

Scottish Commission on Social Security

Scrutiny Report on Draft Regulations:

**The Carer's Assistance (Young
Carer Grants) (Scotland)
Regulations 2019**

Submitted to Scottish Government on: 17.05.19

Foreword

The Scottish Commission on Social Security (SCoSS) is pleased to present its first scrutiny report on draft regulations. As we are a new body and this is a new process for all concerned, we hope it is helpful to provide a brief outline of our role and how we intend to operate.

SCoSS was established by the [Social Security \(Scotland\) Act 2018](#)¹ as an advisory Non Departmental Body, independent of Scottish Government and Parliament but with legal duties that relate to both. We legally came into existence on 21 January 2019 and opened for business on 8 February 2019, as was necessary to enable timely scrutiny of draft Young Carer Grant regulations (See ANNEX A).

The Act broadly sets out three key parts to our role²:

- Scrutinising and reporting on draft regulations arising from the Act in relation to nine forms of devolved assistance³ and the power of Scottish Ministers to top-up benefits reserved to the UK Government
- Reporting, from time to time, on the extent to which expectations in the Social Security Charter are being met and making recommendations for improvements
- Providing any reports requested by Scottish Ministers or the Scottish Parliament on any matter that is relevant to social security

When the Commission scrutinises draft regulations we must have due regard to any relevant international human rights instruments⁴ and the Social Security principles.⁵ As the Social Security Charter “takes these principles and explains what they will mean in practice”⁶ we may also refer to expectations set out in the Charter when scrutinising draft regulations. When we report on the Charter we may have regard to human rights. Together, these functions provide a broad and robust remit to hold Ministers to account for delivering a system that lives up to the

¹ See: <http://www.legislation.gov.uk/asp/2018/9/contents/enacted>

² Section 22(1) of the Social (Security) Scotland Act 2018

³ Carer’s assistance, cold-spell heating assistance, winter heating assistance, disability assistance, early years assistance, employment-injury assistance, funeral expense assistance, housing assistance and short-term assistance.

⁴ Section 22(5) of the Act sets out further detail about what the relevant instruments might be: <http://www.legislation.gov.uk/asp/2018/9/section/22/enacted>

⁵ Section 1 of the Social (Security) Scotland Act 2018 sets out the eight social security principles: <http://www.legislation.gov.uk/asp/2018/9/section/1/enacted>

⁶ Social Security Charter, p4: <https://www.gov.scot/publications/charter/>

principles, human rights obligations and the expectations set out in the Social Security Charter.

SCoSS intends to be open and accessible about how we go about our work. We have therefore developed a draft scrutiny framework that integrates both the principles and human rights, which we will use as a tool for scrutinising draft regulations as they develop (See ANNEX B). In so doing, we may also collect information relevant to reporting on the Social Security Charter. The draft framework covers the whole end-to-end process, from policy intention, development, design and delivery, right through to continuous improvement, monitoring and evaluating impact. It does not mean that our scrutiny of regulations will always cover everything. It might depend on exactly what the regulations cover. Or we might want to focus on one or two key points. It also does not mean that our scrutiny reports will always follow the sequence of main headings in the framework.

The framework means that everyone will know the kinds of questions we have asked and the kinds of evidence that we intend to consider. It also allows us to be held to account against the framework for how we carry out our scrutiny and the conclusions that we reach. The Commission will consider how it can best seek wider feedback on the development and improvement of the framework on an ongoing basis. We will also consider how this and all our work can be communicated accessibly and inclusively. The draft framework is annexed to this report for information.

The members of this Commission care deeply about social security and the critical importance of its role as an investment in people's lives and in Scottish society. We are committed to playing our role in supporting the delivery of a system that lives up to the social security principles, a human rights based approach and the expectations set out in the Social Security Charter. We will also aim to reflect these in the way we ourselves carry out our work; adding value to existing scrutiny processes on behalf of the people of Scotland and providing constructive challenge to help ensure that positive ambitions translate into positive improvements to people's lives.



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Summary

The Commission's overall view is that the Young Carer Grant is a welcome and progressive policy intervention and that the policy aims are consistent with the social security principles and the Scottish Government's human rights obligations. The Grant will mean that Scotland is the only UK social security jurisdiction in which the needs of an often overlooked group have been identified and an attempt made to address them. It is important too that the Scottish Government is not thinking about the Grant as a singular intervention but rather as part of a wider package of support to help young carers realise their social, economic and cultural rights. It is our hope that this package of support will continue to evolve and grow over time, as the impact is measured.

But as our analysis and recommendations make clear, further work is required to ensure that the Scottish Government's policy aims will be fully realised. This applies in particular to addressing engagement and eligibility gaps, revisiting the proposed definition of care and offering a more flexible set of rules relating to the qualifying period. In future, it is desirable that more detailed analysis is presented which demonstrates how payment levels were arrived at and the extent to which it is likely to support delivery of the policy aspiration and the principle that social security should contribute to the reduction of poverty.

The Commission looks forward to the Scottish Government's response and welcomes views on how its scrutiny and reporting can be continuously improved.

Recommendations

Recommendation 1: The Commission invites the Scottish Government to provide information on any specific engagement or consultation undertaken with equalities groups, those from seldom-heard groups and cared-for people.

Recommendation 2: In the event that there was no specific engagement or consultation undertaken by Scottish Government with equalities groups, those from seldom heard groups and cared-for people on this occasion, the Commission recommends that it seeks to improve its approach to engaging with a broader range of people directly affected by a proposed policy as a matter of priority.

Recommendation 3: The Commission recommends that the Scottish Government give consideration to the case for extending eligibility, now or in the future, to young adults over the age of 18 not eligible for Carer's Allowance and invites Scottish Government to provide information on projected costs.

Recommendation 4: The Commission invites the Scottish Government to reflect on how it might address the identified eligibility gap in relation to young people delivering care to people not in receipt of a qualifying benefit, and to comment on whether the devolution of disability benefits may provide a means to help achieve this.

Recommendation 5: The Scottish Government is invited to provide more clarity on the evidence base, and process undertaken, to identify £300 as an appropriate, adequate level of payment; and to comment on the extent to which it believes the grant will deliver on its policy aims.

Recommendation 6: The Scottish Government is invited to comment on what it sees as the appropriate balance between different forms of support for young carers and how it will ensure that the value of YCG is not eroded by reductions or deficits elsewhere.

Recommendation 7: The Scottish Government is invited to provide more clarity on the extent to which it expects the YCG will do more than contribute towards the meeting of basic subsistence needs and whether this reflects the Scottish Government's policy aims.

Recommendation 8: The Commission invites the Scottish Government to consider whether the rules relating to the qualifying period can be adapted to mitigate the risks that it could negatively impact people who care for those with fluctuating conditions and that it is insufficiently flexible to reflect the needs and circumstances of young people.

Recommendation 9: The Commission recommends that the Scottish Government abolishes the proposed definition of care in favour of a more flexible approach. The Commission's view is that the Scottish Government's welcome aim of providing greater clarity could be better achieved through improved guidance and targeted outreach activity.

Recommendation 10: The Scottish Government is invited to clarify what will constitute a valid claim, including evidence requirements, for the YCG; taking account of the Commission's view that the approach should be as flexible and accessible as possible.

Recommendation 11: The Scottish Government should check with DWP that the term “Invalid Care Allowance” is obsolete and, if so, consider removing reference to it from the draft regulations.

Recommendation 12: The Scottish Government is invited to consider whether Regulation 7(1) could be phrased more clearly to avoid risk of confusion about what counts as being “in receipt” of carer’s assistance.

Recommendation 13: The Scottish Government is invited to consider whether the exception made in regulation 7(4)(b) could be broadened to encompass other circumstances than the death of the original YCG recipient, where caring responsibilities reasonably shift between young people.

Recommendation 14: The Scottish Government is invited to consider whether regulation 11 as drafted makes adequate provision for other circumstances in which it would be reasonable to expect that Scottish Ministers would award a Grant without application.

Recommendation 15: The Commission invites the Scottish Government to consider whether the regulations could be strengthened to underline that the form YCG is given in is wholly the choice of young carers, and invites Scottish Government to comment on how it will ensure young carers are fully informed about this and to outline the options that can be offered, as shaped by the consultation.

Recommendation 16: The Scottish Government is invited to clarify whether Schedule 2 of the Social Security (Scotland) Act 2018 leaves scope for different definitions of “regular and substantial care” to appear in different sets of regulations. If so, the Scottish Government is invited to offer a view on whether this risks inconsistency, complexity and confusion.

Recommendation 17: Building on the analysis and recommendations offered throughout this report, the Commission recommends that the Scottish Government monitors, evaluates or researches:

- a) The real world use and impact of the Grant and the extent of the positive difference YCG has made to young carers’ lives
- b) The extent to which this suggests that the policy aims have been fulfilled. If the policy aims have not been fulfilled, what factors have prevented this?

- c) The extent to which the £300 grant is meeting the Scottish Government's ambitious policy aims and whether the evidence suggests this sum should be revisited.
- d) The extent to which the Grant contributed to a reduction in poverty for the people who receive it.
- e) If the Scottish Government does not rethink the qualifying period, whether there is evidence of an impact on take-up, including among specific groups of young carers.
- f) If the Scottish Government does not follow the Commission's recommendation on reverting to a broader definition of care, it should seek to evaluate the impact of the new definition.
- g) Gather evidence of varying take-up or wider impact on young carers with protected characteristics, intersectional characteristics or those belonging to seldom heard groups.
- h) Gather evidence of the impact of the YCG on young women in particular
- i) Monitor the impact, should people subject to immigration control be granted exemption.
- j) To monitor the impact of the operational approach to determining what should constitute a valid claim e.g. is this encouraging or restricting applications.
- k) Consider whether the eligibility rules for devolved disability benefits, once decided, have implications for the eligibility and impact of YCG.
- l) Consider the interface of YCG when developing Carers Assistance to prevent or remedy undesirable inconsistencies or complexity.

1. Introduction

The Commission came into existence at a time when the process of developing Young Carer Grant (YCG) regulations was already well advanced. It was thus necessary to set up the new body, develop ways of working and apply them within a very tight timeframe. Therefore, this is a new process for the Commission, the Scottish Government and the Scottish Parliament. For these reasons, this report – though robust in its analysis – may not fully reflect how the Commission approaches similar scrutiny processes in future. It may also be the case that this report raises issues that can, or could have been, readily addressed had the Commission had the opportunity for earlier engagement from the outset and during the development process.

In developing this report, we met with lead officials at our first meeting held over 21 and 22 February 2019. We also considered evidence drawn from the Scottish Government’s consultation document, the analysis report of responses to that consultation, the report on YCG published by the Social Security Committee and the advice of the Expert Advisory Group on Disability and Carers Benefits. The draft regulations were formally referred to the Commission on 30 April.

With regard to human rights, in addition to the usual instruments that can be expected always to apply, the UN Convention on the Rights of the Child (UNCRC) is of direct relevance to these regulations⁷. The UN Convention on the Rights of Persons with Disabilities (UNCRPD) may also indirectly have some bearing as it sets out the state’s duty to provide adequate social support and protection schemes for ensuring independent and community living⁸.

The report begins with an examination of the Scottish Government’s policy intention and the engagement it undertook to inform policy development. It then sets out detailed scrutiny of the regulations. It closes with recommendations on key issues for monitoring and evaluation, to ensure that that policy objectives are met and with a view to achieving continuous improvement.

⁷ In particular, Article 3: <https://www.unicef.org/child-rights-convention/convention-text>

⁸ In particular, Article 4, 3. (General Obligations, involvement of people with disabilities); General Article 19 (independent living). See: <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html>

2. Policy intention

The Commission welcomes the creation of a Young Carer Grant (YCG); a form of assistance that does not exist in the current UK system. The Scottish Government's aim for the new Grant is commendable and clearly stated in the [consultation document](#)⁹ as to:

*“provide support during a key transition period in young carers’ lives to help improve their health and education outcomes as they move into the adult world. . .”*¹⁰

This document further provides welcome recognition that:

*“For many young adults with significant caring responsibilities, their opportunities may be limited by their caring role. The aim of the Young Carer Grant is to . . . help improve their quality of life and break down barriers, so that young carers can access opportunities that are the norm for many other young people.”*¹¹

Young people aged 16-18 are often at a transition point in their lives as they move into adulthood. They may be finishing school, getting their first job or entering post-16 education. The consultation document provides evidence that young carers have poorer physical and mental wellbeing than non-carers, are considerably more likely to live in the most deprived areas of Scotland and disproportionately to experience social isolation. The Commission welcomes the Scottish Government's work to highlight the evidence underpinning these aims.

These policy aims thus appear to reflect Scotland's responsibilities under the international human rights framework, in particular, to support young carers to more fully participate in society and to strengthen their opportunities to realise their wider social, economic and cultural rights. They indicate that the Scottish Government is taking seriously its commitment to a human rights based approach and that it is thinking widely about how new forms of assistance can support people to realise a whole range of human rights as opposed to a more narrow focus on the right to social security. This is also consistent with the principle that “social security is a human right and essential to the realisation of other human rights”¹².

⁹ See: <https://consult.gov.scot/social-security/consultation-on-young-carer-grant-regulations/>

¹⁰ Consultation on Young Carer Grant Regulations, p6

¹¹ ibid

¹² Principle (b) in Section 1 of the Social (Security) Scotland Act 2018

The overall ambition of the Scottish Government's policy intent therefore seems well aligned with human rights and social security principles. Consistency with the design of the Grant as set out in the draft regulations is considered as applicable throughout the report.

3. Policy development

Social security principles include co-design of the social security system with the people of Scotland, and continuous improvements in putting the needs of the user first and the advancement of equality and non-discrimination¹³. Human rights encompass rights to participation¹⁴. This means that the Commission has a duty to examine not just the content of regulations but the process of participation and engagement that informed their development.

There is good evidence that the Scottish Government has engaged with young carers and the organisations that represent them. Working with young carers to develop the Grant shows respect for children's' right to a say on decisions affecting them¹⁵. The Scottish Government has also sought the advice of the [Expert Advisory Group on Disability and Carers Benefits](#)¹⁶. However, the Commission is not aware that the Scottish Government has taken adequate, proactive steps to identify, engage with or explore the specific requirements of young carers who have protected characteristics, intersecting equality characteristics, or who belong to seldom-heard groups. Focussed engagement with these groups is always likely to be crucial since their needs and circumstances can sometimes vary substantially and in specific ways to those of the majority. Some seldom heard groups may be especially likely to experience acute disadvantage and barriers. The fact they are 'seldom heard' is both a symptom of this and compounds it, making it all the more important that they are given the opportunity to participate in the policy making process.

Regarding protected characteristic groups, a good example is the evidence¹⁷ that young women are more likely than young men to assume traditional gender roles such as caring responsibilities, and that

¹³ Principles (f) and (g) ii in Section 1 of the Social (Security) Scotland Act 2018

¹⁴ See 'PANEL' principles: <http://www.scottishhumanrights.com/rights-in-practice/human-rights-based-approach/>

¹⁵ Article 12 UNCRC. See: : <https://www.unicef.org/child-rights-convention/convention-text>

¹⁶ An independent group of experts who provide policy advice to the Scottish Government. See: <https://www.gov.scot/groups/disability-carers-benefits-expert-advisory-group/>

¹⁷ Consultation on Young Carer Grant Regulations, p14:

<https://www.gov.scot/publications/consultation-young-carer-grant-regulations/#res540446>

this can result in lifelong disadvantage. Focussed engagement with young female carers would therefore have been worthwhile, if not specifically carried out.

Similarly, there is little evidence that the Scottish Government has undertaken proactive engagement with the people who are supported by young carers. It is the Commission's view that this group will have a valuable perspective into the nature and scale of the challenges faced by young carers as well. Moreover, it is imperative that both parties have choice and control over caring arrangements and that neither feel compelled or coerced into a carer/cared-for relationship of a kind they would not want. This appears to be in keeping with the draft general comment on Article 19 of the UNCRPD¹⁸ that requires states to provide adequate social support and protections schemes for ensuring independent and community living. This by implication could encompass the needs of care-givers whose contribution might be key to the 'cared-for' person's enjoyment of that right. This consideration is reinforced by the fact that cared-for people will often be the parent or another close family member of the young carer. Their views on the barriers and solutions for supporting young carers could therefore provide evidence of considerable value.

Recommendation 1: The Commission invites the Scottish Government to provide information on any specific engagement or consultation undertaken with equalities groups, those from seldom-heard groups and cared-for people.

Recommendation 2: In the event that there was no specific engagement or consultation undertaken by Scottish Government with equalities groups, those from seldom heard groups and cared-for people on this occasion, the Commission recommends that it seeks to improve its approach to engaging with a broader range of people directly affected by a proposed policy as a matter of priority.

4. Policy content issues

4.1 Age of eligibility

¹⁸ See: <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticle19.aspx> .

The Scottish Government has amended the version of the regulations that were consulted on so as to extend eligibility to all young carers aged 16-18, irrespective of their educational or employment status. This is a welcome and progressive step that responds positively to the views expressed during the Scottish Government's consultation.

However, the amended version still does not address the evidence presented in responses to the consultation, and to the Social Security Committee, that the originally proposed criteria do not extend entitlement to the full range of people who may accurately be described as young carers. In particular, there will remain an absence of social security support for young adults over the age of 18 who provide fewer than 35 hours of care per week, or who are in full-time education. Young adults falling into these groups are also living through periods of transition and will face very similar challenges and barriers to their slightly younger peers. Yet under the present proposals they will not receive the YCG and will continue to be ineligible for UK Carer's Allowance.

The Commission recognises that the resources available to the Scottish Government are not without limit. But it observes that this is a clear eligibility gap and one that appears to run contrary to the stated policy intention underpinning the design of YCG. If not financially feasible to extend eligibility now, the Commission suggests this might be given early consideration in line with social security principle (g) (also reflected in the Charter) and the human rights provision regarding progressive realisation.¹⁹ This may be something to address in the context of the future design of carer's assistance.

Recommendation 3: The Commission recommends that the Scottish Government give consideration to the case for extending eligibility, now or in the future, to young adults over the age of 18 not eligible for Carer's Allowance and invites Scottish Government to provide information on projected costs.

4.2 Qualifying benefits

Eligibility for YCG will depend on the cared-for person being in receipt of certain disability benefits. 'Passporting' of this kind is often useful and can help simplify the undoubted complexity of the overall social security

¹⁹ Principle (g) in Section 1 of the Social (Security) Scotland Act 2018; Art 2(1) International Convention on Economic, Social and Cultural Rights (ICESCR): <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>

system. But passporting can also reinforce inequality and exclusion. In the case of YCG, the reliance on qualifying benefits could create a further eligibility gap in relation to young people delivering care to people not in receipt of a qualifying disability benefit. For example, the assessment processes for Personal Independence Payment (PIP) have been criticised as going wrong for many people. This may have the effect of excluding young people delivering care in difficult circumstances, yet who nonetheless have been formally identified as entitled to support from public authorities under the [Carers \(Scotland\) Act 2016](#).

One way of resolving this issue may be to use the impending devolution of disability benefits to introduce rules and processes that would allow a broader range of people to qualify for disability assistance that would enable more young carers to 'passport' onto the YCG.

Recommendation 4: The Commission invites the Scottish Government to reflect on how it might address the identified eligibility gap in relation to young people delivering care to people not in receipt of a qualifying benefit, and to comment on whether the devolution of disability benefits may provide a means to help achieve this.

4.3 Payment levels

In scrutinising draft regulations, the Commission will seek to be informed about the evidence used when establishing the level of payment envisaged and determining whether this will be sufficient to deliver the Scottish Government's policy objectives. UN guidance on the right to social security is clear that the adequacy of social security protection is a pivotal human rights concept. Furthermore, social security principle (e) concerns the Scottish social security system's contribution to reducing poverty.

It is undeniable that an additional £300 represents an improvement on the level of support currently available to young carers. The fact that the Scottish Government has secured an agreement with the UK Government that receipt of YCG will not negatively impact on eligibility for other benefits is also welcome. It is helpful too that the Scottish Government intends to use eligibility for the Grant as a means of

identifying young carers and passporting them to other forms of assistance²⁰.

From a human rights perspective, all of this is welcome and positive. Under 18s have rights under the Convention on the Rights of the Child (UNCRC) that the grant may help protect. The Scottish Government must treat the best interests of children affected by its policies as a primary consideration.²¹ Identifying the problems facing young carers and putting in place new support is a sign that the Government is doing this. The Commission also accepts that the Grant may help support young carers' health, development, education and leisure opportunities; potentially helping reduce material deprivation. The Grant and its role as a passport to other forms of support are therefore a welcome step in the right direction. But how big is that step?

The stated policy aims for YCG appear ambitious when set against the situation many young carers find themselves in. The Commission is not aware of any supporting evidence of detailed analysis undertaken by the Scottish Government that provides a clear rationale for how the figure of £300 was arrived at. Neither has the Commission seen analysis from the Scottish Government to suggest that an annual grant of £300 will be sufficient to achieve its policy aims. In these circumstances it is difficult for the Commission to provide informed scrutiny of the payment level. However, there is a risk that the Scottish Government's full aspirations for the Grant will not be met by what may be considered a relatively modest annual payment.

Recommendation 5: The Scottish Government is invited to provide more clarity on the evidence base, and process undertaken, to identify £300 as an appropriate, adequate level of payment and to comment on the extent to which it believes the grant will deliver on its policy aims.

It can be helpful when gauging adequacy and promoting joined-up policy to consider the role of social security within the wider context of support. YCG thus needs to be viewed in the context of support available to young carers, notably local authority provision under the Young Carers (Scotland) Act 2016, social care and the complex interaction between social security and post-16 student support. In particular, the intended balance between the contributions and distinct goals of different forms of

²⁰ Scottish Government intends to provide YCG recipients with free bus travel from 2020/21 (subject to successful piloting) and to roll out a new carer element to the Young Scot National Entitlement Card, providing non-cash benefits for young carers aged 11-18.

²¹ Article 3 of the UNCRC: <https://www.unicef.org/child-rights-convention/convention-text>

support need to be considered when gauging whether the amount of social security payment is adequate in that context. Furthermore, there may be scope for increases in one form of support to be offset by reductions in others, or to be subsumed by pre-existing deficits in others.

Recommendation 6: The Scottish Government is invited to comment on what it sees as the appropriate balance between different forms of support for young carers and how it will ensure that the value of YCG is not eroded by reductions or deficits elsewhere.

The focus of the policy aims for YCG are on improving the health and educational outcomes and opening up access to opportunities for young carers. The Scottish Government has cited statistics in support of the Grant which demonstrate that young carers disproportionately experience poverty and social exclusion. There may therefore be a risk that young people in this position are left with little option but to use YCG to support the household's basic subsistence needs. The extent to which YCG is available to go beyond that, as seems indicated to be the intention, may therefore be questionable.

Recommendation 7: The Scottish Government is invited to provide more clarity on the extent to which it expects the YCG will do more than contribute towards the meeting of basic subsistence needs and whether this reflects the Scottish Government's policy aims.

4.4 Hours of care

It is welcome that the Scottish Government intends to set the required hours of care at 16 as opposed to the 35 hour threshold associated with UK Carer's Allowance. The Commission regards this as an appropriate recognition of the competing pressures faced by young carers as they potentially juggle caring, education and employment. It is also welcome that the Scottish Government has made provision to ensure that young carers will be able to reach the 16 hour threshold by aggregating care provided to three cared-for people.

But the Commission is concerned that unintended consequences may flow from the strictness of the rules around the qualifying period. The regulations propose a qualifying period of 13 weeks and require that care must have been provided in each and every week, totalling an average of 16 hours per week across the period.

These rules are incompatible with the needs of young people delivering care to those with fluctuating conditions. A remission of symptoms for even a week would render such a carer ineligible. Even if the requirement to deliver care in each week was relaxed, the relatively short qualifying period of 13 weeks is still insufficiently flexible. For example, even a relatively brief period of 5 weeks respite over the three month period, would require a young carer to provide an average of 26 hours of care over the remaining 8 weeks - a 62% increase on the 16 hours identified by the draft regulations as a fair weekly average. The Commission's view is that could create an unfair position whereby many young carers are excluded by a rule which takes account of only a brief snapshot in time rather than their broader circumstances.

The Commission further considers that inflexibility of the qualifying period undermines the Scottish Government's key policy aim of supporting young carers through a period of transition. The rules do not take account of many legitimate circumstances in which a young person may not be in a position to provide care temporarily e.g. if they are studying for exams, have a much needed break in which care is provided by another person (which should be encouraged not penalised) or they themselves suffer a period of ill health.

Recommendation 8: The Commission invites the Scottish Government to consider whether the rules relating to the qualifying period can be adapted to mitigate the risks that it could negatively impact people who care for those with fluctuating conditions and that it is insufficiently flexible to reflect the needs and circumstances of young people.

4.5 Definition of care

One of the Commission's chief concerns is that the draft regulations introduce a definition of care that is unnecessary and overly prescriptive. The draft regulations state that the care provided must:

- Assist with the day to day physical tasks and needs of the person being cared for (for example, eating and washing)
- Relate to the mental processes associated with those tasks and needs (for example, the mental process of remembering to eat and wash) or
- Otherwise involve activity that promotes the physical, mental or emotional well-being of the person being cared for

The Commission understands that the Scottish Government's rationale for introducing this criteria is to bring greater clarity about what counts as care, making it easier for young people to recognise that tasks they may regard as routine in fact count towards eligibility. This is a laudable aim. But the Commission is concerned that the definition provided may in practice achieve the opposite outcome; instead increasing complexity and reducing take-up.

Moreover, the Commission welcomes evidence that the Scottish Government is thinking creatively about how best to give effect to its legal duty to promote take-up of the YCG. For example, the intention to promote take-up using social media platforms and channels that young people are receptive to. It may be that this, and perhaps accessible guidance, would be better routes to enabling young people to identify themselves as young carers

The Commission also observes that the proposed definition mostly offers a conception of care that seems rooted in activities that resemble personal rather than social care²²; with 'staying alive' rather than 'having a life'. But 'care' can mean many other things, such as supporting a disabled person to lead a fuller life and to participate in society in a way that helps them to realise their own wider social, cultural and economic rights, including those set out in the UN Convention on the Rights of Persons with Disabilities.

As the Scottish Government's Expert Advisory Group on Carers and Disability Benefits has argued; caring dynamics can vary substantially. What counts as care and what individuals consider to be care is a difficult and complex subject. Often, it is also deeply personal to the individuals concerned. The Commission therefore agrees with the Expert Advisory Group's view that it is challenging to craft a definition that fairly and accurately captures all of the different kinds of support that a young person may be providing. Indeed, the Commission's view is that the most likely outcome of a more prescriptive definition, however well intentioned, is that it will in practice exclude people in ways that are incompatible with the policy aims.

It is perhaps for this reason that the Carers (Scotland) Act 2016 does not seek to define what care is and offers instead a simple definition of

²² **Personal care** includes assistance with dressing, feeding, washing and toileting, as well as advice and psychological support. **Social care** is the provision of assistance with daily living activities, maintaining independence, social interaction and allowing the individual to play a fuller role in society

carers as people who “provide or intend to provide care for another individual”²³. Similarly, the regulations for UK Carer’s Allowance, do not seek to define the nature of care, providing only that it must be “regular and substantial”. The risks of departing from such well-established approaches is that it may undermine the policy intention to help people identify as carers, by in practice narrowing the legal definition of what care is. The resultant risk is that a young person may not apply because they do not recognise the support they provide as fitting with this definition, thereby reducing take-up of the Grant in a way that is not intended.

The Commission further observes that the Scottish Government has not identified whether the proposed definition may have implications for the future design of the Scottish replacement for UK Carer’s Allowance or indeed any other form of Carers Assistance that may be introduced under the Social Security (Scotland) Act 2018. If it is retained for Carer’s Assistance, this will present the difficulties already noted in respect of that benefit too; leading to a position where the Scottish system offers a narrower definition of care than the UK. If it is not retained, then this introduces clear scope for increasing inconsistency across Scottish legislation in terms of how care is defined.

The Commission would also welcome more clarity from the Scottish Government over how they intend both the definition of care and the rules around the qualifying period to be put into operational practice. In particular, it is important to understand what evidence will be required from young carers to demonstrate that care of the kind required has been delivered in 13 consecutive weeks and that it is consistent with, for example, “the mental process of remembering to eat and wash.”

For all of these reasons, and without further information to the contrary, the Commission can only conclude that this more prescriptive definition of care: risks lower take-up; increased confusion and administrative complexity; as well as leaving scope for inconsistent decision making and undermining the policy aim.

Recommendation 9: The Commission recommends that the Scottish Government abolishes the proposed definition of care in favour of a more flexible approach. The Commission’s view is that the Scottish Government’s welcome aim of providing greater clarity could be better achieved through improved guidance and targeted outreach activity.

²³ Section 1(1) of the Carers (Scotland) Act 2016

4.6 Valid applications

Draft regulation 4(5) provides that an application for YCG will be considered valid only if it is made in the form and accompanied by the evidence that is required by Scottish Ministers. However the Scottish Government has not yet explained what will constitute a valid application under this rule e.g. exactly what kind and level of evidence will be required and in what form or formats applications can be made. The regulations are silent on these matters and the consultation document states only that this information will be made available upon completion of further service design work.

The Social Security Charter commits the Scottish Government to the design of processes that are accessible and which take account of individual needs. In line with this, the Commission's view is that guidance on what constitutes a valid claim should be as flexible and generous as is reasonably possible. It is likely that many young carers will be engaging with the social security system for the first time. They may have little access to the kinds of information and paperwork that may be considered pertinent and can reasonably be expected to have minimal experience of navigating a potentially complex administrative process. There may also be a risk that young people may be less confident than others with more experience about challenging or re-applying in circumstances where an application is judged invalid. In these circumstances, it is important that reasonable adjustments are made in order that applications and dates of claim can be preserved e.g. by offering proactive advice and making follow-up enquiries where further information is needed.

A possible anomaly that could theoretically arise as a consequence of the current drafting of the regulations might concern the (presumably rare) event whereby applications for YCG are received from two young carers providing care for the same person. If application A with insufficient evidence is received on Monday, application B with all necessary evidence is received on Wednesday and then the outstanding evidence for application A comes in on Friday, the decision maker needs to know which application should be treated as having been received 'first', as this is the one that will get the grant.

Recommendation 10: The Scottish Government is invited to clarify what will constitute a valid claim, including evidence requirements,

for YCG, taking account of the Commission’s view that the approach should be as flexible and accessible as possible.

4.7 Applicants subject to immigration control

Draft Regulation 7(6) excludes from eligibility people subject to immigration control. This is a relatively standard provision for social security benefits that aligns to the reserved immigration policy of the UK Government. The Commission understands that the Scottish Government intends to approach the Home Office with a view to seeking an exception to this rule in relation to YCG. The Commission encourages this intention; recognising that many young people with no recourse to public funds will be living in particularly difficult circumstances, with very limited access to resources that will restrict their human rights under UNCRC.

5. Drafting issues

5.1 References to “Invalid Care Allowance”

The draft regulations make a number of references to “Invalid Care Allowance”. The Commission understands that this term is obsolete and has been for a considerable period since being replaced by the term “Carer’s Allowance”. Moreover, this historical term is outdated and incompatible with the commitment in the social security principles to respect and dignity.

Recommendation 11: The Scottish Government should check with DWP that the term “Invalid Care Allowance” is obsolete and, if so, consider removing reference to it from the draft regulations.

5.2 Possible circularity

The way that draft regulation 7(1) is framed may introduce a degree of circularity. It provides that an applicant is not entitled to a grant if, on the day of their application, they are in receipt of Carer’s Allowance or Carer’s Assistance payable under the Social Security (Scotland) Act 2018. However Young Carer Grant is itself a form of carer’s assistance under the 2018 Act. There is a risk that the provision may imply that an

applicant cannot receive Young Carer Grant if they are in receipt of a Young Carer Grant.

The Commission accepts that the provision is not necessarily incorrect. The YCG is not an ongoing payment and can be claimed only once every 12 months. This means that if a person is in receipt of a 'current' YCG (i.e. one paid within the last 12 months) then they are ineligible for another. In a technical sense the drafting therefore works. But it is potentially confusing and carries a risk that applicants, decision makers and welfare rights advisors could misinterpret what counts as being "in receipt" of carer's assistance and incorrectly conclude that an individual is ineligible.

Recommendation 12: The Scottish Government is invited to consider whether Regulation 7(1) could be phrased more clearly to avoid risk of confusion about what counts as being "in receipt" of carer's assistance.

5.3 Widening exceptions to one grant for each cared for person

Draft regulation 7(4)(b) introduces an exception to the rule that only one person can receive a YCG in relation to a cared for person in circumstances where the recipient of the original Grant dies.

While this exception is welcome, the Commission observes that there are other reasonable and legitimate circumstances in which caring responsibilities between young people will unavoidably shift. For example, the original recipient may fall ill, become incapacitated or accept an employment or educational opportunity abroad. In such circumstances it seems reasonable that if another young person assumes the outstanding caring responsibilities, they too should be eligible for support.

Recommendation 13: The Scottish Government is invited to consider whether the exception made in regulation 7(4)(b) could be broadened to encompass other circumstances than the death of the original YCG recipient, where caring responsibilities reasonably shift between young people.

5.4 Determination following backdated award of assistance

Draft regulation 11 allows Scottish Ministers to award a Grant without application. This power would be exercised in circumstances where a previous YCG application was rejected purely because the cared-for person was not, at the time of application, in receipt of a qualifying benefit. The idea is that if the cared-for person subsequently receives a backdated award of a qualifying benefit as a result of a successful appeal, then it is reasonable to pay the YCG without receipt of a further application. This is a welcome provision that should, subject to effective implementation, have the effect of reducing the burden on young carers to reapply.

However, there are other common ways for a backdated award to come about e.g. following a decision on a claim or following a revision or supersession. Moreover, the Commission observes that draft regulation 11 does not appear to take account of other circumstances in which it is reasonable that Scottish Ministers should seek to overturn a previous decision without application, notably, upon discovery of official error in the YCG determination. In these circumstances, as things stand, the onus would appear to remain on the young carer to reapply.

Recommendation 14: The Scottish Government is invited to consider whether regulation 11 as drafted makes adequate provision for other circumstances in which it would be reasonable to expect that Scottish Ministers would award a Grant without application.

5.5 Payment in kind

Schedule 2 part 2, paragraph 11(1) of the Social Security (Scotland) Act 2018 stipulates that carer's assistance regulations "may allow carer's assistance to be given to an individual in a form other than money only if the individual (or a person acting on the individual's behalf) has agreed to the assistance being given in that form". Draft regulation 12 (3) provides that YCG is to be given in the form of a single payment of £300, unless the applicant agrees to an offer from Scottish Ministers to accept the Grant in a form other than money. While the Commission broadly welcomes scope for flexibility about the form the Grant takes, it would be desirable to emphasise that, while the Scottish Government may offer a range of options, it is wholly the young carer's choice to make, and that choice must be fully informed. Young carers need to feel confident that they are under no compulsion to accept an 'offer'.

Recommendation 15: The Commission invites the Scottish Government to consider whether the regulations could be strengthened to underline that the form YCG is given in is wholly the choice of young carers and invites Scottish Government to comment on how it will ensure young carers are fully informed about this and to outline the options that can be offered, as shaped by the consultation.

5.6 Multiple definitions of “regular and substantial” care

Paragraph 1 of Schedule 2 of the Social Security (Scotland) Act 2018 requires that carer’s assistance regulations must be framed so that eligibility depends on the provision of “regular and substantial care.” Further provision is made to allow carer’s assistance regulations to define “the circumstances in which an individual is to be regarded as having provided regular and substantial care to another individual during a period”. However the Act does not elaborate on whether this would allow for different sets of carer’s assistance regulations (e.g. for YCG and Carer’s Allowance) to define “regular and substantial” in different ways. Similar to the points made about the definition of care, this would appear to leave scope for substantial inconsistencies across different forms of carer’s assistance for what counts as “regular and substantial” provision of care. Whether or not this is legally permissible, and the Commission has not had the opportunity to take independent legal advice on this matter; and whether or not such flexibility is helpful or risks creating complexity and confusion, the rationale for the same provision being differently defined in different contexts would benefit from clarification.

Recommendation 16: The Scottish Government is invited to clarify whether Schedule 2 of the Social Security (Scotland) Act 2018 leaves scope for different definitions of “regular and substantial care” to appear in different sets of regulations. If so, the Scottish Government is invited to offer a view on whether this risks inconsistency, complexity and confusion.

6. Policy impact and improvement

The Commission’s view is that upholding human rights to progressive realisation and the continuous improvement enshrined in the social

security principle (g) can only be achieved if there are effective mechanisms in place to monitor and evaluate the impact of specific social security policy interventions. Over time, such evaluation would provide a rich source of evidence to support effective scrutiny and informed policy development. Below the Commission proposes a number of relevant matters worthy of more detailed monitoring, evaluation or research.

Recommendation 17: Building on the analysis and recommendations offered throughout this report, the Commission recommends that the Scottish Government monitors, evaluates or researches:

Meeting the policy intent

- a) The real world use and impact of the Grant and the extent of the positive difference YCG has made to young carers' lives.**
- b) The extent to which this suggests that the policy aims have been fulfilled. If the policy aims have not been fulfilled, what factors have prevented this?**

Payment level

- c) The extent to which the £300 grant is meeting the Scottish Government's ambitious policy aims and whether the evidence suggests this sum should be revisited.**
- d) The extent to which the Grant contributed to a reduction in poverty for the people who receive it.**

Qualifying period

- e) If the Scottish Government does not rethink qualifying period, whether there is evidence of an impact on take-up, including among specific groups of young carers.**

Definition of care

- f) If the Scottish Government does not follow the Commission's recommendation on reverting to a broader definition of care, it should seek to evaluate the impact of the new definition.**

Equality and Diversity

- g) Gather evidence of varying take-up or wider impact on young carers with protected characteristics, intersectional characteristics or those belonging to seldom heard groups.**
- h) Gather evidence of the impact of the YCG on young women in particular.²⁴**
- i) Monitor the impact, should people subject to immigration control be granted exemption.**

Valid claims

- j) To monitor the impact of the operational approach to determining what should constitute a valid claim e.g. is this encouraging or restricting applications.**

Future implications

- k) Consider whether the eligibility rules for devolved disability benefits, once decided, have implications for the eligibility and impact of YCG.**
- l) Consider the interface of YCG when developing Carers Assistance to prevent or remedy undesirable inconsistencies or complexity.**

²⁴ General Comment 20 of the UN Committee on the Right of the Child stresses that adolescence is a time when girls in particular can be pushed into traditional gender roles that result in lifelong disadvantage. The provision of unpaid care seems likely to be an example of this, as reflected in the Scottish Government's consultation document, where it is stated that 55% of young carers are female. As the consultation document notes, if young women are more likely to become carers, then they will be the main beneficiaries of YCG, which to an extent may lessen the disadvantage identified by General Comment 20. But it is also possible young female carers might benefit even more from *non-social security* measures (outside the scope of the Commission's work) to e.g. reduce their caring load. But it is unclear whether this more subtle point has been considered.

ANNEX A: Young Carer Grant Draft Regulations

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2019 No.***

SOCIAL SECURITY

The Carer's Assistance (Young Carer Grants) (Scotland) Regulations 2019

Made - - - - - *** 2019

Coming into force in accordance with regulation 1

CONTENTS

PART 1

Introductory and interpretation

1. Citation and commencement
2. Interpretation

PART 2

Eligibility

3. Overview
4. Making of applications
5. Conditions relating to the care being provided
6. Conditions relating to the person being cared for
7. Further eligibility conditions
8. Conditions relating to residence

PART 3

Procedural matters

9. Periods for redetermination requests
10. Multiple applications involving care of the same person
11. Determination following backdated award of assistance

PART 4

Assistance to be given

12. Amount and form of young carer grants

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 28, 41(4)(a), 43(5) and 52 of the Social Security (Scotland) Act 2018⁽²⁵⁾ and all other powers enabling them to do so.

In accordance with section 96(2) of that Act, a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament.

In accordance with section 97(2) of that Act, the Scottish Ministers have consulted the Scottish Commission on Social Security.

PART 1

Introductory and interpretation

Citation and commencement

These Regulations may be cited as the Carer's Assistance (Young Carer Grants) (Scotland) Regulations 2019 and come into force on the first Monday after the day on which they are made.

Interpretation

In these Regulations—

“applicant” means a person who has applied for a young carer grant,

“determination” means a determination of an individual's entitlement under section 37 of the Social Security (Scotland) Act 2018,

“the qualifying period” means the period of 13 weeks described in regulation 5(1),

“young carer grant” means the grant provided for by these Regulations.

PART 2

Eligibility

Overview

—(1) A person who applies for a young carer grant (the “applicant”) is entitled to receive it if that person meets the conditions prescribed in these Regulations.

(2) Regulation 4 describes conditions about the making of applications, including those related to the age of the applicant.

Regulation 5 describes conditions relating to the care being provided and regulation 6 describes conditions relating to the person or persons being cared for.

Regulation 7 describes further conditions relating to receipt of assistance and the status of the applicant.

Regulation 8 describes conditions relating to the applicant's residence.

Part 3 provides timescales for some procedural matters, including situations that involve multiple applications relating to care of the same person, and describes when the Scottish Ministers must determine that an individual is entitled to a young carer grant without an application.

Regulation 12 describes the assistance that an applicant is entitled to receive.

⁽²⁵⁾ 2018 asp 9. The powers to make these Regulations are exercised together by virtue of section 33(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10). These Regulations are subject to the affirmative procedure by virtue of section 33(3) of that Act.

Making of applications

—(1) A person is only entitled to a young carer grant if, on the day their application for that assistance is made, they are aged at least 16 and are under the age of 19.

(2) In a non-leap year, the birthday of a person born on 29th February is to be taken to be 28th February.

An application is to be treated as made on the day it is received by the Scottish Ministers.

In a case where, by virtue of a regulation 11, a determination is to be, or has been, made without an application, references in these Regulations to the day the application is made are to be read in accordance with paragraph (4) of that regulation.

For the avoidance of doubt, a thing that purports to be an application is not an application unless it is—

made in the form, and

accompanied by the evidence,

required by the Scottish Ministers under section 38(1) of the Social Security (Scotland) Act 2018.

For the purposes of determining assistance, the period of an application is the period of 13 weeks ending with the day before the day of the application for a grant and an application in respect of any other period of 13 weeks is to be regarded as an application for a different period, despite any overlap between the two periods.

Conditions relating to the care being provided

—(1) To qualify for a young carer grant the applicant must have provided care, in each of the 13 weeks ending with the day before the day on which their application for a grant is made (“the qualifying period”)—

to a person or persons described in regulation 6,

of the type described in paragraph (2),

which was not provided in the manner described in paragraph (3), and

for the number of hours described in paragraph (4).

Care provided must—

assist with the day to day physical tasks and needs of the person being cared for (for example, eating and washing),

relate to the mental processes associated with those tasks and needs (for example, the mental process of remembering to eat and wash), or

otherwise involve activity that promotes the physical, mental or emotional well-being of the person being cared for.

The care must not have been provided by the applicant—

under or by virtue of a contract, unless the contract is of a kind specified by regulations under section 1(3)(a) of the Carer’s (Scotland) Act 2016⁽²⁶⁾ as not to be regarded as a contract for the purposes of that Act, or

as voluntary work.

The average number of hours of care provided over the qualifying period must have been at least 16 hours per week.

Conditions relating to the person or persons being cared for

—(1) To qualify for a young carer grant the person or persons being cared for must, throughout the qualifying period and on the day the application for assistance is made, each be a person to whom a qualifying disability benefit is normally payable.

(2) An applicant may combine hours caring for up to three persons during the qualifying period.

⁽²⁶⁾ asp 9.

(3) In paragraph (1), “qualifying disability benefit” means a disability benefit, or where applicable a component of a disability benefit, which is of a type, and being paid at a rate, that would entitle a person who cares for the recipient of that benefit and who meets the relevant qualifying conditions to—

- carer’s assistance, payable under section 28 of the Social Security (Scotland) Act 2018,
- carer’s allowance, or
- invalid care allowance.

In paragraph (3), “carer’s allowance” and “invalid care allowance” both mean an allowance payable under section 70 of the Social Security Contributions and Benefits Act 1992⁽²⁷⁾ or section 70 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992⁽²⁸⁾.

Further eligibility conditions

—(1) An applicant is not entitled to a young carer grant if, on the day their application is made, the applicant is in receipt of a benefit listed in regulation 6(3) in respect of any of the persons being cared for.

(2) An applicant is not entitled to a young carer grant if they have applied for a benefit listed in regulation 6(3) in respect of a period that includes the day their application is made, unless it has already been determined that the applicant is ineligible for that benefit in respect of that day.

An applicant is not entitled to a young carer grant if they have previously received a young carer grant, unless the day their application is made is at least one year after the day of the application in respect of which that grant was paid.

If any other person has received a young carer grant in respect of care of any of the persons being cared for in an application for a young carer grant, the applicant is not entitled to a young carer grant unless—

- the day the application is made is at least a year after the day of the application in respect of which that grant was paid, or the day of the latest such grant, or
- the person who received that grant has died.

If an applicant has already received three young carer grants, they are not entitled to a further young carer grant.

An applicant is not entitled to a young carer grant if, on the day their application is made, they are subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act 1999⁽²⁹⁾, unless the applicant falls within a category or description of persons specified in Part 2 of the schedule of the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000 (persons not excluded under section 115 of that Act from entitlement to various social security benefits)⁽³⁰⁾.

Conditions relating to residence

—(1) Subject to paragraphs (2) and (3), to qualify for a young carer grant the applicant must, on the day their application is made for that assistance, be—

- habitually resident in the United Kingdom, the Channel Islands, the Isle of Man, the European Economic Area or Switzerland, and
- ordinarily resident in Scotland.

Paragraph (1)(a) does not apply to the following persons (if they meet the condition in paragraph (1)(b) of being ordinarily resident in Scotland)—

- a refugee within the definition in Article 1 of the Convention relating to the status of refugees done at Geneva on 28th July 1951, as extended by article 1(2) of the Protocol relating to the status of refugees done at New York on 31st January 1967,
- a person who has been granted, or who is deemed to have been granted, leave outside the rules made under section 3(2) of the Immigration Act 1971⁽³¹⁾, where that leave is—

⁽²⁷⁾ 1992 c.4. There are amendments to section 70 that are not relevant to these Regulations.

⁽²⁸⁾ 1992 c.7. There are amendments to section 70 that are not relevant to these Regulations.

⁽²⁹⁾ 1999 c.33. There are amendments to section 115 that are not relevant to these Regulations.

⁽³⁰⁾ S.I. 2000/636.

⁽³¹⁾ 1971 c.77.

discretionary leave to enter or remain in the United Kingdom,
leave to remain under the destitution domestic violence concession, or
leave deemed to have been granted by virtue of regulation 3 of the Displaced Persons
(Temporary Protection) Regulations 2005⁽³²⁾,
a person who has humanitarian protection granted under the rules made under section 3(2) of the
Immigration Act 1971, or
a person who—
is not subject to immigration control within the meaning of section 115(9) of the Immigration
and Asylum Act 1999⁽³³⁾, and
is in the United Kingdom as a result of deportation, expulsion or other removal by compulsion
of law from another country to the United Kingdom.

An applicant who is not ordinarily resident in the United Kingdom does not need to meet the conditions
in paragraph (1) (and therefore is entitled to a young carer grant) if they—

have previously been properly paid a young carer grant,
have since the day of their application for the young carer grant that was properly paid, or the later of
two such grants, left the United Kingdom to become ordinarily resident in the European Economic
Area or Switzerland, and
meet the other conditions prescribed in these Regulations.

PART 3

Procedural matters

Periods for redetermination requests

—(1) The period for requesting a re-determination of entitlement to a young carer grant, under section 41
of the Social Security (Scotland) Act 2018, is 31 days beginning with the day that the applicant is informed,
in accordance with section 40 of that Act, of the right to make the request.

(2) Where such a request is validly made, the period allowed for re-determination (within the meaning of
section 43 of that Act) is 16 working days beginning with—

the day the request is received by the Scottish Ministers, or
where the request is received by the Scottish Ministers later than the period prescribed by paragraph (1),
the day on which the Scottish Ministers, or on appeal the First-tier Tribunal for Scotland, decide
that the applicant has a good reason for not requesting the re-determination sooner.

For the purpose of paragraph (2), a “working day” is a day other than—

a Saturday,
a Sunday, or
a bank holiday in Scotland under the Banking and Financial Dealings Act 1971⁽³⁴⁾.

Multiple applications involving care of the same person

—(1) Paragraphs (2) and (3) apply where two or more applicants state that they are caring for the same
person.

(2) The Scottish Ministers must determine which (if any) of the applicants is to be entitled to receive a
young carer grant.

⁽³²⁾ S.I. 2005/1379.

⁽³³⁾ 1999 c.33.

⁽³⁴⁾ 1971 c.80. Schedule 1, paragraph 2 sets out the Scottish bank holidays; it is amended by the
St Andrew’s Day (Scotland) Act 2007 (asp 2), section 1.

(3) Where the applications were made at different times, the Scottish Ministers must determine the application made first before they determine any other application.

Determination following backdated award of assistance

—(1) The Scottish Ministers are to make a determination of an individual’s entitlement to a young carer grant without receiving an application where—

an application has previously been made for a young carer grant (“the application”),

the determination made in respect of the application was that the applicant was not entitled to a young carer grant,

the only reason for the applicant not being entitled to a young carer grant was that a person being cared for was not during the qualifying period for the application in receipt of a qualifying disability benefit as required by regulation 6,

the Scottish Ministers establish that—

following an appeal, an award of a qualifying disability benefit has made to the person being cared for that is a backdated award,

had that award been made before the day of the application, a determination that the individual is entitled to a young carer grant would have been made instead, and

no other person has received a young carer grant since the day of the application, in respect of care of the person being cared for.

In making a determination required by paragraph (1) the Scottish Ministers are to use—

the information provided in the application that led to the original determination, and

any other information they have obtained in connection with that application.

Where a determination is to be, or has been, made without an application by virtue of this regulation, references in these Regulations to the day the application is made are to be read as references to the day the application that led to the original determination was made.

In this regulation a “backdated award” means an award of assistance for a day, or a period that begins on a day, that falls before the day the decision to make that award was taken.

PART 4

Assistance to be given

Amount and form of young carer grants

—(1) A young carer grant is to be given as a payment of £300.

(2) A young carer grant is to be given as money (subject to paragraph 0).

If—

the Scottish Ministers offer to give an applicant some or all of the value of a young carer grant in a form other than money, and

the applicant agrees to be given the grant in that form,

the grant is to be given in that form, unless the applicant withdraws agreement before the grant is given.

[***]

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations make provision under section 28 of the Social Security (Scotland) Act 2018 for payments to be made to help young persons who care for disabled persons.

Part 1 is formal and contains commencement and interpretation provisions.

Regulations 3 and 4 provide that applications are required and describe the age limits which determine when applications can be made.

Regulations 5 to 7 set out entitlement rules. These are based on the amount and nature of care, the persons to whom care can be provided and rules relating to receipt of social security assistance and immigration status. Regulation 8 describes residence requirements.

Regulation 9 prescribes periods for making requests for redetermination of decisions on applications and for responding to those requests.

Regulation 10 describes what is to happen where applications are made by more than one person.

Regulation 11 prescribes a situation in which the Scottish Ministers are required to determine, without receiving an application, that a person is entitled to a young carer grant. This is to be done where a person being cared for receives a backdated award of a social security benefit, that would have altered a previous determination had the award been made before that determination was made, where certain conditions are met.

Part 4 sets out the amount of a young carer grant that is to be given to persons who qualify for the grant.

A regulatory impact assessment has not been produced for this instrument as it has no impact on the costs of business.

ANNEX B

Draft scrutiny framework

Please note: References are illustrative and are not intended to be comprehensive. They do not currently refer to specific commitments in the Social Security Charter, although these may be relevant and considered. For the purposes of this exercise we have drawn on the 'PANEL' approach to human rights' assessment (Participation, Accountability, Non-Discrimination, Empowerment and Legality. See: <http://www.scottishhumanrights.com/rights-in-practice/human-rights-based-approach/>).

Overview

- 1) Are the regulations consistent with the Act, legally and in terms of the policy intention behind the Act?
- 2) Are the regulations clear overall?
- 3) Are there particular human rights instruments that are likely to be relevant?
- 4) What impact assessments have been done, e.g. on equality, poverty, human rights? What do they tell us?

References:

- Principles: (b) social security is itself a human right and essential to the realisation of other human rights
- Human rights: Legal (PANEL)

Policy intention

Clarity

- 5) Has Scottish Government presented clear evidence about the issue the policy seeks to address?
- 6) Is the policy objective of the regulations clear?

- 7) Is the policy objective clearly consistent with the principles and with human rights?
- 8) Are there apparent inconsistencies or anomalies in the way the regulations are drafted that do not reflect the policy objective, principles or human rights?

Scope

- 9) Could the regulations reasonably have gone further in advancing the policy objective, principles and human rights?

References

- Human rights to progressive realisation

Policy development

- 10) Who has the Scottish Government involved and how accessibly?
 - The target client group
 - Seldom-heard and intersectional people from the target group
 - Other people directly affected
 - Representative stakeholder organisations
- 11) Has Scottish Government clearly set out what the client group and others have told them about their needs, barriers and ideas for solutions? To what extent do the regulations address the key needs, barriers and ideas for solutions identified?
- 12) To what extent do stakeholders support the policy objectives and draft regulations? Is there clear evidence of shared concerns? Has Scottish Government addressed them? If not, is there a good case for not addressing them?
- 13) Are there any major areas of disagreement between stakeholders? What does SCoSS think about these areas and why?

References

- Principles: (f) the Scottish social security system is to be designed with the people of Scotland on the basis of evidence
- Human rights to **P**articipation, **E**mpowerment ('**PANEL**')
- Other: Equality Impact Assessment

Policy design

Context

- 14) Have possible implications for other policy areas other than social security been explored? This might include whether an increase in social security payment could be offset by a reduction in another form of support or just plug a gap in another form of support.
- 15) Are there issues around the interface with reserved benefits?
- 16) Are the regulations likely to increase or reduce the overall complexity of the (devolved and reserved) social security system? Is there scope to simplify? Is increased complexity justifiable?
- 17) Are there any wider legal considerations? For example, is it consistent with EU co-ordination rules, immigration rules, etc?
- 18) Do the policy objectives and draft regulations improve upon overall (devolved and reserved) existing provision?

References

Principles: (g) opportunities are to be sought to continuously improve the Scottish social security system in ways which (i) put the needs of those who require assistance first, and (ii) advance equality and non-discrimination; (h) the Scottish social security system is to be efficient and deliver value for money.

Payment levels

- 19) How did Scottish Government establish the level of payment? What evidence or other factors did it draw upon?
- 20) Is the level of payment adequate for the purpose and role (in view of other types of support) intended for the benefit?

- 21) Has any contribution towards reducing poverty appear been explored?

References

- Principles: (a) social security is an investment in the people of Scotland; (b) social security is itself a human right and essential to the realisation of other human rights; (e) the Scottish social security system is to contribute to reducing poverty in Scotland
- Human rights to adequate income, standard of living.

Eligibility

- 22) Do the eligibility criteria deliver on the policy objective, principles and human rights?
- 23) Are the eligibility criteria fair? Do the eligibility criteria create winners and losers? Is this unforeseen? Is it justified?
- 24) Are there any identifiable ambiguities or risks of unforeseen consequences, for example in relation to fraud or take-up?

References

- Principles: (c) the delivery of social security is a public service; (d) respect for the dignity of individuals is to be at the heart of the Scottish social security system; (h) the Scottish social security system is to be efficient and deliver value for money; (g) opportunities are to be sought to continuously improve the Scottish social security system in ways which (i) put the needs of those who require assistance first, and (ii) advance equality and non-discrimination
- Other: Equality Impact Assessment

Assessment process

- 25) Does the assessment process put the needs of those who require assistance first?
- 26) How easy or difficult will it be to demonstrate eligibility?
- 27) Will it create direct or indirect disincentives? These might include unnecessary hurdles, fear of loss of income, intrusion into privacy, focusing on what people can't do rather than what they could do with the right support. Is this necessary? How could it be mitigated?

References

- Principles: (a) social security is an investment in the people of Scotland; (c) the delivery of social security is a public service; (d) respect for the dignity of individuals is to be at the heart of the Scottish social security system; (h) the Scottish social security system is to be efficient and deliver value for money; (g) opportunities are to be sought to continuously improve the Scottish social security system in ways which (i) put the needs of those who require assistance first, and (ii) advance equality and non-discrimination.
- Human rights to availability; Empowerment (PANEL)

Policy delivery

- 28) Do the regulations lend themselves to simple, efficient and cost-effective administrative processes?
- 29) How will all eligible people, including seldom heard people, be informed about their entitlement?
- 30) How will administrative procedures reasonably accommodate different access requirements and preferences?

References:

- Principles: (c) the delivery of social security is a public service; (c) the delivery of social security is a public service; (d) respect for the dignity of individuals is to be at the heart of the Scottish social security system; (h) the Scottish social security system is to be efficient and deliver value for money.
- Human right to accessibility (all covered, particularly those most belonging to most disadvantaged or marginal groups); availability.
- Other: Duty to promote take-up; inclusive communications.

Policy impact and improvement

Monitoring

- 31) What is in place to measure, monitor and enable adjustments? In particular, how will it measure:
 - Whether the needs of those who require assistance are put first
 - Whether it advances equality and non-discrimination
 - The impact it has had on the lives of people claiming it. What has it enabled them to do that they could not do before?

- 32) Are there other particular issues that could usefully be monitored?
- 33) Who will be involved in monitoring and evaluation? Whose voices will be heard, particularly those of the service users?

Sustainability

- 34) How could the policy objectives, and/or the regulations that deliver them, be improved in future to advance the principles or human rights?

Transparency and accountability

- 35) Are there measures in place for reporting, publicly, transparently and inclusively, and for holding to account?

References

- Principles: (a) social security is an investment in the people of Scotland; (b) social security is itself a human right and essential to the realisation of other human rights; (c) the delivery of social security is a public service; (d) respect for the dignity of individuals is to be at the heart of the Scottish social security system; (e) the Scottish social security system is to contribute to reducing poverty in Scotland; (f) the Scottish social security system is to be designed with the people of Scotland on the basis of evidence (g) opportunities are to be sought to continuously improve the Scottish social security system in ways which (i) put the needs of those who require assistance first, and (ii) advance equality and non-discrimination; (b) social security is itself a human right and essential to the realisation of other human rights.
- Human rights to 'progressive realisation'; availability to future generations; **Accountability ('PANEL')**
- Other: Equality Impact Assessment

Concluding questions

- 36) To what extent do the policy objectives and regulations overall appear consistent with the social security principles and the advancement of a human rights?
- 37) Have equality and diversity considerations (including intersectionality) been embedded throughout each stage?

38) From a first reading of draft regulations, are there unresolved issues that SCoSS wishes to explore further, consult on, invite Scottish Government officials or lawyers to provide information about/explain, get independent legal or expert advice on, or investigate/commission research on?

References

- Principles: (g) opportunities are to be sought to continuously improve the Scottish social security system in ways which (i) put the needs of those who require assistance first, and (ii) advance equality and non-discrimination;
- Human rights: **Non-Discrimination and Equality** ('PANEL')
- Other: Equality Impact Assessment