



Scottish  
Commission  
on Social  
Security

**Scottish Commission on Social Security**

Further scrutiny report on draft regulations:  
**The Disability Assistance for  
Children and Young People  
(Scotland) Regulations**

Submitted to the Scottish Government and the Scottish  
Parliament's Social Security Committee on 17 December 2020.

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## **Summary of recommendations and observations**

**Recommendation 1:** In evaluating the delivery of CDP, the Scottish Government should assess whether the timescales to apply for re-determinations meet applicants' needs. Social Security Scotland should gather and publish information on reasons and outcomes where re-determination requests are received outside the time limit.

**Recommendation 2:** The Scottish Government should amend the definition of 'severe visual impairment' in regulation 7(4) to remove the mobilising requirement. Further, it should provide detailed guidance on the VINCYP assessment and the types of supporting information that will evidence severe visual impairment.

**Observation 1:** Generally, where there is a significant change in policy as regulations are developed, it would be good practice to consider any consequential impacts and update equality and other impact assessments as needed. To ensure any potential impacts are identified regarding children with visual impairments, the Scottish Government should monitor how many children qualify for CDP under the new definition of severe visual impairment.

**Recommendation 3:** As part of its take-up strategy for CDP working with organisations and services, the Scottish Government should work with VINCYP networks to promote take-up among children with visual impairments.

**Observation 2:** We note that further adjustments to drafting of regulations are needed to ensure that the route to qualifying for higher rate mobility for a child with a 'severe mental impairment' who also has 'severe behavioural difficulties' is set out in regulations in a manner consistent with the policy intention of it being a single test where both parts must be satisfied.

**Recommendation 4:** The Scottish Government should amend the regulations to clarify the policy intention that interventions in a positive behavioural support plan are evidence but having such a plan is not required for a child to be accepted as having 'severe behavioural difficulties'.

**Recommendation 5:** The Scottish Government should ensure that regulation 7(3) is explicit about which routes to qualifying for

higher rate mobility are affected by a child's ability to walk using an artificial limb or artificial aid.

**Recommendation 6:** The Scottish Government should ensure that the policy intention relating to a child's ability to walk out of doors is clear in regulations and guidance.

**Observation 3:** We note that further adjustments to drafting of the regulation for lower rate mobility component may be needed to explicitly relate the need for guidance or supervision to a physical or mental impairment. Should the Scottish Government consider the draft regulations to be sufficient as they are, it should explain how they are consistent with the Social Security (Scotland) Act.

**Recommendation 7:** The Scottish Government should amend regulation 14 to allow a nil amount to be paid when entitlement begins while a child is resident in a care home or residential educational establishment.

**Recommendation 8:** The Scottish Government should clarify whether the policy intention is not to pay CDP care component arrears if a child or young person is released from legal detention without charge or sentenced to a non-custodial prison sentence.

**Recommendation 9:** The Scottish Government should:

- clarify in the regulations the circumstances in which an advance application can be made, with a view to a broad flexibility;
- clarify in the regulations that the qualifying period for the lower rate mobility component can be served before a child's 5<sup>th</sup> birthday;
- attend to the technical issues noted in relation to start dates for entitlement.

**Recommendation 10:** The Scottish Government should amend the regulations so that the general rule is that a child has a right to receive their correct entitlement fully backdated when an official error has caused an underpayment.

**Recommendation 11:** The Scottish Government should:

- ensure that the policy intention on flexible payment methods for young people is fully realised in the regulations;

- **ensure that regulation 30(6) achieves the policy intention of paying the equivalent of 8 more weeks CDP if a child dies.**

**Recommendation 12: The Scottish Government should consider how to amend the past presence test for CDP to ensure that it complies with human rights legislation.**

**Observation 4: We would welcome further information on how the Scottish Government plans to ensure that young people do not experience a gap in payments as they transition from CDP to an adult disability benefit.**

## 1. Introduction

The Scottish Commission on Social Security (SCoSS) presents its supplementary report on revised draft Disability Assistance for Children and Young People (Scotland) Regulations.<sup>1</sup>

SCoSS originally reported<sup>2</sup> on draft Disability Assistance for Children and Young People ('DACYP') regulations<sup>3</sup> on 9 March 2020 ('the original draft regulations'). However, the original draft regulations were not laid in the Scottish Parliament and the Scottish Government has not yet formally responded to our scrutiny report.

The Cabinet Secretary for Social Security and Older People formally referred the revised draft regulations to SCoSS on 29 October 2020.<sup>4</sup> In doing so, the Cabinet Secretary noted that the impact of coronavirus had "posed particular challenges for our plans to deliver disability assistance" but that work had continued on developing DACYP. The Cabinet Secretary also stated that the revised draft regulations have a "particular focus on responding to the recommendations made by SCoSS". DACYP has also been renamed as Child Disability Payment (CDP).

We expect the Scottish Government to publish its responses to this report and our original report simultaneously, at the same time that it lays the revised draft regulations in the Scottish Parliament. In making recommendations below, we cross-refer to recommendations in our original report where they are relevant but otherwise do not repeat text from that report.

### 1.1 Overview

The Cabinet Secretary has asked the Commission to consider a narrow range of issues arising from the redrafted provisions:

- the provisions relating to the periods for requesting and making re-determinations;
- the provisions applicable to the mobility component; and
- the provisions relating to temporary absences from home, including non-payability of assistance.

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<sup>1</sup> [The Disability Assistance for Children and Young People \(Scotland\) Regulations 2021 \(www.gov.scot\)](http://www.gov.scot)

<sup>2</sup> [FINAL+SCoSS+Report+on+the+draft+DACYP+%28S%29+Regs+2020.pdf \(www.gov.scot\)](http://www.gov.scot)

<sup>3</sup> [SI/SR Template \(www.gov.scot\)](http://www.gov.scot)

<sup>4</sup> [Cabinet Secretary for Health and Wellbeing.dot \(www.gov.scot\)](http://www.gov.scot)

We consider these provisions in turn below<sup>5</sup>, then examine other issues that have changed since SCoSS scrutinised the original draft regulations.<sup>6</sup> In doing so, we have taken account of the written submissions provided to SCoSS by stakeholders on the draft regulations.<sup>7</sup> We thank all those who submitted their views, particularly given the restricted timescales for doing so. The timeline of our scrutiny is contained in the Annex.

## **2. Requesting and making re-determinations**

### **2.1 Time limits for requesting and making re-determinations**

The Scottish Government has reviewed timescales for requesting and making re-determinations for clarity and consistency with existing Scottish benefits. Following the review, there is no change to the timescales proposed in DACYP regulations, set at 42 days for the individual to apply and 56 days for Social Security Scotland to make the re-determination. Both timescales are expressed in 'days' (which includes weekends) rather than 'working days'. For all other Scottish benefits, individuals have 16 days to apply for a re-determination and Social Security Scotland has 16 working days to make the re-determination. The Scottish Government has explained that it intends to use 'days' for disability assistance for both individual and Social Security Scotland time limits, but 'working days' for Social Security Scotland time limits for other types of assistance<sup>8</sup>, believing that divergence is appropriate due to the strong preference for this approach expressed in its public consultation on Disability Assistance in Scotland.

In considering the time limits for requesting and making re-determinations for CDP, SCoSS has been guided by the Charter which requires that processes should be simple and clear, and applications and enquiries should be dealt with by Social Security Scotland as quickly as they can.<sup>9</sup>

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<sup>5</sup> In accordance with section 97(4) of the Social Security (Scotland) Act.

<sup>6</sup> Since SCoSS reported on the original draft regulations, the Scottish Parliament has passed the Social Security Administration and Tribunal Membership (Scotland) Act 2020, while the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill is at stage 1 of the parliamentary scrutiny process.

<sup>7</sup> [2020+November+19+--+Written+subs+collated.pdf \(www.gov.scot\)](#)

<sup>8</sup> For example Best Start Grant, Scottish Child Payment.

<sup>9</sup> [Social Security Scotland: our charter - gov.scot \(www.gov.scot\)](#): 'Processes that work', commitments 1 and 2.

Turning first to timescales for Social Security Scotland to make a re-determination, we consider that CDP does not need to be aligned with existing Scottish benefits as ‘working days’ as long as the divergence is completely clear to staff, particularly those working across benefits, and can be accurately represented in management information and reporting. Our original report considered some of the pros and cons of setting the time limit for CDP at 56 days.<sup>10</sup> For existing Scottish benefits, 97 per cent of re-determinations are completed within the 16 working days allowed, suggesting that the timescale is reasonable for those benefits and holds Social Security Scotland to quick responses, which is in line with Charter expectations. However, CDP is a more complex benefit and it is important that Social Security Scotland has enough time to make fully informed re-determinations. 56 days may strike a reasonable balance between speed and accuracy, but the optimum time limit will need to be kept under review.

However, alignment is more important when it comes to timescales for individuals. We agree that timescales for individuals are best expressed in ‘days’ and consider that the number of days allowed is best aligned across Scottish benefits. Having different timescales for different benefits could be confusing for individuals and their advisers. Fair outcomes of re-determinations and appeals will be a measure of success of disability assistance and any potential barrier should be kept under review and removed where possible.

**Recommendation 1: In evaluating the delivery of CDP, the Scottish Government should assess whether the timescales to apply for re-determinations meet applicants’ needs. Social Security Scotland should gather and publish information on reasons and outcomes where re-determination requests are received outside the time limit.**

### **3. Mobility component**

#### **3.1 Severe visual impairment route to higher rate mobility**

Our original report noted that children in Scotland with a visual impairment are assessed under the Visual Impairment Network for Children and Young People (VINCYP). As a result, the test of severe visual impairment for Disability Living Allowance (DLA) and hence also in the original draft DACYP regulations, were not a good fit with existing

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<sup>10</sup> Paragraph 6.3 of our original report: <https://www.gov.scot/publications/the-disability-assistance-for-children-and-young-people-scotland-regulations-2020-scrutiny-report-on-draft-regulations/>



best practice. Therefore, SCoSS recommended that the Scottish Government should review the eligibility criteria for the higher rate mobility component for children who are visually impaired.

We are pleased to see that regulation 7(4) of the revised draft regulations now provides entitlement to higher rate mobility for children who have a severe visual impairment, fulfilling the VINCYP definition. The new test in regulation 7(4) has two parts:

- (a) the child ‘has a severe visual impairment’, fulfilling the definition from VINCYP, and
- (b) the child ‘is unable to mobilise safely’ .... ‘due to severe sight impairment’.

This approach is a much better fit with good practice in Scotland, and should make evidencing entitlement for children with a visual impairment more straightforward. It is reassuring that RNIB Scotland approves of the change overall.<sup>11</sup> However, RNIB Scotland points out that the second part of the test (regulation 7(4)(b) on mobilising safely) is not needed because having a severe visual impairment in itself should be sufficient to qualify. Other stakeholders have voiced concerns that including a mobilising test could inadvertently restrict entitlement compared to the DLA test of severe visual impairment which it replaces.

We are grateful to the Scottish Government for conveying to us the following insights from VINCYP national lead clinicians. We understand that whereas VINCYP has an agreed definition of ‘visual impairment’ in children (reproduced in regulation 7(8)), the assessment of ‘severe visual impairment’ does not depend on the child’s ability to mobilise as the draft regulations suggest. VINCYP does refer to mobilising in the same terms as reproduced in regulation 7(4)(b), but as a shorthand used by clinicians producing a statement that a family can use to evidence entitlement to a Blue Badge or travel card. Unlike adults, the definition of ‘severe’ in children cannot always be measured in terms of the standard sight tests of visual acuity, either because they are too young, or because visual impairment is due to an abnormality of brain function so that they cannot ‘see’ due to profound difficulties with visual processing in the brain. Where it is not appropriate to apply the adult visual acuity criteria, clinicians form a professional opinion on whether a child has equivalent visual function to someone meeting the adult criteria. Best practice is for a child to have a functional assessment by a team of

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<sup>11</sup> The RNIB Scotland written submission to SCoSS is available [here](#).

professionals with expertise in visual impairment including a teacher and habilitation specialist.

In the light of this information about the broader functional nature of the VINCYP test of severe visual impairment in children, we consider that removing the mobilising requirement in regulation 7(4) will help align the regulations more successfully with the clinical approach to assessments.

**Recommendation 2: The Scottish Government should amend the definition of ‘severe visual impairment’ in regulation 7(4) to remove the mobilising requirement. Further, it should provide detailed guidance on the VINCYP assessment and the types of supporting information that will evidence severe visual impairment.**

### **3.2 How many children with a severe visual impairment will qualify under the new test?**

The Scottish Government has not been able to estimate the number of children likely to qualify for the higher rate mobility component under the new definition of severe visual impairment. 107 children currently qualify for DLA higher rate mobility under the existing definition.

Approximately 2,500 children in Scotland have a visual impairment<sup>12</sup> but statistics from VINCYP on how many of these have a severe visual impairment have been delayed because of COVID. However, we expect that it would be possible for the Scottish Government to estimate whether any significant change is expected as a result of the new definition, which would reassure stakeholders. Children have been assessed under VINCYP for some time so it may be reasonable to assume that any significant change to how many children qualify for DLA would already have emerged. In any case, the Scottish Government should monitor how many children with a severe visual impairment qualify for CDP so that any impacts can be identified.

**Observation 1: Generally, where there is a significant change in policy as regulations are developed, it would be good practice to consider any consequential impacts and update equality and other impact assessments as needed. To ensure any potential impacts are identified regarding children with visual impairments, the Scottish Government should monitor how many children qualify for CDP under the new definition of severe visual impairment.**

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<sup>12</sup> [NMCN Annual Report \(scot.nhs.uk\)](https://www.scot.nhs.uk/nmcn/annual-report/)

## Take-up

The Scottish Government pledges in the Charter to work to improve benefit take-up, ensuring as many people as possible get what they are entitled to, making a particular effort to reach people who are most likely to be excluded. Take-up initiatives are set out in a Benefit Take-up Strategy<sup>13</sup>, as required by the Social Security (Scotland) Act 2018, which includes working with stakeholders on promotion and engagement.

There are various organisations and services for children with visual impairments that the Scottish Government will want to involve in promoting take-up of CDP. There is also an opportunity for the Scottish Government to work with the network of practitioners and bodies through VINCYP to promote take-up of CDP among children with visual impairments, many of whom have other impairments and as a group would be expected to have a high take-up of CDP. For example, VINCYP standards<sup>14</sup> recommend a multi-agency review and report for each child within 8 months of identification of a visual impairment, which would be an opportunity to ensure that a benefit check for the family has been carried out.

**Recommendation 3: As part of its take-up strategy for CDP working with organisations and services, the Scottish Government should work with VINCYP networks to promote take-up among children with visual impairments.**

### 3.3 Severe mental impairment route to higher rate mobility

#### (a) Significant difference from DLA

SCoSS's original report noted that DLA regulations have a single test for the severe mental impairment route to qualifying for the highest rate of the mobility component. A child must be 'severely mentally impaired' and have 'severe behavioural problems' and also get the highest rate of the care component. The original DACYP draft regulations had diverged significantly from this approach, which did not seem to be the policy intention.

The revised draft regulations (regulation 7(2)(g)) have been amended to add the requirement to have the higher rate care component, but not to have a single test. The test is still that a child will qualify if they either have a 'severe mental impairment' or have 'severe behavioural

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<sup>13</sup> <https://www.gov.scot/publications/social-security-scotland-act-2019-benefit-take-up-strategy-october-2019/pages/1/>

<sup>14</sup> <https://www.vincyp.scot.nhs.uk/wp-content/uploads/2019/11/2019-09-20-VINCYP-standards-v3.pdf>

difficulties'. We understand the Scottish Government's policy intention is to have a single test and to amend the regulations accordingly.

**Observation 2: We note that further adjustments to drafting of regulations are needed to ensure that the route to qualifying for higher rate mobility for a child with a 'severe mental impairment' who also has 'severe behavioural difficulties' is set out in regulations in a manner consistent with the policy intention of it being a single test where both parts must be satisfied.**

**(b) Evidence for physical restraint**

Our original report noted a reference to children whose behaviour requires 'physically restraining' and, in particular, that the use of restraint to avoid damage to property is not consistent with good practice. We recommended that the reference to damage to property be removed and that in producing guidance for case managers the Scottish Government should consider wider concerns about use of physical restraint.

We are pleased to see that the revised draft regulations remove the reference to damage to property. In addition, it adds specific detail about positive behavioural support plans, the accepted best practice framework within health, social care and educational services relating to interventions to reduce and prevent challenging behaviour.

Stakeholders have told SCoSS that they welcome the change. However, CPAG asks whether all interventions must be described in a positive behavioural support plan, and, if so, whether that means a child would need to have such a plan to qualify. If this were the case, it may create an unintended barrier to eligibility under this route, for example, for children who are waiting to be assessed for a positive behavioural support plan. Officials have clarified the policy intention: interventions in a positive behavioural support plan will be evidence of challenging behaviour but other evidence can also be relevant, therefore, having such a plan is not required to qualify for higher rate mobility component through the severe mental impairment/ behavioural difficulties route. This policy intention could be clarified by amending regulation 7(7)(b).

**Recommendation 4: The Scottish Government should amend the regulations to clarify the policy intention that interventions in a positive behavioural support plan are evidence but having such a plan is not required for a child to be accepted as having 'severe behavioural difficulties'.**

### **3.4 Drafting issue relating to artificial aids**

Whether a child qualifies for higher rate mobility component through being unable or virtually unable to walk takes into account their walking ability using any suitable walking aid or prosthesis. We are pleased that regulations have been amended to be more explicit that the need to use walking aids does not disqualify a child with prosthetic legs, as we recommended in our original report.<sup>15</sup> However, we suggest that the regulation would be clearer still if it was explicit that walking aids and prostheses were also irrelevant to the other routes to qualifying for higher rate mobility component (in regulation 7(2)(e) to (g)). This would also ensure that the draft regulations were consistent with relevant DLA provisions.

**Recommendation 5: The Scottish Government should ensure that regulation 7(3) is explicit about which routes to qualifying for higher rate mobility are affected by a child’s ability to walk using an artificial limb or artificial aid.**

### **3.5 Unable or virtually unable to walk as an outdoor test**

The test of whether a child is unable or virtually unable to walk for DLA higher rate mobility component has always been an outdoors test taking no account of a child’s particular surroundings such as living on a hill. We understand that the policy intention for CDP is that it should also be an outdoors test. However, the draft DACYP regulations do not specify this (regulation 7). This misalignment with DLA could have the effect of case law no longer applying to CDP.

**Recommendation 6: The Scottish Government should ensure that the policy intention relating to a child’s ability to walk out of doors is clear in regulations and guidance.**

### **3.6 Lower rate mobility eligibility depending on physical or mental impairment**

Our original report noted that, under the Social Security (Scotland) Act 2018, disability assistance regulations must be framed so that eligibility depends on having a physical or mental impairment. However, the original draft regulations, which provided for the lower rate mobility component, made no reference to the guidance or supervision needs of a child having to relate to an impairment. SCoSS recommended that the

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<sup>15</sup> Recommendation 21 of our [original report](#).

regulation for lower rate mobility component should relate the need for guidance or supervision to a physical or mental impairment. The revised draft regulations seek to make the link with a physical or mental health condition more explicit. However, we note that regulation 6 still does not contain an explicit requirement for a child to have a physical or mental impairment.

**Observation 3: We note that further adjustments to drafting of the regulation for lower rate mobility component may be needed to explicitly relate the need for guidance or supervision to a physical or mental impairment. Should the Scottish Government consider the draft regulations to be sufficient as they are, it should explain how they are consistent with the Social Security (Scotland) Act.**

#### **4. Temporary absences from home and non-payability of assistance**

Our original report noted that children staying in a care home or residential school lost entitlement to CDP altogether. This had real disadvantages including loss of passported benefits. The proposal for CDP was different to DLA, where payment would stop but entitlement would continue. It was necessarily different because there was no power in the Social Security (Scotland) Act 2018 to stop payment. We recommended that the Scottish Government consider amending the Act to enable entitlement to remain while payment is suspended.

The Social Security Administration and Tribunal Membership (Scotland) Act 2020 will allow Scottish Ministers to pay a nil amount in respect of some or all of an award when an individual is resident in a specified place. The revised regulations reflect the policy intention to pay a nil amount instead of removing entitlement when a child is staying in a care home or residential school, or is in legal detention.

Stakeholders have warmly welcomed this change, which also means that children and their families will now retain entitlement to passported benefits.

There are aspects of the regulations which could be further improved:

- If a CDP application is made while a child is staying in a care home or residential school, regulation 14 provides for care component entitlement to begin when they leave. As stakeholders

have pointed out to the Commission, this has implications for passported entitlements.<sup>16</sup> It means, for example, that parents cannot access a disabled child element in universal credit based on the care component until the child leaves the care home or school and cannot claim exemption from the benefit cap. For DLA, parents would have access to these passporting benefits because only payment of the care component would be deferred until the child left the care home or school, allowing entitlement to be established.

**Recommendation 7: The Scottish Government should amend regulation 14 to allow a nil amount to be paid when entitlement begins while a child is resident in a care home or residential educational establishment.**

- The Scottish Government aims to support children and young people in legal detention to transition back into a community setting by continuing to pay CDP mobility component to help the family keep in contact with the child.<sup>17</sup> However, CDP care component payment stops while in custody. No CDP arrears are paid if a child or young person is released from legal detention without charge or sentenced to a non-custodial prison sentence, in contrast to the DLA rules.<sup>18</sup> Given the policy intention is to make rules on payments in alternative accommodation more consistent by aligning rules in legal detention with care homes and residential schools, this divergence from DLA rules may be intended.<sup>19</sup>

**Recommendation 8: The Scottish Government should clarify whether the policy intention is not to pay CDP care component arrears if a child or young person is released from legal detention without charge or sentenced to a non-custodial prison sentence.**

## **5. Other issues about applying for CDP and changing awards**

### **5.1 Advance applications**

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<sup>16</sup> The written submissions to SCoSS from the Child Poverty Action Group in Scotland and Citizens Advice Scotland are available [here](#).

<sup>17</sup> Paragraph 19 of the Scottish Government's Equalities Impact Assessment.

<sup>18</sup> Social Security (General Benefit) Regulations 1982 No. 1408. However, payment of both components of DLA stops in custody, in contrast to CDP where only the care component stops.

<sup>19</sup> Paragraph 20 of the Scottish Government's Equalities Impact Assessment.

Being able to apply for a benefit in advance is a useful provision when a child is likely to qualify in the next few weeks or months. It gives Social Security Scotland time to assess entitlement and make the payment as soon as the qualifying conditions are met. It also allows for flexibility if someone has claimed at the 'wrong' time, for example during the 13-week qualifying period for satisfying a disability condition. As drafted, regulation 20(2) permits advance claims during the qualifying period for a care or mobility component, or for a baby before the lower age limit for the care component of 3 months. However, the scope of this provision is not clear, and may be narrower than intended. For example, it does not appear to permit an advance application for a child approaching their 3<sup>rd</sup> or 5<sup>th</sup> birthday – the lower age limits for higher and lower mobility component respectively. It seems reasonable to allow applications in advance of any of the qualifying conditions being met. We suggest this be clarified in regulations.

On a related issue, a child should be able to serve the 13-week qualifying period before their birthday, allowing entitlement to start as soon as they reach the lower age limit of 3 or 5-years-old. However, as drafted, it appears as though a child would have to wait until they were aged 5 years and 3 months before qualifying for lower rate mobility component (regulation 6(7)(a)). We suggest regulations clarify that entitlement can begin at the lower age limit.

On a technical note regarding regulation 20:

- We understand that regulation 20(2) will be amended to provide for Scottish Ministers to treat an advance application as having been made on the day requirements are satisfied, not as the draft regulation says 'on a day after which those requirements become satisfied'.
- References in regulation 20(2)(a) to regulations 6(5) and 7(10), appear to reference the wrong paragraphs.
- Regulation 20(5) fixing the start date of entitlement when an application is received late should refer to paragraph (1) and not paragraph (2). We assume the intention is that the start date will normally be the day the application is received.

**Recommendation 9: The Scottish Government should:**

- **clarify in the regulations the circumstances in which an advance application can be made, with a view to a broad flexibility;**



- **clarify in the regulations that the qualifying period for the lower rate mobility component can be served before a child's 5<sup>th</sup> birthday;**
- **attend to the technical issues noted in relation to start dates for entitlement.**

## **5.2 Underpayments caused by official error**

People will usually challenge CDP awards by asking for a re-determination and appeal. If the award is found to be wrong, the child will get full arrears paid whatever the reason the award was wrong, including official error. An official error is a mistake made by the state (Scottish or UK Government). If it is too late to correct an official error the usual way, Social Security Scotland can still change an award through the 'determination without application' process. However, through this process, regulation 27(1)(d) starts correct entitlement from the date on which Social Security Scotland becomes aware of the official error. If that would be 'unjust', there is discretion in regulation 27(2) to set an earlier date and pay arrears further back.

The Charter promises to 'pay you on time in the right amount' and goes on to say, in the context of encouraging complaints when things go wrong, that Social Security Scotland will 'do everything we can to make things right'. To make good on the Charter commitments, it is hard to imagine in what situations it would be fair or just to withhold fully backdated correct entitlement when an official error has been established. Further, relying on an exercise of discretion to decide whether to pay or not seems an unnecessary barrier, and possibly one that would be subject to challenge on human rights grounds, depending on how it is used in practice.<sup>20</sup>

If the Scottish Government has strong reasons for needing the power to withhold payment, there should be specified exceptions. The general rule should be that a child has a right to receive their correct entitlement fully backdated.

We also note that, as currently drafted, this rule is now out of line with both Scottish Child Payment (SCP)<sup>21</sup> and DLA.<sup>22</sup> In the interests of consistency across Scottish benefits, CDP and SCP rules on paying

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<sup>20</sup> For example under Article 1, Protocol 1 of the European Convention on Human Rights.

<sup>21</sup> Schedule, paragraph 6, the Scottish Child Payment Regulations 2020 SSI 2020 No. 351, requires full backdating when someone is underpaid due to an official error.

<sup>22</sup> For DLA and other UK benefits, the default is full backdating when there has been an official error, except where it is an error of law.

arrears due following an official error should be the same unless there is a good reason for the difference.

**Recommendation 10: The Scottish Government should amend the regulations so that the general rule is that a child has a right to receive their correct entitlement fully backdated when an official error has caused an underpayment.**

### **5.3 Payments**

The Scottish Government has said it will offer various payment methods as well as paying into a bank account, such as a Post Office or Credit Union account or digital voucher system,<sup>23</sup> recognising that payment method is of particular importance for some communities and for young adults who have not yet opened an account.<sup>24</sup>

We are not clear that the draft regulations reflect this intention. On reaching age 16, it seems that Social Security Scotland is required to take action if a young person has not notified ‘their bank details’, which we assume means CDP payment will end (regulation 24(1)(a)(vii)). Officials have told us that this would be a last resort and, in any case, the regulation will be modified when provision to suspend entitlement is introduced under the Social Security Administration and Tribunal Membership (Scotland) Act 2020.

There is a further technical issue with payments. If a child should die while entitled to CDP, instead of a run-on of entitlement, the policy seems to be to make an extra payment equivalent to 8 weeks of entitlement. Drafting of regulation 30(6) does not clearly achieve this. For example, it links the amount of the extra payment not to the weekly rate applicable at the date of death but to the amount actually paid in the week ending with the date of death, which does not seem to fit with a 4-weekly payment cycle.

**Recommendation 11: The Scottish Government should:**

- **ensure that the policy intention on flexible payment methods for young people is fully realised in the regulations;**
- **ensure that regulation 30(6) achieves the policy intention of paying the equivalent of 8 more weeks CDP if a child dies.**

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<sup>23</sup> Paragraph 87 of the Equalities Impact Assessment refers to paying through iMovo, a secure digital voucher system delivered through email or text message and redeemable at PayPoint outlets.

<sup>24</sup> Paragraph 87 of the Scottish Government’s Equality impact assessment.

## 6. Residence and presence conditions

CDP has conditions about presence in Scotland and the UK which specify how long a child must have been in the UK before they can be eligible. This is 13 weeks for babies under six months, 26 weeks for infants up to age two, and two years for children from age three. This two-year ‘past presence’ test in DLA has been held by the Upper Tribunal<sup>25</sup> to be in breach of the United Nations Convention on the Rights of the Child (UNCRC) and the European Convention on Human Rights (ECHR). The remedy given is to apply the 26-week past presence test to all children from the age of six months.

The Scottish system of social security recognises that social security is itself a human right.<sup>26</sup> Protecting and fully realising human rights is fundamental to the system. Indeed, it is not within devolved competence for the Scottish Government or Scottish Parliament to make legislation that is incompatible with the ECHR.<sup>27</sup> Furthermore, the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, if passed by the Scottish Parliament, will make it unlawful for a public authority to act in a way which is incompatible with the UNCRC requirements.<sup>28</sup>

**Recommendation 12: The Scottish Government should consider how to amend the past presence test for CDP to ensure that it complies with human rights legislation.**

## 7. Other matters

### 7.1 Age rules

Young people can only be eligible for CDP beyond their 18<sup>th</sup> birthday if they have applied for Adult Disability Payment and are waiting for a determination. This provision is in regulation 2, in the meaning of ‘young person’. Adult Disability Payment is the Scottish Government’s proposed replacement for personal independence payment (PIP). CDP can then be paid until Adult Disability Payment is determined, to avoid gaps in entitlement. The Scottish Government aims to roll out CDP nationally from autumn 2021, in advance of introducing Adult Disability Payment in

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<sup>25</sup> TS (by TS) v SSWP (DLA); EK (by MK) v SSWP (DLA) [2020] UKUT 284 (AAC).

<sup>26</sup> “Social security is itself a human right and essential to the realisation of other human rights”, section 2 of the Social Security (Scotland) Act.

<sup>27</sup> Sections 29 and 54 of the Scotland Act 1998

<sup>28</sup> Section 6(1) of the Bill states, “It is unlawful for a public authority to act in a way which is incompatible with the UNCRC requirements.”

summer 2022. On the face of it, that suggests that there could be young people getting CDP who reach their 18<sup>th</sup> birthday before Adult Disability Payment is available to them. The practice currently is that 16 to 18-year-olds can apply to the DWP for PIP until the Scottish Government launches Adult Disability Payment. However, there is no provision to keep a CDP award running until a PIP claim can be assessed, so there may be gaps in payment for these young people.

**Observation 4: We would welcome further information on how the Scottish Government plans to ensure that young people do not experience a gap in payments as they transition from CDP to an adult disability benefit.**

## **8. Annex**

### **Draft scrutiny timetable**

30 September 2020: SCoSS Board meeting: Briefing from Scottish Government official on related policy issues

29 October 2020: Draft Regulations referred to SCoSS by the Cabinet Secretary for Social Security and Older People

29 October 2020: SCoSS Board meeting: Briefing from Scottish Government official on the draft regulations

2 November 2020: SCoSS requested written submissions from stakeholders

1 December 2020: SCoSS published stakeholders' submissions