to a children's hearing if they appear to be at risk or vulnerable. This could be for behaviour such as assaulting others or theft. The hearing can help decide how best to help the child and their family.

### **Children aged 12-15**

13. Children between the age of 12 and 15 are most likely to be referred to the Children's Reporter if they commit an offence. The Children's Reporter is responsible for deciding whether to refer the child to a children's hearing. The decision by the children's hearing can become part of a criminal record.

14. Children aged 12 or older can also be prosecuted for a criminal offence in court if the offence is serious.

### **Young people aged 16-18**

15. 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.

### **Legal detention locations**

16. 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**

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

18. Individuals who are legally detained abroad do not fall under section 19 of our regulations. This is because being legally detained abroad does not fall under section 295 of the Criminal Procedure (Scotland) Act 1995.

19. Entitlement to CDP stops after 13 weeks as a result of the individual being temporarily absent from the UK. This is because they are treated as being present in the UK for the first 13 weeks of a temporary absence<sup>1</sup>. This applies to both components of CDP. For more information on temporary absence from the UK, see the Residence and Presence chapter.

*1 CDP regs, reg. 7(1)(a)*

**Example: an individual who is legally detained abroad for 60 days**

Basira is 16 and is entitled to the lowest rate of the care component and lower rate of the mobility component of CDP. Basira enters legal detention on 1 June for 60 days while visiting Denmark. She is released from legal detention on 31 July and returns to Scotland 2 days later. Basira was not absent from the UK for more than 13 weeks and is still entitled to CDP.

**Example: an individual who is legally detained abroad for 160 days**

Tim is entitled to the lower rate of the mobility component of CDP. He is legally detained for 160 days on 1 March while visiting the United States. Tim is released on 8 August and returns to Scotland 3 days later. Tim is no longer entitled to CDP after 13 weeks spent in the United States. This is because Tim is now considered to be absent from the UK.

**Being legally detained at home**

20. Individuals may also be legally detained at home under house arrest. They are still entitled to be paid the care component of CDP when this happens. This is because they are not in legal detention for the purposes of s. 295 of the Criminal Procedure (Scotland) Act 1995.

**Legal Detention and entitlement to CDP**

**The mobility component**

21. Entitlement to payment of the mobility component continues when an individual is in legal detention. This includes individuals entitled to the higher rate of the mobility component of CDP who have opted in to 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.

22. For more information on the AVE scheme please refer to the CDP Mobility Component – Higher Rate chapter and to the Operational Guidance.

**The care component**

23. Individuals in legal detention are entitled to be paid £nil of the care component from the day after they have been in legal detention for a full 28 calendar days<sup>1,2</sup>. This 28 day period begins on the day after the day they enter legal detention<sup>3</sup>.

*1 CDP regs, reg. 18(2)*

*2 CDP amendment regs, reg. 11(b)*

*3 CDP regs, reg. 19(1)(a)*

24. Entitlement to the care 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 care component of CDP will begin again upon release.

**Example: an individual enters legal detention after legal proceedings**

Martin is entitled to the middle rate of the care component of CDP. 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 care component of CDP.

Martin is sentenced to prison for 6 months. He is no longer entitled to be paid the care component of CDP after he spends 28 days in prison after being sentenced.

25. Individuals are responsible for contacting Social Security Scotland to notify when they have entered or are released from legal detention. For more information on this process please see the *Unscheduled Reviews* chapter.

26. 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.

27. Individuals may be overpaid CDP if Social Security Scotland is not notified<sup>1</sup>. 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's award of CDP remains the same after being released from legal detention**

Peter is entitled to the lowest rate of the care component of CDP. He is legally detained in a young offenders institution on 10 January. Peter is no longer paid the care component after 28 days. He is released after 50 days. Social Security Scotland are informed promptly when he enters and is released from legal detention.

Peter remains entitled to the lowest rate of the care component during his legal detention. Upon release, he will not need to make a new application and payment of the care component of CDP will begin again as a determination without application to resume payment will be carried out once Social security Scotland are notified.

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

Mikaele is 16 and entitled to the middle rate of the care component of CDP. His award review was due to happen in March. He is legally detained in January for 6 months. Mikaele is no longer paid the care component of CDP while in legal detention after 28 days. His scheduled review does not take place in March because he is in legal detention.

Mikaele notifies Social Security Scotland when he is released from legal detention in July. This means that Mikaele's award of CDP can be reviewed because he is no longer in legal detention. The case manager will need to make a determination without application before Mikaele's payment of the care component of CDP can begin again<sup>1</sup>.

*1 CDP regs, reg. 31(a)*

28. It is possible to make an application for CDP while in legal detention. An individual's entitlement to CDP may begin when they are in legal detention<sup>1</sup> The individual must also be likely to satisfy the entitlement criteria within 13 weeks. The 13- week period begins on the day the application is received. Payment will not start until the individual has left legal detention and a determination without application has been made.

*1 CDP regs, reg. 24(2)*

### **Example: an application for CDP is made when an individual is in legal detention**

Georgie is 15. She entered legal detention on 15 February. She will be released from legal detention on 25 April. Georgie's parent applies for CDP on 1 March on Georgie's behalf.

The case manager determines that Georgie meets the eligibility criteria to be entitled to the lowest rate of the care component. Payment of the care component of CDP is set at £0 whilst Georgie is in legal detention.

Social Security Scotland is informed of Georgie's release from legal detention on 25 April. She is entitled to be paid the lowest rate of the care component of CDP on and after April 26.

### **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.

31. A person whose care component is reduced to £nil because they are in legal detention is not entitled to short-term assistance<sup>1</sup>.

*1 CDP regs, para 1(3), part 1, schedule*

### **Types of legal detention**

### **Custodial sentences**

32. A custodial sentence is a sentence of imprisonment or detention either:
- of a young person (between the ages of 15 and 20) in a young offenders institution
  - of an adult offender.

33. 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.

34. 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.

35. Individuals who are given a deferred sentence are still entitled to be paid CDP unless they enter legal detention during this time. If this happens, they should no longer be paid the care component of CDP after 28 days.

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

Jon, who is 17, is entitled to the lowest rate of the care component of CDP. A judge rules during legal proceedings that Jon should be given a deferred sentence of 6 months. Jon should still be paid the care component during this time because he is not in legal detention.

Jon commits a second offence 3 months later and is taken into legal detention. Jon's payment of the care component of CDP should stop after 28 days in legal detention.

36. 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.

37. Payment of the care component of CDP should begin again once an individual is released from legal detention, so long as they still meet the eligibility criteria.

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

### **Leaving legal detention**

39. The date that an individual leaves legal detention is not counted as a day in legal detention<sup>1</sup>.

*1 CDP regs, reg. 19(1)(b)*

## Release on license

40. 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.

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

42. 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**

Melanie is 16 and is entitled to the lowest rate of the care component of CDP. She is taken into legal detention and is no longer paid the care component of CDP after 28 days. She is released from legal detention 10 months later but must follow a strict curfew.

Melanie can start to receive payment of the care component of CDP now that she is no longer in legal detention. This is because she is not being 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

43. 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.

44. Individuals released on temporary license are not imprisoned or detained in legal custody. This means they can be paid the care component of CDP. Payment of the care component of CDP should resume during any period not spent in legal detention. To ensure this happens the case manager will need to make a determination without application<sup>1</sup>.

<sup>1</sup> CDP regs, reg. 31(a)



**Example: an individual entitled to the care component is released from legal detention on temporary licence**

Jonah is 16 and is entitled to the lowest rate of the care component of CDP. He is legally detained on 1 January and after 28 days is no longer paid the care component of CDP. Jonah is released from legal detention on temporary licence for 40 days on 1 March.

Jonah can start receiving payment of the care component of CDP starting from the day after he leaves legal detention because he notified Social Security Scotland within one month of the change of circumstances. Jonah re-enters legal detention on 10 April for another 60 days.

Jonah is no longer paid the care component of CDP after 28 days in legal detention. Jonah is released from legal detention on 9 June and can once again start receiving payment of the care component of CDP because he notified Social Security Scotland within one month of the change of circumstances.

45. 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**

46. Individuals can be released from legal custody on bail before or during legal proceedings. Individuals who are released on bail can be paid the care component of CDP because they are not in legal detention. Individuals who break the conditions of their bail and are legally detained will no longer be paid the care component of CDP after 28 days.

**Example: an individual entitled to the care component of CDP is released from legal detention on bail**

Daisy is 15 and entitled to the middle rate of the care component of CDP. She is legally detained on 1 February pending legal proceedings. Daisy is released on bail after 10 days on 11 February. Daisy can still be paid the care component of CDP because she was not in legal detention for more than 28 days.

**Authorised Absence**

47. An authorised absence is a period of time when a prisoner is not held in legal detention. An example of this is if a prisoner is ill and must spend time in hospital.

48. Individuals released because of an authorised absence can receive payments of the care component of CDP because they are not in legal detention.

49. An individual's entitlement to be paid the care component of CDP must be considered on each occasion they enter or leave legal detention because of authorised absences. This is because payment of the care component of CDP can be made for any 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.

**Example: an individual entitled to the care component of CDP is released from legal detention because of an authorised absence**

Gregor is 16 and entitled to the lowest rate of the care component of CDP. He entered legal detention on 1 April for 60 days. His payment of the care component of CDP is stopped after 28 days.

Gregor is released on authorised absence for 25 days on 31 June. He is entitled to receive payments of the care component of CDP because he notifies Social Security Scotland within a month of being released.

Gregor returns to legal detention on 25 July for another 40 days. Again, his payment of the care component of CDP is stopped after 28 days.

He is released again on 3 September on authorised absence for 10 days. He promptly notified Social Security Scotland about his release. Gregor is once again entitled to the receive payments of the care component of CDP.

Gregor enters legal detention again on 13 September for 50 more days. After 28 days in legal detention his payment of the care component of CDP should be stopped.

**Pardons**

50. Prisoners who are pardoned leave legal detention. Individuals who are pardoned are entitled to receive payments of the care component of CDP when they leave legal detention if they still meet the eligibility criteria. Individuals in these cases cannot receive a backdated payment of CDP 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 the care component of CDP once they have left legal detention following a determination without application.

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

### **Unlawfully at large**

53. An individual is considered to be unlawfully at large if they escape while serving a period of legal detention. Individuals who are unlawfully at large are to be treated as being legally detained as specified in the Criminal Procedure (Scotland) Act 1995.

54. As individuals who are unlawfully at large are treated as being legally detained, their payment of the care component of CDP should be stopped after 28 days in legal detention.

55. If Social Security Scotland are not informed of an individual's legal detention within a month, and the individual is considered to be unlawfully at large before the 28 days is up, any continued payments may be considered as payment in error. For more information, please see the chapter on payment in error.

### **Example: an individual is released from a young offenders institution for the day but does not return**

Elias is 14 and entitled to the lowest rate of the care component and lower rate of the mobility component of CDP. He enters legal detention on 1 July in a young offenders' institution. Elias is no longer paid the care component of CDP after 28 days.

On 1 September, Elias is released for the day but does not return. Elias is now considered to be unlawfully at large. For this reason, Elias' payment of the care component of CDP is not resumed as they are considered legally detained, whilst unlawfully at large.