



Scottish  
Commission  
on Social  
Security

**Scottish Commission on Social Security**

**Scrutiny report on draft regulations:**

**Disability Assistance for Children  
and Young People (Scotland)  
Regulations 2020**

**Submitted to the Scottish Government and the Scottish  
Parliament's Social Security Committee on 6 March 2020.**

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## **Summary of recommendations and observations**

**Recommendation 1: The Scottish Government should investigate and risk assess the many different aspects of the interface between devolved and reserved benefits, and the implications of divergence for people receiving assistance, to ensure these are identified before further policy changes are implemented.**

**Recommendation 2: In drafting Disability Assistance regulations, the Scottish Government should remove the more out-dated language, in keeping with the principles of dignity and respect.**

**Recommendation 3: The Scottish Government should consider what more can be done in the medium term to ensure that human rights and social security principles are embedded in disability assistance policy and practice, including that children themselves are appropriately involved in policy development.**

**Recommendation 4: The Scottish Government should take the necessary action to ensure that its own administrative systems protect terminally ill children, young people and their carers from experiencing the complexity arising from diverging systems in Scotland and the rest of the UK, and work with the DWP to create a seamless interface.**

**Recommendation 5: To ensure the system is robust, the Scottish Government should make sure that processes for getting a second opinion from another doctor about whether a child or young person meets the definition of 'terminal illness' for entitlement under the special rules are clearly explained and accessible in accordance with the expectations in the Charter.**

**Recommendation 6: Monitoring and evaluation of how the system supports terminally ill people should be joined up across Social Security Scotland, the NHS and the DWP, and take account of the need for quick, effective action to address any problems.**

**Recommendation 7: The Scottish Government should attend to the technical issues noted in relation to terminal illness regulations:**

- **to include a mobility component qualifying period exemption for terminal illness;**

- to replace in regulations the term ‘claim’ with the term ‘application’;
- to clarify in regulations or guidance whether it is intended that there is no requirement for a terminally ill child to be present in the UK for entitlement to CDP;
- to clarify in regulations or guidance how the special rules operate when children reach age 16.

**Recommendation 8: Regulations should be framed in such a way as to:**

- provide young people a choice of which benefit to claim from age 16;
- prevent a short break in a care home or a stay in a residential school from triggering a need to apply for DAWAP;
- protect people from the consequences of applying for the wrong type of assistance, for example, by treating an application for DAWAP as one for CDP and vice versa.

**Observation 1: Given that young people aged 16 to 19 could potentially be on either CDP or DAWAP or transitioning between the two, there may well be a need to adjust CDP regulations in light of DAWAP regulations to ensure they are properly aligned.**

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

- assess the likely behavioural impacts of Short-term Assistance and knock-on effects (including on timeliness and standards of decision making), and ensure that Social Security Scotland and the Scottish Courts and Tribunals Service are prepared with the capacity to handle the estimated number of redeterminations and appeals;
- monitor the extent to which the appeals system, with the availability of Short-term Assistance, enables people to overcome barriers to challenging decisions, or results in unintended consequences
- build in learning from the Tribunals Service, for example, about reasons for overturning decisions which can point to ways to improve decision making at an earlier stage.

**Recommendation 10: the Scottish Government should attend to the technical issues noted in relation to Short-term Assistance:**

- to consider whether regulations should allow STA to be paid in full when an application is late;
- to clarify in regulations what deductions for an overpayment would be made from STA when someone has continued entitlement to CDP;
- to redraft regulation 18(2) to achieve the policy intention;
- to clarify the regulations with regard to fraud, and to moving from Scotland to another part of the UK.

**Recommendation 11: The Scottish Government should attend to the technical issues noted in relation to Child Winter Heating Allowance:**

- To amend the draft regulations to clarify that children who get DLA and live outside Scotland cannot access Winter Heating Assistance;
- To consider adding a provision allowing access to Winter Heating Assistance when DLA is awarded following a revision, supersession or appeal;
- To consider adding a provision to allow access to Winter Heating Assistance when CDP is awarded to correct an official error;
- To clarify in regulations whether there is one £200 payment per child or per household.

**Recommendation 12: The Scottish Government should undertake a thorough review of caselaw and how it is incorporated into CDP legislation. This review should be in time to inform drafting of the very similar legislation for Disability Assistance for Older People.**

**Recommendation 13: The Scottish Government should make clearer the distinction between ‘attention’ and ‘supervision’ in the draft regulations.**

**Recommendation 14: The Scottish Government should amend the draft regulations to ensure that the provisions on residence and presence are clear and align with the policy intention.**

**Recommendation 15: The comparison tests of the care and mobility needs of children with those of children of the same age should be consistent across the care and mobility components.**

**Recommendation 16: The regulation for lower rate mobility component should relate the need for guidance or supervision to a physical or mental impairment.**

**Recommendation 17: The Scottish Government should amend the draft regulations to align with the policy intention regarding children who are blind or visually impaired.**

**Recommendation 18: The Scottish Government should review the eligibility criteria and evidence required for children who are blind or visually impaired to ensure they are in line with current best practice in Scotland.**

**Recommendation 19: The reference in the regulations (regulation 7(8)(b)) to damage to property should be removed. In producing guidance for case managers, the Scottish Government should consider wider concerns and policy about the use of physical restraint.**

**Recommendation 20: The Scottish Government should produce clear guidance on factors that case managers will take into account in deciding eligibility for the highest rate of the mobility component under the 'severe mental impairment' test, and consider whether the formulation 'significantly impaired capacity for judgement' in the draft regulations adequately reflects the caselaw.**

**Recommendation 21: Draft regulation 7(2)(e) should be amended so that the need to use walking aids does not disqualify a child with prosthetic legs.**

**Recommendation 22: The Scottish Government should ensure that the simple processes, passported exemptions and entitlements, and certainty of award currently available to people entering or leaving a care home are not lost to those getting CDP. One route to achieving this is to consider amending the Act to enable entitlement to remain while payment is suspended.**

**Recommendation 23: The Scottish Government should amend the draft regulations so that they align with the policy intention with**

regard to applications made while in a care home or residential school.

**Recommendation 24:** To help people with Motability vehicles, the Scottish Government should consider options to provide better continuity through the appeals process, including utilising Short-term Assistance, and through transitions between Scottish disability assistance and DLA or PIP.

**Recommendation 25:** The Scottish Government should clarify the regulation relating to provision of vehicles, to clearly distinguish between the child with the CDP award and the person who is liable for the vehicle agreement.

**Observation 2:** The Commission believes that there would be value in seeking wider views to help develop understanding of the potential consequences of diverging systems between Scotland and the rest of the UK when it comes to benefit transfers and beyond.

**Recommendation 26:** The Scottish Government should attend to the technical issues noted:

- To amend regulation 43 to correctly make middle or higher rate care component of CDP the qualifying benefit for carer's allowance.
- To clarify the difference between a temporary absence from Scotland and a move elsewhere in the UK that changes ordinary residence, for example by considering adding to regulations a temporary absence from Scotland provision for absences within the UK.

**Recommendation 27:** The Scottish Government should make clear, ideally in the regulations, that the least possible information will be required to start an application.

**Recommendation 28:** The best interests of the child should be the primary consideration in designing processes and guidance about appointing parents and others to act for children and young people. Processes and guidance should be designed to ensure that children can properly exercise their right to express their views.



**Recommendation 29: Social Security Scotland should keep under review the optimum time limit for requesting a redetermination, for example, by monitoring appeals about process decisions.**

**Recommendation 30: Social Security Scotland should keep under review the optimum time limit for making a redetermination, and ensure that processes are designed so that nobody drops out of the system simply because the agency has not determined their case in time.**

**Recommendation 31: To fully meet Charter expectations, the Scottish Government should ensure that regulations and processes always contain appeal rights, for example, where the Agency disagrees with a parent who believes her child's needs have increased.**

**Recommendation 32: The Scottish Government should consider the technical issues raised about 'determination without application':**

- **to clarify that Social Security Scotland has the necessary powers to remove an award where a person is no longer eligible;**
- **to ensure the regulations achieve the policy intention with regard to backdating payments when new facts come to light;**
- **to clarify in regulations that an award can still be corrected if an official error comes to light after an appeal has concluded;**
- **to provide for how changes in circumstances are dealt with while a redetermination or appeal is underway.**

**Recommendation 33: The Scottish Government should improve consistency and coherence across regulations with regard to time limits for redeterminations.**

**Recommendation 34: In view of their complexity, length and speed of development, the Scottish Government should continue to review the draft regulations before and after CDP is launched to identify and rectify any immediate issues arising and to ensure a robust basis for developing future Disability Assistance regulations.**

# 1. Introduction

## 1.1 Overview

The laying of the Disability Assistance for Children and Young People (Scotland) Regulations 2020 will mark a significant new stage in the Scottish social security system. The assistance – to be known as Child Disability Payment (CDP) – replaces Disability Living Allowance (DLA) for children and is the first of the devolved forms of assistance that will replace current UK benefits for disabled people.<sup>1</sup>

The transfer of disability benefits represents by far the largest undertaking for devolved social security policy and delivery to date and, as such, it is to be expected that a host of implications for the interface between devolved and reserved provision will come to the fore. The Scottish Government has been clear that it must take a careful approach to be sure of continuing to pay people with the least disruption.

Consequently, while there are some significant policy changes, the draft regulations by and large seek to replicate the DLA provisions for children. However, it is not always possible to exactly replicate DLA for two main reasons. Firstly, DLA has been in existence for many years and has been shaped by caselaw that interprets the legislation. In drafting CDP regulations, there were necessary choices for the Scottish Government to make over whether and to what extent this caselaw should be reflected in the new regulations. Secondly, with a different system in the Social Security (Scotland) Act 2018 for applying for, deciding, paying and appealing Scottish social security, some DLA provisions are impossible to replicate.

Therefore, in our scrutiny, for provisions which are intended to replicate DLA, we have highlighted areas where we believe there are, nonetheless, material differences which could have unintended consequences.

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<sup>1</sup> Disability Living Allowance (DLA) for children aims to help with the extra costs of looking after a child who is under 16: <https://www.gov.uk/disability-living-allowance-children>. The Scottish Government also intends to introduce Disability Assistance for Working Age People as a replacement for Personal Independence Payment (PIP); and Disability Assistance for Older People as a replacement for Attendance Allowance (AA).

Understandably, many people are looking to the Scottish Government to use its powers to rectify known issues and inequities within current disability benefits and to make improvements. Scope to exercise such powers is unavoidably limited where the focus is on smooth transition of existing claims. However, some areas of improvement have been included, notably with regard to terminal illness, transitions for young people aged 16 to 18, new support for people challenging decisions, and new financial support for winter fuel bills.

While improvements are welcome, they do create differences between disability assistance delivered across the UK. This can raise issues for people relocating between Scotland and other parts of the UK. The more differences between a Scottish and UK benefit, the harder it is to move smoothly from one to the other. Even once fully transferred, Scottish Disability Assistance continues to act as a passport to elements of reserved benefits.<sup>2</sup> It remains to be seen how much divergence would be possible while still being sufficiently similar to be considered as a reliable passport to UK entitlements.

Where we believe there are changes that could be made in these draft regulations that are in keeping with the careful approach to transfer from DLA, we have made recommendations. We also highlight some broad considerations that, in the future, might inform more fundamental changes that aim to align devolved provision more closely to the social security principles and human rights obligations while mindful of the potential risks and complexities that may bring. However, many of our recommendations concern technical or drafting issues and the need to remove the risks of unintended consequences.

**Recommendation 1: The Scottish Government should investigate and risk assess the many different aspects of the interface between devolved and reserved benefits, and the implications of divergence for people receiving assistance, to ensure these are identified before further policy changes are implemented.**

## **1.2 Approach to scrutiny**

This report by the Scottish Commission on Social Security (SCoSS) on the draft Disability Assistance for Children and Young People (Scotland) Regulations 2020 has been completed in accordance with our pre-

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<sup>2</sup> For example, to Universal Credit disabled child element, Benefit Cap exemption

legislative scrutiny function. This is set out in sections 22 and 97 of the Social Security (Scotland) Act 2018<sup>3</sup>. Section 97 requires us to carry out our role with regard to the Scottish social security principles and any relevant provisions of human rights law. The Commission's scrutiny was also informed by our draft scrutiny framework<sup>4</sup>.

As with our approach to scrutinising Scottish Child Payment draft regulations<sup>5</sup>, our engagement with the Scottish Government on these draft regulations has been fluid and iterative. The benefit of this approach is that the Commission has been able to influence the Scottish Government's ongoing development of the draft regulations. We are pleased that the Cabinet Secretary for Social Security and Older People has welcomed this approach and highlighted various amendments made to the draft regulations as a result of the Commission's earlier input.<sup>6</sup> These amendments are presented in Annex A.

However, the difficulties we experienced in scrutinising these draft regulations were also similar to those we faced in considering the Scottish Child Payment. The Cabinet Secretary referred an earlier draft of the regulations to the Commission on 12 December 2019<sup>7</sup> and a further version on 7 February.<sup>8</sup> While we were able to undertake some limited consultation with stakeholders on the earlier draft, the tight deadline for the Commission to report meant that our ability to consult on

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<sup>3</sup> Social Security (Scotland) Act 2018 asp 9 s1

<sup>4</sup> <https://www.gov.scot/publications/scottish-commission-on-social-security-draft-scrutiny-framework/>

<sup>5</sup> <https://www.gov.scot/publications/the-scottish-child-payment-regulations-2020-scrutiny-report-on-draft-regulations/>

<sup>6</sup> [https://www.gov.scot/binaries/content/documents/govscot/publications/correspondence/2019/12/3-the-scottish-commission-on-social-security-letters-disability-assistance/documents/cabinet-secretary-letter-on-disability-assistance-7-february-2020/cabinet-secretary-letter-on-disability-assistance-7-february-2020/govscot%3Adocument/Cab%2BSec%2BSSOP%2BLetter%2Bto%2BSSCo%2B-%2BDACYP%2BRegulations%2B-%2B7%2BFebruary%2B2020\\_.pdf](https://www.gov.scot/binaries/content/documents/govscot/publications/correspondence/2019/12/3-the-scottish-commission-on-social-security-letters-disability-assistance/documents/cabinet-secretary-letter-on-disability-assistance-7-february-2020/cabinet-secretary-letter-on-disability-assistance-7-february-2020/govscot%3Adocument/Cab%2BSec%2BSSOP%2BLetter%2Bto%2BSSCo%2B-%2BDACYP%2BRegulations%2B-%2B7%2BFebruary%2B2020_.pdf)

<sup>7</sup> <https://www.gov.scot/publications/3-the-scottish-commission-on-social-security-letters-disability-assistance/>

<sup>8</sup> <https://www.gov.scot/binaries/content/documents/govscot/publications/correspondence/2019/12/3-the-scottish-commission-on-social-security-letters-disability-assistance/documents/disability-assistance-for-children-and-young-people-scotland-draft-regulations-2020---7-february-2020/disability-assistance-for-children-and-young-people-scotland-draft-regulations-2020---7-february-2020/govscot%3Adocument/SSDraft-%2BDisability%2BAssistance%2Bfor%2BChildren%2Band%2BYoung%2BPeople%2B%2528Scotlan d%2529%2BRegulations%2B-%2Bfinal%2Bdraft%2BFeb%2B7%2B2020%2B%2528004%2529%2B%2528003%2529.pdf>

the further version of the draft regulations was very restricted.<sup>9</sup> Moreover, the length and complexity of the draft Disability Assistance for Children and Young People regulations, and the very draft nature of those referred on 12 December, significantly increased the challenge we faced. Further details of our engagement with stakeholders and the timeline for our scrutiny are contained in Annex B. Annex C contains a summary note of a roundtable discussion that we held with stakeholders on the earlier draft regulations.

In view of the demonstrated benefits of the iterative approach taken with recent draft regulations, we would welcome continuing working in this way. This would entail the Scottish Government referring an early set of draft regulations that we can use for our initial consideration and for consultation purposes, and then a further set, that may have been amended in light of our earlier input, for our detailed scrutiny. The Scottish Government should also ensure that we have sufficient time for undertaking both those stages. This will be particularly important to allow for the effective engagement of people with lived experience, and where regulations are lengthy and complex.

## **2. The bigger picture: rights and principles**

Section 97 of the Social Security (Scotland) Act states that, when exercising its pre-legislative scrutiny function, the Commission must have regard to any relevant human rights instrument ratified by the UK and to the Scottish social security principles. Implications for the draft regulations will be highlighted as appropriate throughout the report, but we feel there is merit in highlighting at the outset some of the most relevant human rights provisions in particular.

### **2.1 Prohibition of discrimination in the enjoyment of social rights**

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<sup>9</sup> While the Act permits SCoSS to take the time it deems necessary to carry out its scrutiny function, to miss deadlines for the laying of the Regulations would significantly diminish scope for influencing their drafting, given that amendments beyond that point are not permitted.

Non-discrimination provisions appear in multiple human rights agreements.<sup>10</sup> While not all explicitly recognise disability as a prohibited ground for discrimination, it is well established that in these cases disability falls within the protection of the broad prohibition of discrimination on the basis of ‘other status’.<sup>11</sup> The absence of formal discrimination against disabled people is not sufficient to comply with the non-discrimination provisions. Special measures may be required to eliminate substantive discrimination, enabling people with impairments to participate in society and enjoy their other rights on equal terms with others.<sup>12</sup>

The existing UK disability ‘extra costs’ benefits<sup>13</sup> act as such a special measure, by recognising and partially compensating for the additional costs people can incur as a result of their impairment and discriminatory barriers.<sup>14</sup> However, devolution provides an opportunity to consider whether provision could be improved to better achieve this objective, whether now or at later date following the secure transition from DLA to CDP, in keeping with the aspiration in human rights law to the progressive realisation of social rights.<sup>15</sup> Social security principle (g) also makes clear the advancement of equality and non-discrimination must be central to the quest for continuous improvement.<sup>16</sup>

Apart from the obvious objective that, as far as possible, disabled people can enjoy the rights outlined below on equal terms with other members of society, there is a need to consider whether people with certain kinds of impairment are particularly disadvantaged in the current system. For example, at our stakeholder roundtable on the earlier version of the draft regulations, the Commission heard that people with mental health conditions can face particular barriers to receiving support in the UK

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<sup>10</sup> International Covenant on Economic, Social and Cultural Rights article 2(2); European Convention on Human Rights article 14; Convention on the Rights of the Child article 2(1); Convention on the Rights of Persons with Disabilities article 5; European Social Charter preamble.

<sup>11</sup> CESCR general Comment 19 on the right to social security.

<sup>12</sup> CESCR General Comment 20 on non-discrimination in economic, social and cultural rights.

<sup>13</sup> Disability Living Allowance, Attendance Allowance and Personal Independence Payment

<sup>14</sup> For example, inaccessible public transport.

<sup>15</sup> International Covenant on Economic, Social and Cultural Rights article 2(1); CESCR general comment 3 on the nature of state parties’ obligations.

<sup>16</sup> A review that encompassed a fundamentally different approach would acknowledge the role of external factors (such as inaccessible environments, transport, communication methods) in determining impact, rather than just medical condition, in accordance with the social model of disability.

social security system. This reflects the findings of previous research and inquiries.<sup>17</sup>

Further, the principle of non-discrimination might be respected by modernising the medicalised approach and associated language, including the language of 'suffering' (a point made by stakeholders we consulted) that can be experienced by people using the system as dehumanising and discriminatory. This would also be in keeping with social security principle (d), that respect for the dignity of individuals should be at the heart of the Scottish social security system. It is something that should be considered when drafting guidance and should future opportunities for more fundamental review of the approach become available.

**Recommendation 2: In drafting Disability Assistance regulations, the Scottish Government should remove the more out-dated language, in keeping with the principles of dignity and respect.**

## **2.2 Rights to social security and to a reasonable standard of living**

Rights to social security, or to benefit from social security, are found across a range of international agreements.<sup>18</sup> Disability is one of the nine contingencies against which social security is expected to protect.<sup>19</sup> Again, the UK system already does this, but devolution provides an opportunity to consider whether the protection offered can be improved in Scotland. One of the key functions of social security is to help people enjoy an adequate standard of living, which the Convention on the Rights of Persons with Disabilities specifies should include appropriate assistance with disability-related costs.<sup>20</sup> A secure transition from DLA to CDP is being prioritised at present, but in the medium term there may be more that can be done to ensure that those children who need the additional support disability benefits provide are able to access it, and

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<sup>17</sup>[http://www.niassembly.gov.uk/globalassets/documents/raise/knowledge\\_exchange/briefing\\_papers/series3/mckeever141113.pdf](http://www.niassembly.gov.uk/globalassets/documents/raise/knowledge_exchange/briefing_papers/series3/mckeever141113.pdf);  
<https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/829/829.pdf>

<sup>18</sup> International Covenant on Economic, Social and Cultural Rights article 9; Convention on the Rights of the Child article 26; Convention on the Rights of Persons with Disabilities article 28; European Social Charter article 12

<sup>19</sup> General Comment 19 on the right to social security

<sup>20</sup> International Covenant on Economic, Social and Cultural Rights article 11; Convention on the Rights of the Child article 27; Convention on the Rights of Persons with Disabilities article 28.

that it is paid at an appropriate rate.<sup>21</sup> Social security principles on contribution to poverty (e) and continuous improvement in ways which put the needs of those who require assistance first (g) are consistent with this.

Other human rights provisions can act as a check-list against which to test whether the social security system supports an adequate standard of living, including disability-related costs. The core elements of the right to an adequate standard of living – adequate food and housing – are supposed to be met through the main income-replacement benefits, which are not devolved, although some recipients of CDP might also benefit from the Scottish Child Payment. Disabled children have a right to the highest attainable standard of health.<sup>22</sup> For many, realisation of this right will require extra expenditure on heating, special diets, home adaptations or other forms of support. There have also been well-publicised examples of the administration of the social security system having a detrimental effect on health, due to the stresses of the process or prolonged waits for payments.<sup>23</sup> There is certainly scope to reduce such risks.

Disabled children also have a right to a full, decent and dignified life, with the ability to actively participate in the community.<sup>24</sup> This is reinforced by the wider rights of disabled people to social inclusion and personal mobility,<sup>25</sup> and presumably includes the child's right to play.<sup>26</sup> Additional support compared to other children may be required to secure these rights, with both care needs and mobility costs, consistent with principle (b) that social security is a human right and essential to the realisation of other human rights.

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<sup>21</sup> See research by Scope on the 'Disability Price Tag': <https://www.scope.org.uk/campaigns/extra-costs/disability-price-tag/>

<sup>22</sup> International Covenant on Economic, Social and Cultural Rights article 12; Convention on the Rights of the Child article 24; European Social Charter article 11

<sup>23</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/604097/pip-assessment-second-independent-review.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604097/pip-assessment-second-independent-review.pdf)

<sup>24</sup> Convention on the Rights of the Child article 23

<sup>25</sup> Convention on the Rights of Person with Disabilities article 19, 20

<sup>26</sup> Convention on the Rights of the Child article 31



## 2.3 The best interests of the child and the right to a voice

The best interest of the child must be treated as a primary consideration in the making of any decisions affecting their welfare. This has been a particularly important right in the area of social security in recent years. The right could impact on the development of the CDP in various ways. On the one hand, if there are clear deficiencies in current UK disability benefit provision for children, devolution provides an opportunity to rectify them. On the other, it would clearly *not* be in the interests of disabled children if the transition from DLA to CDP resulted in some losing entitlement to, or experiencing delays in the receipt of, either a disability benefit or a passported cash or non-cash benefit.

Finally, children have a right to express their views on matters affecting them and to be heard in administrative proceedings.<sup>27</sup> This has implications for the policy development process, which ought to provide opportunities for input from disabled children themselves, and not just from parents, carers and organisations or professionals speaking on their behalf. This is consistent with principle (f), that the system should be designed with the people of Scotland. It also has implications for the administration of the CDP, which ought to seek appropriate ways for children to be active participants in their own applications and any subsequent appeals – having due regard to their age and any cognitive impairment or mental health condition.

**Recommendation 3: The Scottish Government should consider what more can be done in the medium term to ensure that human rights and social security principles are embedded in disability assistance policy and practice, including that children themselves are appropriately involved in policy development.**

## 3. Policy changes from disability living allowance

While making a smooth transition the priority, the Scottish Government has nonetheless decided on some policy changes for CDP where the rules will diverge significantly from DLA. We consider these in turn below.

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<sup>27</sup> Convention on the Rights of the Child article 12

## 3.1 Terminal illness

### Differences in Scottish approach

Currently, children and young people who are terminally ill are fast-tracked to a higher rate of benefit under 'special rules'. The Scottish Government has sought to improve these special rules. As one stakeholder told the Commission, 'it is hard to imagine anything worse than a parent facing the death of their child'. The Commission welcomes sensitive changes to rules that protect the dignity of children and families at such a time, in accordance with social security principle (d)<sup>28</sup>. In brief these changes are as follows:

- Under existing rules for DLA, a DWP decision maker decides whether a person has a progressive disease and is reasonably expected to die within six months. In Scotland, for CDP (and other disability assistance), this six month limit will be removed.
- For DLA and other UK benefits, evidence is supplied by a doctor on form DS1500. In Scotland, for disability assistance, this system will be replaced by one where a doctor or nurse<sup>29</sup> uses *Guidance for Doctors Completing Benefits Assessment Under Special Rules in Scotland* (BASRiS) to decide whether someone is terminally ill.
- This clinical judgement is recorded on a BASRiS form and gives entitlement to the highest rate of both the care and mobility components of CDP without further assessment and with no review period. In contrast, for DLA, a child who is terminally ill is entitled to the highest rate of the care component but not to the mobility component.

### Administrative implications

The Scottish Government anticipates that the new definition of terminal illness means a wider range of illnesses and conditions will come within the scope of the special rules provisions.<sup>30</sup> The BASRiS guidance has been developed by the Chief Medical Officer in consultation with medical

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<sup>28</sup> Respect for the dignity of individuals is to be at the heart of the Scottish social security system.

<sup>29</sup> The Scottish Government intends to introduce a Social Security Bill to include nurses  
[https://www.parliament.scot/S5\\_Social\\_Security/General%20Documents/20200221\\_CabSecSSOP\\_to\\_Convener\\_Social\\_Security\\_Bill.pdf](https://www.parliament.scot/S5_Social_Security/General%20Documents/20200221_CabSecSSOP_to_Convener_Social_Security_Bill.pdf)

<sup>30</sup> Scottish Government draft Equality Impact assessment on DACYP

professionals and other stakeholders. We understand that although still in draft, the clinical content is finalised but there may be changes to practical aspects, for example, about how BASRiS forms are sent and received. Both aspects are obviously critically important for a system that is primarily intended to get support to people quickly and easily.

An obvious pressure point is the fact that, in Scotland, there will be two systems operating for determining whether someone has a terminal illness. This has implications for DWP and Social Security Scotland, as well as for doctors, terminally ill children and their families.

For example, a young person diagnosed with a terminal illness could be claiming universal credit (and needing to get a DS1500 form from a doctor to send to the DWP<sup>31</sup>) and claiming CDP (and needing to get a BASRiS form to send to Social Security Scotland). This process complexity could impact access to the support children and young people are entitled to. It relies on a high degree of understanding of the system from the young person, their parents or carers and the doctor. People are often uncertain of exactly which benefit they are claiming or getting, and doctors are not experts in social security.

Where terminally ill children move from Scotland to live in another part of the UK, the divergence in definitions and systems means that in the move from CDP to DLA they will need to be assessed to keep the mobility component and will need to ask a doctor to supply a DS1500 to keep the highest rate of the care component without a further assessment.

There are ways to mitigate this. Officials have explained to the Commission that Social Security Scotland will accept a DS1500 form where one exists and will not require a BASRiS form as well. This is welcome as it will help make the process easier for children, young people, their parents and carers. However, ideally the regulations would be clearer that this is acceptable. As drafted, a DS1500 form would only be acceptable evidence if the doctor (or nurse once the necessary amendments are made to the Act) signing the form had taken account of the BASRiS guidance. However, we accept that this may not be a barrier in practice.

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<sup>31</sup> Someone who is terminally ill is fast-tracked to a 'limited capability for work-related activity element' in Universal Credit

**Recommendation 4: The Scottish Government should take the necessary action to ensure that its own administrative systems protect terminally ill children, young people and their carers from experiencing the complexity arising from diverging systems in Scotland and the rest of the UK, and work with the DWP to create a seamless interface.**

Some terminally ill children and young people will be eligible for higher amounts of CDP than their counterparts in the rest of the UK. The same will be true for terminally ill children and young people already getting DLA when CDP is introduced. We commend the Scottish Government's intention to prioritise transferring people who would be better off on CDP.

The decision-making process for whether or not a child or young person is considered terminally ill clearly needs to be robust. If a doctor takes the view that a child or young person is not terminally ill within the parameters of the BASRiS guidance, there is no right of redetermination about that judgement through Social Security Scotland, or any onwards appeal. Social Security Scotland case managers have no role in deciding whether a child is regarded as 'terminally ill' in law. Instead, BASRiS guidance advises doctors that the individual may ask for a second opinion, and that 'the usual processes' should be applied.

**Recommendation 5: To ensure the system is robust, the Scottish Government should make sure that processes for getting a second opinion from another doctor about whether a child or young person meets the definition of 'terminal illness' for entitlement under the special rules are clearly explained and accessible in accordance with the expectations in the Charter.**

The special rules on terminal illness are intended to simplify the application process, to remove qualifying periods and to fast track applications. Monitoring the performance of the new BASRiS system should take into account the greater need for a quick response to any problems identified with the system.

**Recommendation 6: Monitoring and evaluation of how the system supports terminally ill people should be joined up across Social Security Scotland, the NHS and the DWP, and take account of the need for quick, effective action to address any problems.**

## Technical and drafting issues

We note some technical issues with the regulations on terminal illness.

- There is no equivalent for the mobility component to regulation 5(7) which exempts someone who is terminally ill from having to satisfy the standard three-month qualifying period for the care component. We assume that this is a drafting issue which will be rectified before the draft regulations are laid.
- Regulation 5(7) uses the term 'claim' and 'date of claim' which are not terms used elsewhere in Scottish social security or defined in the regulations. The regulation should be drafted using defined terms.
- Regulation 4(7) lifts the usual requirement in regulation 4(1)(d) to have been present in the UK for a specified length of time before someone can be eligible for CDP. This allows a terminally ill baby to get CDP from birth, or a terminally ill child who comes to live in the UK from another country to get CDP without waiting for the usual two years. However, in a departure from DLA rules, it also lifts the requirement to be present in the UK at all. This would allow a child to leave the UK indefinitely as long as they remained ordinarily resident in Scotland. This may well be an intended consequence but if so it should be made very clear at least in case manager guidance.
- How the special rules are intended to operate when children reach age 16 is not clear. For example, would a child stay on CDP indefinitely rather than be required to apply for Disability Assistance for Working Age People? Robust decision making will need clear processes, rules and guidance.

**Recommendation 7: The Scottish Government should attend to the technical issues noted in relation to terminal illness regulations:**

- **to include a mobility component qualifying period exemption for terminal illness;**
- **to replace in regulations the term 'claim' with the term 'application';**
- **to clarify in regulations or guidance whether it is intended that there is no requirement for a terminally ill child to be present in the UK for entitlement to CDP;**
- **to clarify in regulations or guidance how the special rules operate when children reach age 16.**

### **3.2 Transitions at age 16**

As children reach age 16, Social Security Scotland will automatically extend a CDP award to their 18th birthday. The welcome intention is to ensure that young people do not have to apply for a new benefit at a time when they are dealing with other transitions in their lives. It will also have the benign effect of prolonging entitlement for those young people who will not be eligible under the different rules for Disability Assistance for Working Age People (DAWAP). However, stakeholders have also raised a number of issues:

- It is important that young people have a choice. Some will be better off claiming DAWAP (which will be the replacement in Scotland for Personal Independence Payment). Regulations do not seem to provide a clear mechanism for this to happen.
- A child aged 16 to 18 who lives at home and takes regular short breaks in a care home may lose entitlement to CDP simply due to spending days in a care home. If the policy intention is that entitlement should resume when the young person returns home (as it would for a child under 16), this would seem to be prevented by regulation 22(4) which only allows CDP where entitlement begins before age 16. It is not desirable for a short break to trigger a need to apply for DAWAP particularly as there is no mechanism to continue CDP until DAWAP is in place.
- It is more than likely that some people aged 16 to 19 in particular, but possibly of any age, will be confused about which benefit is the right one to apply for. Their date of application could be protected by including in regulations a provision to treat an application for DAWAP as an application for CDP or vice versa.

**Recommendation 8: Regulations should be framed in such a way as to:**

- **provide young people a choice of which benefit to claim from age 16;**
- **prevent a short break in a care home or a stay in a residential school from triggering a need to apply for DAWAP;**
- **protect people from the consequences of applying for the wrong type of assistance, for example, by treating an application for DAWAP as one for CDP and vice versa.**

In scrutinising these draft regulations without also seeing the age rules for DAWAP and regulations to manage the transition between CDP and DAWAP, the Commission is aware of only seeing part of the picture at this point.

**Observation 1: Given that young people aged 16 to 19 could potentially be on either CDP or DAWAP or transitioning between the two, there may well be a need to adjust CDP regulations in light of DAWAP regulations to ensure they are properly aligned.**

### **3.3 Short-term Assistance**

Short-term Assistance (STA) is a new payment, and not part of the current system. Those receiving CDP will be able to apply for it when they request a redetermination or appeal after regular payments of disability assistance have been stopped or reduced. STA will replace the amount lost until the challenge is complete.<sup>32</sup>

Although STA is a form of social security assistance in its own right, there are no standalone regulations. STA is included in the draft Disability Assistance for Children and Young People Regulations. These provide for STA to be paid on application during a redetermination, and again while an appeal is underway. By continuing to pay people the amount they previously received, the intention is people will feel more able to challenge decisions than is the currently the case with UK benefits.<sup>33</sup> Those who then go on to lose their redetermination or appeal will not be required to repay STA.

#### **Incentive to request redetermination or appeal**

This new financial support is likely to help families cope with a sudden drop in household income at the point that a CDP award is removed or reduced. As such, it would seem reasonable to conclude that STA is in the best interests of the child. As an active incentive to challenge a

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<sup>32</sup> It is intended that STA will also be available with other forms of social security assistance (such as carer's assistance and employment injury assistance) where these are regular payments rather than one off grants.

<sup>33</sup> <https://www.gov.scot/publications/consultation-disability-assistance-scotland-scottish-government-response/pages/4/>

decision, this is likely to be regarded as enhancing the rights of children to be heard in administrative proceedings.<sup>34</sup>

However, while the intention is to encourage people to challenge decisions they think are wrong, STA presents a clear incentive to challenge decisions solely in order to access these payments. Seeking a 'second opinion' is perfectly legitimate and incentivising people to do so is a reasonable aim given the well-publicised barriers that exist to challenging decisions.<sup>35</sup> For CDP, this is not likely to lead to many 'extra appeals'. The Scottish Fiscal Commission has forecast the additional cost of STA for CDP as less than £2m given that when a child's DLA award is reviewed, the award is generally continued, so the number of CDP challenges and thus STA claims is likely to be low.<sup>36</sup>

The picture could be different for Disability Assistance for Working Age People. Overall, the Scottish Government expects there to be fewer appeals. However the potential impact of STA driving more appeals may not have been fully considered.<sup>37</sup> Clearly, under social security principle 1(h), the Scottish Government has a duty to ensure that the system is efficient and delivers value for money. If there are many more appeals than expected, this could have adverse effects for the system and public confidence.

There is an opportunity to learn from experience in Northern Ireland where there a model similar to STA in some respects is already in operation. People appealing as they move from DLA to PIP in Northern Ireland receive a 'welfare supplementary payment' equivalent to the amount of lost benefit, until the end of the appeal process.<sup>38</sup> Experience of this system may offer insights into behavioural impacts, administration and cost. We note that appeals also provide a valuable opportunity to learn how initial decision-making can be improved.

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<sup>34</sup> Convention on the Rights of the Child article 12

<sup>35</sup> See for example <https://www.gov.uk/government/publications/ssac-occasional-paper-18-decision-making-and-mandatory-reconsideration>

<sup>36</sup> <https://www.fiscalcommission.scot/wp-content/uploads/2020/02/Scotlands-Economic-and-Fiscal-Forecasts-February-2020.pdf> para A.41.

<sup>37</sup> Business and Regulatory Impact Assessment: DACYP, paragraph 34.

<sup>38</sup> <http://www.legislation.gov.uk/nisr/2016/250/contents/made>;  
<http://www.legislation.gov.uk/nisr/2017/28/contents/made>



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

- **assess the likely behavioural impacts of Short-term Assistance and knock-on effects (including on timeliness and standards of decision making), and ensure that Social Security Scotland and the Scottish Courts and Tribunals Service are prepared with the capacity to handle the estimated number of redeterminations and appeals;**
- **monitor the extent to which the appeals system, with the availability of Short-term Assistance, enables people to overcome barriers to challenging decisions, or results in unintended consequences**
- **build in learning from the Tribunals Service, for example, about reasons for overturning decisions which can point to ways to improve decision making at an earlier stage.**

## **Technical and drafting issues**

There are a number of technical issues with the draft regulations on STA:

- The period of entitlement is not tied to the date of application as is usually the case with benefit entitlements. As an extreme example, this would seem to allow someone to lose an appeal and then apply for STA, and for this to be paid back from the date they first asked for a redetermination, which could be many months. This consequence may already have been considered, and in any case the possibility of late applications can be minimised through processes that actively offer people STA at each stage.
- Where someone has been overpaid social security assistance, they can repay it by deductions from an ongoing award. These deductions will be carried forward into an STA award. As drafted, it is not clear whether someone who continues to have a deduction made from an ongoing reduced CDP award, must also have the same deduction made from STA, which could then mean a double deduction.
- Drafting of regulation 18(2) is ungrammatical (the opening words in relation to the subsequent paragraphs) and probably incomplete (paragraph (c)).
- Where fraud is involved, the intention is that no STA payment is possible. The regulations as drafted do not clearly set this out. Nor

do they make it clear what would happen if fraud is not identified at the start of the process but only when STA is already in payment. The Scottish Government has said that it would only ever ask people to pay back STA if it is later established that they were claiming disability assistance fraudulently<sup>39</sup> but, if this is still the intention, there appears to be no clear mechanism to recover overpaid STA.

- The intention is that STA is not available to people who move from Scotland to another part of the UK and are receiving a 13-week run on. It is not clear that the regulations as drafted achieve this intent.

**Recommendation 10: the Scottish Government should attend to the technical issues noted in relation to Short-term Assistance:**

- **to consider whether regulations should allow STA to be paid in full when an application is late;**
- **to clarify in regulations what deductions for an overpayment would be made from STA when someone has continued entitlement to CDP;**
- **to redraft regulation 18(2) to achieve the policy intention;**
- **to clarify the regulations with regard to fraud, and to moving from Scotland to another part of the UK.**

### **3.4 Child winter heating assistance**

The Scottish Government will replace the existing UK Winter Fuel Payment by the end of 2021 with Winter Heating Assistance (WHA). WHA will be an annual payment of £200 for people over pension age. The Scottish Government is using its new powers to extend eligibility to disabled children who are in receipt of the highest rate of the care component of CDP or DLA. These draft regulations provide for this extended Child WHA. Further regulations will follow for WHA for pensioners.

Child WHA is intended to improve the health and wellbeing of severely disabled children and contribute to a reduction in fuel poverty.<sup>40</sup> It is

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<sup>39</sup> Scottish Government Consultation on Disability Assistance in Scotland, page 33.

<https://www.gov.scot/publications/social-security-consultation-disability-assistance-scotland/pages/13/>

<sup>40</sup> Scottish Government Position Paper Disability Assistance: Child Disability Payment, February 2020.

forecast to benefit around 16,000 families in the first year, at a cost of £3.5m.<sup>41</sup> The right of disabled children to the highest attainable standard of health may involve households spending extra on heating, and the right to enjoy an adequate standard of living involves providing support with those costs. Child WHA is a step towards meeting these rights.<sup>42</sup> Obviously WHA and CDP are connected and both have a contribution to make to advancing the rights of children. How and if WHA enhances rather than duplicates CDP support should be a focus for longer term policy developments.

The Commission notes that, in time, the Scottish Government aims to improve the way WHA is delivered, including to rural households who are not on the gas grid and may have higher upfront costs. It would seem sensible to consider the feasibility of paying WHA early to off-grid households alongside a review of whether the week beginning on the third Monday in September is the best qualifying week for WHA. This is the same qualifying week as for the Winter Fuel Payment, which is being replaced. The rationale for choosing this qualifying week was to give the DWP time to carry out the necessary checks and make payments before Christmas. Social Security Scotland may need more or less time, depending on such things as staffing capacity, IT and data sharing. As both CDP and DLA are qualifying benefits, this requires DLA data to be shared between the DWP and Social Security Scotland. Officials tell us that they are working with the DWP to ensure appropriate data sharing arrangements are in place in time.

### **Technical and drafting issues**

There are a number of technical issues with the regulations on WHA:

- Children in receipt of DLA at the relevant rate will be eligible for WHA. Regulation 17 applies no residence or presence test to WHA, presumably relying on the test having been applied to CDP as the qualifying benefit. However, as drafted, children who live outside Scotland who are in receipt of DLA are not excluded from entitlement to WHA.

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<sup>41</sup> <https://www.gov.scot/publications/consultation-disability-assistance-scotland-scottish-government-response/pages/4/>.

<sup>42</sup> Convention on the Rights of the Child article 27; Convention on the Rights of Persons with Disabilities article 28; International Covenant on Economic, Social and Cultural Rights article 12; Convention on the Rights of the Child article 24; European Social Charter article 11.

- Children who get the relevant rate of CDP only after a redetermination or appeal do not miss out on WHA by virtue of regulation 17(1)(b). However, there is no similar provision to protect children who only get the relevant rate of DLA following a revision, supersession or appeal. It would seem fair to have the same rule apply to all.
- Where a CDP award is made to correct an official error (under regulation 32), there will be no entitlement to WHA even where the CDP payment is backdated to the WHA qualifying week. The rationale for treating an award to correct an official error less favourably is not clear.
- Regulation 17(2) provides for £200 to be paid to the individual who is in receipt of CDP or DLA. For clarity, there could be separate provisions for the amount payable in respect of the child, and to whom it is paid. If this is not clearly set out, there could be confusion over whether there is one £200 payment per child, or one £200 payment per household where a parent is paid CDP for more than one child.

**Recommendation 11: The Scottish Government should attend to the technical issues noted in relation to Child Winter Heating Allowance:**

- **To amend the draft regulations to clarify that children who get DLA and live outside Scotland cannot access Winter Heating Assistance;**
- **To consider adding a provision allowing access to Winter Heating Assistance when DLA is awarded following a revision, supersession or appeal;**
- **To consider adding a provision to allow access to Winter Heating Assistance when CDP is awarded to correct an official error;**
- **To clarify in regulations whether there is one £200 payment per child or per household.**

## **4. Areas for clarification or review in regulations**

### **4.1 Meaning of terms and caselaw**

The Scottish Government has chosen not to stay in lockstep with UK social security in the sense of adopting identical legislation. In contrast, in Northern Ireland the legislation is more or less identical to legislation in England and Wales. Thus, caselaw arising in England and Wales, in practice, applies in the same way in Northern Ireland. In Scotland, tribunals and courts will decide to what extent, if at all, DLA caselaw from the rest of the UK is binding or persuasive for CDP.

For any benefit, the Act and regulations provide the framework but caselaw applies the law to people's real life situations. This clarifies what terms mean. For example you 'require' attention if it is what you reasonably need, rather than it being what you need medically. It also keeps legislation relevant as society changes. For example, you reasonably 'require' attention if it is what you need to live a normal life and participate in recreational, social and cultural activities.

DLA has been in existence for many years and a large body of caselaw has developed. Some is in day to day use. Questions in the claim form ask about social activities for example, and decision makers routinely apply caselaw as they decide entitlement.

In drafting CDP regulations, the Scottish Government has chosen to take account of some of the DLA caselaw, incorporating some milestone cases into the meaning of terms. The Commission believes this is the right approach. Had it done otherwise, this would have had the effect of winding the clock back, losing decades of lived experience that has informed the practical application of the law, creating uncertainty for case managers making decisions on entitlement, and meaning tribunals having to go over old ground unnecessarily. We also acknowledge the difficulty of incorporating caselaw and note that the end result is that the meaning of certain terms for CDP is not identical to DLA. Social Security Scotland staff deciding entitlement will need clear guidance with case study examples on how the law is intended to be applied to real life situations. To support the Scottish Government's take up strategy, organisations who will be spreading information and learning about CDP will need access to this guidance. The Scottish Fiscal Commission (SFC) has also noted that although entitlement rules for CDP and DLA

are similar, how they are interpreted will depend on guidance, which will influence SFC's forecast on spending on CDP.

**Recommendation 12: The Scottish Government should undertake a thorough review of caselaw and how it is incorporated into CDP legislation. This review should be in time to inform drafting of the very similar legislation for Disability Assistance for Older People.**

The Commission considers that some adjustments could be made now to these draft regulations where the drafting could be clearer. For example, in regulation 2, 'attention' includes 'vigilance to ensure the safety of an individual'. By giving prominence to the concept of vigilance, which derives from caselaw, the line is blurred between 'attention' and 'supervision', which are two different routes to qualifying for the care component.

**Recommendation 13: The Scottish Government should make clearer the distinction between 'attention' and 'supervision' in the draft regulations.**

## **4.2 Residence and presence conditions**

To be eligible for CDP, a person must satisfy various tests about their residence in Scotland: be 'ordinarily resident in Scotland'<sup>43</sup>, 'habitually resident'<sup>44</sup> in the UK, Ireland, the Channel Islands and the Isle of Man (called the Common Travel Area), not subject to immigration control and, in some cases, able to demonstrate a 'genuine and sufficient link to Scotland'<sup>45</sup>. A person must also be present in the UK, and have been present for a certain length of time. To avoid a short holiday or other temporary absence abroad immediately ending entitlement, there are provisions that treat people as though they were still present in the UK during a temporary absence. There are also exemptions for certain groups such as army personnel outside of the UK.

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<sup>43</sup> 'Ordinary residence' is not defined, and can be short or long settled residence. Claims for UK benefits are rarely refused on this ground.

<sup>44</sup> 'Habitual residence' is considered in caselaw and includes people who have had an appreciable period of residence and a settled intention to reside in an area. Claims for UK benefits can be refused on this ground, particularly when people are newly arrived in the UK.

<sup>45</sup> 'genuine and sufficient link' is a relatively new concept in UK benefits used in relation to people from EEA member states who are relying on EU co-ordination rules to meet presence tests for disability and carers' benefits

The Scottish Government's intention is to replicate the DLA rules on temporary absence.<sup>46</sup> CDP regulations are indeed very similar to DLA provisions but there are differences:

- In DLA regulations, only serving members of the forces working abroad and their families are exempt from the residence tests as well as the presence tests. Others who are abroad, for example people who go on a short holiday, are treated as though they are present in Britain as long as the absence is no longer than 13 weeks (typically) but must continue to satisfy the residence tests.
- CDP regulations, however, treat people going on a short holiday in the same way as serving members of the forces. They are exempt from both presence and residence tests but have to demonstrate a 'genuine and sufficient link to Scotland'.

This introduces a potentially complicated test of whether a person has a 'genuine and sufficient link to Scotland' when they go abroad on holiday where before determining continued entitlement was a simple matter of counting weeks abroad. It also seems at least possible that someone could find themselves ineligible for CDP while in Scotland (for example because of living in the UK for less than two years) but eligible for CDP when they leave the country because the requirement to have lived in the UK for any length of time is lifted.

A further example relates to people from the EEA or UK citizens who have worked in an EEA country where certain 'co-ordination rules' apply. EU co-ordination rules are intended to support free movement of people across EU member states. For example, the rules allow periods of presence in one country to count towards entitlement to benefit in another country. However, the CDP regulations go further than this and remove the requirements to be present in the UK and to serve the two-year past presence test, again replacing these with a requirement to 'demonstrate a genuine and sufficient link to Scotland'.

Some stakeholders have queried the effect of the UK leaving the European Union on the application of the draft CDP regulations. We understand that although the EU co-ordination rules referred to in the CDP regulations have now been converted into UK law, references to

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<sup>46</sup> Scottish Government Consultation on Disability Assistance in Scotland paragraph 2.3  
<https://www.gov.scot/publications/consultation-disability-assistance-scotland-scottish-government-response/pages/3/#page-top>

EU legislation remain valid during the transition period at least until the end of 2020 (and beyond for EU nationals granted settled status). Scottish Ministers will have powers to make amendments to CDP and other devolved social security assistance should this be needed for example, depending on how a future negotiated relationship with the EU treats EU nationals arriving from 2021.<sup>47</sup>

Three other residence and presence rules merit clarification:

- It is not obvious whether regulation 4(3)(e) is meant to apply to all the previous paragraphs (a) to (d) or only to paragraph (d).
- Regulation 4(3)(d) should specify that the temporary absence should be from the UK, which seems to be the intention.
- Regulation 4 requires a person to pass the residence and presence tests on the day the CDP application is made. Regulation 27 deems those tests to continue to be satisfied until the date set for the review of entitlement. There is no specific provision to redetermine entitlement should a person no longer meet those tests, for example, if they should leave the UK for an extended stay or permanently. Thus it is not clear that CDP entitlement would end in those circumstances.

**Recommendation 14: The Scottish Government should amend the draft regulations to ensure that the provisions on residence and presence are clear and align with the policy intention.**

### **4.3 Lower rate mobility component**

A child who can walk but needs guidance or supervision due to a physical or mental impairment, can qualify for the lower rate of the mobility component. Because young children all need guidance or supervision, the help they need is compared to that needed by other children of the same age.

The draft regulations offer two different versions of this comparison test: regulation 5(2) which applies to the care component and follows the DLA rule; and regulation 6(2) which applies to the lower rate mobility component and partially follows the DLA rule. Having raised this with officials, they have indicated to us that they intend to amend regulation

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<sup>47</sup> Section 1B European Union (Withdrawal) Act 2018; Schedule 1 of the European Union (Withdrawal Agreement) Act 2020



6(2) in line with regulation 5(2), though this is not reflected in the draft regulations referred to us for scrutiny.

**Recommendation 15: The comparison tests of the care and mobility needs of children with those of children of the same age should be consistent across the care and mobility components.**

The Act provides that disability assistance regulations must be framed so that eligibility depends on having a physical or mental impairment. Regulation 6, which provides for the lower rate mobility component, makes no reference to the guidance or supervision needs of a child having to relate to an impairment.

**Recommendation 16: The regulation for lower rate mobility component should relate the need for guidance or supervision to a physical or mental impairment.**

#### **4.4 Mobility component and children with a visual impairment**

Mobility needs can arise from visual impairment, hearing impairment and learning disabilities where children may be able to walk but nonetheless have significant difficulty moving safely out of doors. The highest rate of the mobility component has a specific route to qualifying for children with a visual impairment. There are two issues with how the CDP regulations deal with this. Firstly, they do not exactly mirror the DLA regulations and secondly they may not be a good fit with current best practice for children with visual impairments.

The CDP regulations introduce a separate qualifying route for children who are 'blind' which does not exist in DLA. As drafted, a child who is 'blind' qualifies for the higher rate of the mobility component under regulation 7(2)(g), while a child who is both 'blind and deaf' qualifies under regulation 7(2)(h). Having raised this with officials, they have indicated to us that the intention is not to diverge from DLA and that they plan to amend the regulations accordingly, though this is not reflected in the draft regulations referred to us for scrutiny.

**Recommendation 17: The Scottish Government should amend the draft regulations to align with the policy intention regarding children who are blind or visually impaired.**

As with DLA, there is one test of 'blind' and one of 'severe visual impairment'. In Scotland, children under 16 diagnosed with a sight

impairment are not ‘certified’ as used to be the case. Accordingly, children applying for CDP do not need under the regulations to be certified as they do, at least technically, for DLA. While this is a positive change, other aspects of the test remain the same and would benefit from a review to ensure they are in line with current best practice under the Visual Impairment Network for Children and Young People.<sup>48</sup> A review should also consider whether the ‘disablement’ definition of ‘blind’, which traditionally and by caselaw<sup>49</sup> relates to being unable to work, is relevant for children.

**Recommendation 18: The Scottish Government should review the eligibility criteria and evidence required for children who are blind or visually impaired to ensure they are in line with current best practice in Scotland.**

#### **4.5 Mobility component and children with a ‘severe mental impairment’**

Children with learning disabilities or behavioural disorders more often get DLA at the lower rate of the mobility component, which is for children who can walk but need more adult support to get around safely. However, the highest rate of the mobility component has a specific qualifying route for children with a ‘severe mental impairment’ and a significant number of children qualify this way. There are issues with how the CDP regulations deal with this (regulation 7(2)(i) and (j) and regulation 7(7) and (8)): there are significant differences from DLA regulations; there is a provision which may not be in line with the best interests of the child; and there are terms which could be updated or defined.

#### **Significant differences from DLA**

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 also have ‘severe behavioural problems’ and also get the highest rate of the care component. The CDP regulations have separated this into two separate tests – regulation 7(2)(i) ‘severe mental impairment’, and regulation 7(2)(j) ‘severe

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<sup>48</sup> <https://www.vincyp.scot.nhs.uk/>

<sup>49</sup> R(DLA) 3/95

behavioural difficulties'. A child who is 'severely mentally impaired' can qualify, and a child who has 'severe behavioural problems' can qualify. The CDP regulations also remove the requirement to have the higher rate of the care component. Having raised this with officials, they have indicated to us that these are not intended policy changes and regulations will be amended accordingly.

## **Physical restraint**

Regulation 7(8)(b) refers to children whose behaviour requires 'physically restraining'. The Children and Young People's Commissioner Scotland has highlighted serious concerns about the use of restraint.<sup>50</sup> The Scottish Government has committed to producing guidance aimed at reducing its use. Stakeholders have told the Commission that it is an outdated measure of a child's needs and, in particular, the use of restraint to avoid damage to property is not consistent with good practice in social care, centred on the needs of the child.

**Recommendation 19: The reference in the regulations (regulation 7(8)(b)) to damage to property should be removed. In producing guidance for case managers, the Scottish Government should consider wider concerns and policy about the use of physical restraint.**

## **Clarification**

Regulation 7(2)(i) and (7) changes certain wording from the equivalent rule in DLA - from 'severe impairment of intelligence and social functioning' (DLA) to 'significantly impaired capacity for judgement' (CDP). Neither version is readily understood in terms of how children manage in the real world. The DLA version has the advantage of having been considered and clarified in caselaw.

**Recommendation 20: The Scottish Government should produce clear guidance on factors that case managers will take into account in deciding eligibility for the highest rate of the mobility component under the 'severe mental impairment' test, and consider whether**

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<sup>50</sup> No Safe Place, Restraint and Seclusion in Scotland's Schools, 2018

**the formulation ‘significantly impaired capacity for judgement’ in the draft regulations adequately reflects the caselaw.**

#### **4.6 Mobility component and children with prosthetic legs**

Children with no legs or feet qualify for the highest rate mobility component. CDP regulation 7(2)(e) makes it clear that this is so irrespective of whether a child has prosthetic legs. However, someone with prosthetic legs may still need to use other walking aids to move freely. This should not disqualify them from the highest rate mobility component, and would not do so under current DLA rules.

**Recommendation 21: Draft regulation 7(2)(e) should be amended so that the need to use walking aids does not disqualify a child with prosthetic legs.**

#### **4.7 Care homes and residential schools**

The general rule is that a child resident in a care home or a residential school (where costs are met from public funds) is not entitled to the CDP care component after the first 28 days. There are provisions to allow for short breaks in a care home and spells away from a care home. These also exist in DLA. However, DLA provisions are difficult to replicate in CDP because of the way the Social Security (Scotland) Act 2018 works. In DLA, entitlement continues but payment is suspended. In CDP, entitlement ends altogether. There is no power in the Act to suspend payment. There are important advantages with the DLA system of suspending payments. Payment can be put back quickly and easily with a phone call, there is no risk of a gap in payments if there is any delay in reporting, there is no reassessment so no risk of losing the level of award and there is no loss of exemption from the benefit cap or other passported benefits that depend on entitlement such as the disabled child element in Universal Credit. With CDP entitlement ending altogether, the Commission considers that all efforts should be made to ensure that these advantages are not lost. We also note that one option may be to amend the Act to introduce a power to suspend payments.

The regulations provide for this to some extent. Regulation 15 sets out a mechanism to reinstate an award at the same rate without a reassessment where a child who is resident in a care home takes a period of leave. However:

- It is not clear that this mechanism is intended to apply to a child who normally lives at home and has regular short breaks in a care home, or to someone returning home permanently after a period of convalescence in a care home.
- It seems to be the case but is not completely clear that entitlement would be paid from the date of leaving the care home whenever that is notified.
- Regulation 15 does not apply if entitlement to CDP began during a care home stay, where the determination was made under regulation 14(2).

**Recommendation 22: The Scottish Government should ensure that the simple processes, passported exemptions and entitlements, and certainty of award currently available to people entering or leaving a care home are not lost to those getting CDP. One route to achieving this is to consider amending the Act to enable entitlement to remain while payment is suspended.**

We also note the following technical issue with regulations about care homes and residential schools:

- Regulation 14 allows someone to make a new application while in a care home or residential school and have the care component paid for 28 days. This is a change from DLA regulations. Officials have told us that the regulations will be redrafted in line with the policy intention so that applications made while in a care home enable faster and simpler processes to start the award when a person leaves the care home but do not give rise to 28 days entitlement.

**Recommendation 23: The Scottish Government should amend the draft regulations so that they align with the policy intention with regard to applications made while in a care home or residential school.**

#### **4.8 Accessible Vehicles and Equipment Scheme**

A child's highest rate mobility component can be used to lease a powered wheelchair or car adapted for their needs. Motability, the charity which delivers this scheme for DLA and PIP, has been accredited by the Scottish Government to provide the same scheme for CDP and Disability Assistance for Working Age People. This continuity is

welcome. It helps to secure the vitally important access to transport that protects disabled children's right to join in activities with other children and families and participate in the community.<sup>51</sup>

The scheme works by having the mobility component paid directly to Motability by Social Security Scotland (or the DWP in the case of DLA and PIP). If someone loses the highest rate mobility component, they need to give the car back after a grace period. This does not always allow enough time to pursue an appeal. In Scotland, the availability of Short-term Assistance presents an opportunity to help people keep their Motability car until the end of the appeal process. Options to explore to improve continuity include paying Short-term Assistance directly to Motability to extend the grace period.

As people come to live in Scotland from elsewhere in the UK or move away from Scotland, and switch disability benefits from one system to another, one consequence could be an interruption in other entitlements such as Motability vehicles. This transition should be seamless.

**Recommendation 24: To help people with Motability vehicles, the Scottish Government should consider options to provide better continuity through the appeals process, including utilising Short-term Assistance, and through transitions between Scottish disability assistance and DLA or PIP.**

There is one technical issue with the regulations on provision of vehicles:

- While CDP is the child's award, it will usually be paid to a parent or 'appointee' who will also enter into the lease agreement with Motability. Regulation 39 refers to 'the individual's' liability under the lease agreement and to CDP being paid in respect of 'the individual' – in other words, this implies that the child is liable under the lease agreement. Terminology could be clearer.

**Recommendation 25: The Scottish Government should clarify the regulation relating to provision of vehicles, to clearly distinguish between the child with the CDP award and the person who is liable for the vehicle agreement.**

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<sup>51</sup> Convention on the Rights of the Child article 23, article 31; Convention on the Rights of Person with Disabilities article 19, 20

## **5. Interface with UK system**

The Scottish Government and the DWP need to work effectively together to ensure the safe and secure transition from DLA to CDP, and to ensure people do not lose out as a result of having related entitlements administered by separate agencies. The need for a good working relationship becomes ever more important as delivery of Scottish social security progresses from one-off grants to high-volume, regular payments.

### **5.1 Joined up processes**

Understanding how related entitlements interact and where processes need to join up will help ensure that disabled children can access their full entitlement. For example:

- Social Security Scotland needs to be able to check whether a child gets DLA to avoid delays in processing applications for CDP.
- When a CDP award starts, stops or changes, Scottish systems need to share that information with DWP and with HMRC to avoid families missing out on the disabled child element with Universal Credit or Child Tax Credit.
- Staff in Social Security Scotland and in the DWP need to be equipped to give the right advice. Wrong official advice is a major reason why people claim the wrong benefit or claim at the wrong time.
- When disabled children come to live in Scotland from elsewhere in the UK, or move away from Scotland, systems need to avoid gaps in entitlement. Diverging rules between CDP and DLA may make transferring between the two more complex for some children. The clearest example of this is in relation to the more generous entitlement in Scotland for children with a terminal illness.

Bridging the gap requires, for example, IT systems to be ready in time, staff to be trained across agencies, UK benefit regulations to be in place and guidance developed. While the UK benefits system has long been administered by more than just the DWP, the creation of a separate

benefit system in Scotland brings new challenges that are not always easy to foresee.

**Observation 2: The Commission believes that there would be value in seeking wider views to help develop understanding of the potential consequences of diverging systems between Scotland and the rest of the UK when it comes to benefit transfers and beyond.**

## **5.2 Relocating within the UK**

The draft regulations contain provisions for people moving into or out of Scotland from the rest of the UK. A child who moves from Scotland to elsewhere in the UK will continue to receive CDP for 13 weeks. As drafted, the regulations provide that a child under age 18 who moves to Scotland will continue to receive DLA for 13 weeks. However, officials have told the Commission that this latter provision is not within devolved competence and will be amended. To join up UK and Scottish systems would then need some reciprocal arrangement with the DWP.

### **Technical and drafting issues**

We also note two technical issues with the regulations relevant to interfaces with the UK system:

- To make sure that carers looking after a disabled child can still get carer's allowance, the Scottish Government is amending the carer's allowance provisions to include CDP as a qualifying benefit.<sup>52</sup> As drafted, this amendment (regulation 43) widens the gateway so that either component at any level of CDP is sufficient. For DLA, only middle or higher rate of the care component counts. We presume the widened gateway to be unintentional.
- Regulations provide for CDP to continue for 13 weeks when a child moves to live elsewhere in the UK (regulation 41). It is not clear when this period begins. It applies when a child who was 'ordinarily resident' in Scotland becomes ordinarily resident elsewhere in the UK. If a family moves home permanently, then clearly they have changed where they are ordinarily resident. But there will be other situations where the dividing line is far less clear. For example, if a

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<sup>52</sup> Section 70, Social Security Contributions and Benefits Act 1992



child who has been living with one parent goes to stay with another parent outside Scotland, at what point does an extended visit become a change in ordinary residence? There is no regulation that provides for a temporary absence from Scotland where the absence is within the UK. Such a provision could provide some certainty that for a specified period of time, a temporary absence from Scotland will not mean a change of ordinary residence.

**Recommendation 26: The Scottish Government should attend to the technical issues noted:**

- **To amend regulation 43 to correctly make middle or higher rate care component of CDP the qualifying benefit for carer's allowance.**
- **To clarify the difference between a temporary absence from Scotland and a move elsewhere in the UK that changes ordinary residence, for example by considering adding to regulations a temporary absence from Scotland provision for absences within the UK.**

## **6. Processes and time limits**

### **6.1 Applications and assessments**

It is clear that there has been a considerable loss of trust in the fairness of decision making in disability benefits, particularly for PIP.<sup>53</sup> It is equally clear that the experience of applications and assessments is very important to people. The Charter, created together with people with lived experience, sets out a range of expectations about how people want to experience the system – that it should be simple and clear, positive and stress-free, convenient and accessible, with independent advice and support available. It also places an emphasis on creating a learning system where staff are well trained and supported. In due course, the Commission will be able to report its views on how such Charter expectations are being delivered.

Alongside producing these draft regulations, there are very many other systems and processes to be set up in time for CDP to be delivered later

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<sup>53</sup> <https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/829/82903.htm>

in 2020. A good system is one in which correct decisions are made first time, and one that values continual learning and improvement. Certainly to be effective, people will need help to explain their needs fully from the start. The Scottish Government is designing a new application form for CDP that can be completed online, by phone, on paper or face-to-face and is setting up a network of local staff to provide pre-application support. There is also a promise that children and young people will not have to undergo a face-to-face assessment.

Turning to the draft regulations, these provide for things like the date of the application, who can make an application and what experience case managers and others involved in assessments must have.

To give people time to complete what could be a lengthy application form, CDP regulations allow six weeks from the date a person first contacts Social Security Scotland and supplies enough 'data required to construct a record in respect of the child' (regulation 24(4)). What exactly would be enough to construct a record is not specified. The more data or verification required, the more people will fail to meet the requirement and lose out on benefit. Examples from the current system range from DLA where the date of claim is simply the date the form is requested, to Universal Credit where the complex ID and verification process leave many failing to claim altogether.

The Commission takes the view that the needs of children should be the primary consideration in designing these processes. Undoubtedly allowing time to complete the form is compatible with this approach. While due attention must also be given to effective administration, care should be taken that the process does not require more than the minimum needed to start an application, which may be no more than a record of a phone call. For clarity, ideally the exact requirements should be set out in the regulations, and certainly set out in publicly available case managers' guidance.

**Recommendation 27: The Scottish Government should make clear, ideally in the regulations, that the least possible information will be required to start an application.**

To deliver a system based on dignity and respect, the Charter requires that staff are well supported and trained, and understand the needs of different people and the barriers they face. Regulations specify that case managers and 'specialist advisers' must be trained on mental health

conditions and learning disabilities. This will help support Charter expectations. Obviously, training will go beyond legal requirements. In designing staff training, we consider that equipping them with the skills they need to support people to give a complete picture of their needs will be important. To be properly enabling, this task will need to go beyond scripted questions, and build on staff having a good understanding of the issues that matter for the individual and the skills to be able to draw out a full account of those needs from the individual.

Finally, in creating feedback loops to learn from, Social Security Scotland should build in learning from the Scottish Courts and Tribunal Service (and its UK and Northern Ireland counterparts), for example, about reasons for overturning decisions, which can point to ways to improve decision making at an earlier stage.<sup>54</sup>

## **6.2 Applying on behalf of a child**

We are pleased that the Scottish Government intends to introduce a Bill to enable Social Security Scotland to appoint a parent or another appropriate person to act on behalf of a child in relation to their social security assistance. This addresses a gap in the law. There may need to be consequential amendments to these draft regulations. There will also be a need for processes to be designed and guidance produced to clearly explain those processes. To be in line with human rights tenets, the touchstone in developing these processes and guidance must be considering what is in the best interests of the child. There should certainly be a clear process for dealing with disputes between appointees, which should provide an independent review, and a process for assessing a young person's capacity to handle their own claim when they turn 16 that ensures they can properly exercise their right to express their views.<sup>55</sup>

**Recommendation 28: The best interests of the child should be the primary consideration in designing processes and guidance about appointing parents and others to act for children and young people.**

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<sup>54</sup> The Second Independent Review of the Personal Independence Payment Assessment, Paul Gray March 2017, offers insights from Tribunal Judges on common reasons for overturning decisions at appeal hearings

<sup>55</sup> Convention on the Rights of the Child article 12

**Processes and guidance should be designed to ensure that children can properly exercise their right to express their views.**

### **6.3 Time limits for redetermination**

#### **Time limit to request a redetermination**

If someone wishes to challenge a decision about CDP, they have 42 days to ask for a redetermination (regulation 35). There is provision in the Act to make a late request for up to a year from the decision if Social Security Scotland accepts that the person has a good reason for being late. There is broad support amongst stakeholders that we spoke to for the time limit being 42 days.<sup>56</sup> The Commission notes that these redetermination time limits for CDP are different from DLA and other reserved benefits and not directly comparable. As an example, someone getting DLA has 31 days to ask for a reconsideration but if they miss the deadline they have an unqualified right to appeal for up to 13 months. Someone getting CDP would have longer – 42 days – to ask for a redetermination but would not be able to proceed to redetermination or appeal if they missed the deadline unless they could show a good reason for the delay. They could, however, appeal about the question of good reason – called a ‘process decision’. Rules requiring people to show a good reason for their actions are common in social security. For some, they are a considerable barrier. We are pleased to see that the Scottish Government anticipates that case managers would make appropriate enquiries of people of their reasons.<sup>57</sup> We also recognise that the availability of Short-term Assistance may act as an incentive to appeal, and may therefore counter this barrier to some extent.

**Recommendation 29: Social Security Scotland should keep under review the optimum time limit for requesting a redetermination, for example, by monitoring appeals about process decisions.**

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<sup>56</sup> <https://www.gov.scot/publications/scottish-commission-on-social-security-submissions-disability-assistance/>

<sup>57</sup> <https://www.gov.scot/binaries/content/documents/govscot/publications/correspondence/2019/12/3-the-scottish-commission-on-social-security-letters-disability-assistance/documents/disability-assistance-for-children-and-young-people-regulations-2020-pocily-note---february-2020/disability-assistance-for-children-and-young-people-regulations-2020-pocily-note---february-2020/govscot%3Adocument/Disability%2BAssistance%2Bfor%2BChildren%2Band%2Byoung%2Bpeople%2Bregulations%2B-%2BPolicy%2BNote%2B-%2BFebruary%2B7%2B2020.pdf>

## Period to make a redetermination

Having received a request for a redetermination, Social Security Scotland has 56 days to make the redetermination (regulation 35(2)). Stakeholders have welcomed having a time limit in law, in contrast to the open-ended mandatory reconsideration process for reserved benefits. However there are differing views about what is a reasonable timescale with some believing it leaves people waiting too long.<sup>58</sup> The Commission is sympathetic to the situation of people who may rely on disability benefits for basic household bills who cannot easily adjust to a lower income, although some will have access to Short-term Assistance to tide them over the time it takes to resolve their case. We are also mindful of the need for the Agency to have enough time to make a fully-informed decision. A shorter time limit presumably means more undecided cases. The consequence of running out of time is that the undecided case is handed back to the individual to take to appeal or not as they choose. This carries the risk of people simply giving up.

**Recommendation 30: Social Security Scotland should keep under review the optimum time limit for making a redetermination, and ensure that processes are designed so that nobody drops out of the system simply because the agency has not determined their case in time.**

## 6.4 Changing awards

The Scottish Government has explained that children will get ‘rolling awards’ of CDP. How disability benefit awards are assessed and reviewed is a matter of great concern to people. In developing this policy the Scottish Government has been guided by advice from the Disability and Carers Benefits Expert Advisory Group (DACBEAG).<sup>59</sup> The draft regulations say there will be no fixed end point to an award but rather a review period set based on when it is anticipated that a child’s needs may change. At the end of the review period, Social Security Scotland will make a new determination of entitlement. DACBEAG also

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<sup>58</sup> Submissions provided by stakeholders to SCoSS are available here:

<https://www.gov.scot/publications/scottish-commission-on-social-security-submissions-disability-assistance/> ; and for disability assistance consultation <https://www.gov.scot/publications/consultation-disability-assistance-scotland-analysis-responses/>

<sup>59</sup> <https://www.gov.scot/publications/disability-and-carers-benefits-expert-advisory-group-award-duration/>

recommended that reviews should be light touch and minimise stress. However, the process for review will be a matter for guidance. During the review period, a child is assumed to continue to satisfy the eligibility conditions.

There are provisions that allow an award to change before the review period comes to an end, for example, where a child's needs have increased. Regulation 31 requires a new determination if a change of circumstances 'would **possibly** result in an alteration to the level of CDP' (emphasis added). This means that the Agency could make a new determination – and change the award or leave it unchanged – or not make a new determination. Only if there is a new determination would the individual have a right to challenge that decision by way of redetermination and appeal. There is a balance to be struck between on the one hand being able to assure people that when things happen that are not relevant to their entitlement, their award is safe, and on the other hand providing the appeal rights that people expect. For example, young people starting college should be able to do so without worrying that they will automatically be reassessed if their needs have not changed, whereas a parent who believes her child's needs have increased should have the right to appeal if the agency disagrees with her. The Charter expectations are that the agency will 'look at your application again if you disagree with a decision.'<sup>60</sup>

**Recommendation 31: To fully meet Charter expectations, the Scottish Government should ensure that regulations and processes always contain appeal rights, for example, where the Agency disagrees with a parent who believes her child's needs have increased.**

### **Technical issues about 'determination without an application'**

There are some technical issues with regulations about 'determination without an application':

- It is not completely clear that regulations provide Social Security Scotland with the necessary powers to remove an award altogether where a person is no longer eligible. For example, it is clear that the powers are there to reduce an award if there is

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<sup>60</sup> 'Processes that work' commitment 7.

[https://dgxmvz0tqkndr.cloudfront.net/production/images/general/Our-Charter\\_1.pdf](https://dgxmvz0tqkndr.cloudfront.net/production/images/general/Our-Charter_1.pdf)

a change of circumstances, but not clear that the phrase ‘an alteration to the level payable’ (regulation 31(1)(a)(i)) includes removing an award altogether.

- Regulation 31(1)(a)(iv) and regulation 33(1)(c) provide for full backdating if new facts come to light that would have given a child a higher award had they been taken into account in the original award. This is more generous than in the current DLA system where arrears would not be awarded. There is no indication of the policy intention but this may be an intentional improvement in putting the needs of people who require assistance first.<sup>61</sup>
- Regulation 32 deals with changing an award where there has been an official error. For example, Social Security Scotland may make an official error if it gets the law wrong or ignores important information. To avoid confusion, the regulation says that the route to changing the award by making a determination without an application should not be used if a redetermination or appeal is underway. While this clarification is helpful, it does leave a potential gap if the error only comes to light after an appeal has already been decided. Sometimes errors come to light that affect lots of people. It would be unfair if this could be put right for some people but not others.
- In our Scrutiny Report on the draft Scottish Child Payment regulations,<sup>62</sup> we drew attention to the need for clarity on how changes of circumstances would be taken into account while a redetermination or appeal was underway, for example, whether an appeal tribunal would decide an award based on circumstances at the day of the hearing or whether a new application would be required. We note that this will also be an issue for CDP where clarity will be needed for individuals, case managers and tribunals.

**Recommendation 32: The Scottish Government should consider the technical issues raised about ‘determination without application’:**

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<sup>61</sup> In line with social security principle (g)

<sup>62</sup> See section 3.3. <https://www.gov.scot/publications/the-scottish-child-payment-regulations-2020-scrutiny-report-on-draft-regulations/>

- to clarify that **Social Security Scotland has the necessary powers to remove an award where a person is no longer eligible;**
- to ensure the regulations achieve the policy intention with regard to **backdating payments when new facts come to light;**
- to clarify in regulations that an award can still be corrected if an **official error comes to light after an appeal has concluded;**
- to provide for how changes in circumstances are dealt with while a **redetermination or appeal is underway.**

## 7. Consistency and coherence

In our Scrutiny Report on Scottish Child Payment draft regulations<sup>63</sup>, the Commission drew attention to a need to routinely review whether there is scope to increase consistency and coherence across regulations unless there is good reason for differences between them. The same applies to these draft regulations. Below we note some provisions which could be better aligned across social security assistance already in place. Obviously, as important will be consistency across disability assistance regulations yet to come. We suggest that these draft regulations be kept under review as new disability assistance regulations are drafted to avoid needless divergence:

- a. CDP regulation 35(1) gives people 42 days to request a redetermination. For Best Start Grant, Funeral Support Payment and Young Carer Grant, the time limit is 31 days. Having decided to increase the time limit for CDP, there is good reason to bring other social security assistance in line. Claimants and their advisers are often confused by the different time limits that already exist, which risks people missing crucial deadlines.
- b. Under CDP regulation 35(1), the 42-day time limit runs from ‘the day after the day on which a statement of determination was issued’. The equivalent Best Start Grant provision has the time limit running from a day ‘the individual is informed in accordance with section 40’ of the Act, which by section 62 of the Act would be 48 hours after the notification is sent.

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<sup>63</sup> See section 5.2. <https://www.gov.scot/publications/the-scottish-child-payment-regulations-2020-scrutiny-report-on-draft-regulations/>



- c. CDP regulation 35(2), which gives the time allowed for Social Security Scotland to make a redetermination, is drafted differently from the equivalent Best Start Grant provision in two respects as follows:
- Firstly, the Best Start Grant period is expressed in terms of 16 working days while the CDP period refers to 56 calendar days. CDP is a more complex benefit than Best Start Grant and it is reasonable that it will take longer to make a fully informed decision. However, it seems to be needless complexity to express one time limit in terms of calendar days and another in terms of working days.
  - Secondly, the time allowed runs from a later date for Best Start Grant if the request for redetermination is late. This allows time to decide the question of whether the individual had a good reason for the late request.<sup>64</sup> This useful provision has been missed from the CDP regulations.

**Recommendation 33: The Scottish Government should improve consistency and coherence across regulations with regard to time limits for redeterminations.**

## **8. Concluding remarks**

While welcoming the improvements that the Scottish Government has sought to make within the unavoidable constraints imposed by the priority for a smooth transition and the framing of the Act, we have highlighted in this report a number of technical drafting issues that will need to be addressed by the Scottish Government before these regulations are ready to be laid if unintended consequences are to be avoided. Most are straightforward and in some cases officials have already indicated their intention to make amendments in line with our advice.

As the first transfer of a major benefit, it is entirely reasonable to expect that the process of drafting regulations will reveal numerous issues

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<sup>64</sup> paragraph 2(1)(b) of Schedule 1 of the Early Years Assistance (Best Start Grants) (Scotland) Regulations 2018

concerning the alignment and interface between devolved and reserved provision, and that there will be much to learn from this exercise. The Commission does not have a further opportunity to scrutinise a final version of these regulations. However, we observe that it is not uncommon to amend new regulations fairly quickly, usually when operational experience uncovers unintended consequences. In this case, in view of the inevitable challenges of drafting regulations that adequately cater for all eventualities in this new scenario, we suggest there may be merit in actively reviewing the CDP regulations **before and after** CDP is launched. In our judgement, further review of CDP regulations is likely to be helpful to ensuring that they provide the best starting point for similar disability assistance regulations to follow. This approach is in line with Scottish social security principles (g) and (h).<sup>65</sup>

**Recommendation 34: In view of their complexity, length and speed of development, the Scottish Government should continue to review the draft regulations before and after CDP is launched to identify and rectify any immediate issues arising and to ensure a robust basis for developing future Disability Assistance regulations.**

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<sup>65</sup> (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.

## Annex A: Changes to draft regulations

In referring the further set of draft Disability Assistance for Children and Young People regulations to SCoSS on 7 February 2020, the Cabinet Secretary noted that various amendments had been made to the earlier draft regulations to take account of early views provided by SCoSS members.<sup>66</sup> These included the following:

- the interpretation and definition of a number of phrases to ensure that the existing case law definition of these terms is reflected in the regulations;
- in relation to reporting of a change of circumstances, changing the threshold at which a new determination would be made through amendments to the phrasing of regulation 31(1)(a)(i); and
- provision to ensure that where a redetermination or an appeal increases the level of assistance a client should have received for a period, the back payment relating to that entitlement is paid net of any Short-Term Assistance they have already received.

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<sup>66</sup> [https://www.gov.scot/binaries/content/documents/govscot/publications/correspondence/2019/12/3-the-scottish-commission-on-social-security-letters-disability-assistance/documents/cabinet-secretary-letter-on-disability-assistance-7-february-2020/cabinet-secretary-letter-on-disability-assistance-7-february-2020/govscot%3Adocument/Cab%2BSec%2BSSOP%2BLetter%2Bto%2BSCoSS%2B-%2BDACYP%2BRegulations%2B-%2B7%2BFebruary%2B2020\\_.pdf](https://www.gov.scot/binaries/content/documents/govscot/publications/correspondence/2019/12/3-the-scottish-commission-on-social-security-letters-disability-assistance/documents/cabinet-secretary-letter-on-disability-assistance-7-february-2020/cabinet-secretary-letter-on-disability-assistance-7-february-2020/govscot%3Adocument/Cab%2BSec%2BSSOP%2BLetter%2Bto%2BSCoSS%2B-%2BDACYP%2BRegulations%2B-%2B7%2BFebruary%2B2020_.pdf)

## **Annex B: Timeline of scrutiny**

In both our report on the Scottish Child Payment and our subsequent evidence to the Social Security Committee, we noted our determination to improve scrutiny processes as our experience develops. In practical terms, the draft regulations' length and complexity, and tight reporting deadlines, made the involvement of people with lived experience impossible. Nonetheless, we were able to carry out some limited engagement with stakeholders and we greatly appreciate their contribution to our drafting of this report. We received written submissions from a few targeted stakeholders<sup>67</sup> and held a roundtable discussion on the earlier draft regulations in January. We later hosted a small roundtable with third sector organisations to explore how we might best meaningfully and inclusively engage with people with lived experience in the future.

We thank Scottish Government officials for providing various briefings and for responding to our written questions.

### **Scrutiny timeline**

- 14 August 2019 SCoSS board meeting: Briefing from Scottish Government official on Scottish Government's Disability Assistance Consultation.
- 19 November 2019 SCoSS board meeting: Informal briefing on a Scottish Government paper on Disability Assistance for Children and Young People from Scottish Government official.
- 12 December 2019: first draft regulations referred to SCoSS by Cabinet Secretary for Social Security and Older People.
- 13 December 2019 SCoSS board meeting: Discussion with Scottish Government official on DACYP draft regulations.
- 30 January 2020 SCoSS board meeting: Roundtable discussion with stakeholders on DACYP draft regulations.
- 7 February 2020: further draft regulations referred to SCoSS by Cabinet Secretary for Social Security and Older People.
- 18 February 2020: Informal SCoSS meeting to discuss draft report

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<sup>67</sup> <https://www.gov.scot/publications/scottish-commission-on-social-security-submissions-disability-assistance/>

- 26 February 2020 SCoSS board meeting: members' discussion of draft report and separate roundtable with stakeholders on involving people with lived experience in SCoSS's work.

## **Annex C: Summary note of consultation event**

This annex summarises the main points made at the stakeholder discussion on 30 January 2020 on the initial draft Disability Assistance for Children and Young People Regulations.

Participants were invited to highlight their key issues. The following points were raised—

- Draft regulations look ‘bitty’ in terms of which issues are to be carried over from DLA and which differ; there should be an overarching policy logic.
- Not clear whether all relevant case law is ‘transferring across’ into the draft regulations.
- The need for a safe and secure transition from DLA.
- Concern about the use of language in the draft regulations (examples of ‘suffering from’). They should demonstrate greater recognition of the social model of disability.
- Concern that rights may be lost in Scotland compared with DLA, some apparent loss of rights may be drafting effects.
- Clarification is required on part 5 of the draft regulations, which are concerned with time spent in care homes, residential educational establishments, etc.
- The need to clarify provision for children with mental health issues.
- Concern about the ‘stark changes’ in the time limit to request a redetermination.
- Need to clarify the role of appointees and claiming on behalf of children.

Participants then discussed six broad topics that had been identified in advance by SCoSS members. The key points are summarised below.

### **Topic 1: Interface with UK benefits**

- Participants discussed the interfaces between DLA and Disability Assistance for Children and Young People, for example around case transfers from DLA, and how disability assistance is a passport to entitlement to UK benefits.
- There is a danger that people might fall through gaps, depending on whether some decisions are made in Scotland or elsewhere in

the UK especially for people who share the care of children. It would be good to establish an overarching, reciprocal arrangement so people cannot fall through gaps. There is a model reciprocal arrangement within the EU, so could use that model in Scotland.

- It was recognised that it will be for UK ministers to decide whether Disability Assistance still gives rise to the same passported UK entitlements as DLA, depending on how different Disability Assistance might become from DLA.

## **Topic 2: Terminal illness**

- The divergence in policy was noted. In Scotland, there will be guidance to allow medical practitioners to take a broader view. Further, entitlement will be given once the relevant form is submitted (BASRiS) whereas it is possible for individuals currently to get DLA via, for example, a phone call from a practitioner.
- There were mixed views as to what should be dealt with in the draft regulations and what in guidance. A possible advantage of expanding the draft regulations would be to provide greater coherence and consistency, and not rely solely on the views of individual medical practitioners.
- Others noted that certain conditions change over time with medical developments (e.g. improvements in survival for people with cancer).
- It was noted that decision makers would have no discretion to make a decision on terminal illness.
- Some ambiguities or possible drafting errors were noted in the draft regulations.

## **Topic 3: Care homes and residential schools**

- Participants were concerned that, in some circumstances, the provisions could mean that entitlement to the proposed assistance would stop, rather than be 'paused' as is effectively the case with relevant UK legislation.
- This scenario may also mean an individual in Scotland also losing entitlement to UC; entitlement to DLA is enough to receive part of UC. Carer would also lose entitlement. This may mean parents moving into a different kind of conditionality regime.

- Would expect provision here as to who can make an application on behalf of a child and who would receive the payment.
- Draft regulation 13(5) was considered unclear: why is the distinction being made with foster care?
- SCoSS members identified a need to access information on patterns of residential respite care for children.

#### **Topic 4: Timescales**

- The 42 day limit to request a redetermination is different from DLA, which allows for 13 months.
- Some consider that the 56 days for Social Security Scotland to conduct a redetermination is too long. It was noted, though, that if Short-term Assistance were in place there may not be as much pressure to do this quickly for individuals. Would be good to clarify what the process would be if 56 days were reached and still no decision had been made.
- The draft regulations could result in a loss of rights to review a recipient's current award – they do not necessarily allow a new redetermination therefore a recipient will not have an appeal right and therefore they will be 'stuck'.
- The individual could go straight to appeal even though there has been no redetermination, or revert to Social Security Scotland to make a redetermination. But it is plausible that nothing would happen if an individual did not take control once 'put back in the driving seat'. Short-term Assistance may kick-in with this scenario, but only if the individual had the award in the first place, not if they were starting from nothing.

#### **Topic 5: Mental health conditions**

- Participants noted a vagueness in the draft regulations and that mental health conditions can fluctuate: can children with mental health conditions rely on the draft regulations? Are they robust enough?
- There is a sense that DLA rules have not kept pace with what we now understand about mental health in children.
- There is some confusion around language: sensory or development issues are misconstrued as mental health issues.



The wording on application processes focuses on physical activities; may have to shoehorn in children with mental health issues, rather than it being obvious as is the case with physical disabilities. It was also noted that there may be a conflation of mental health with learning disability. It is important to get the distinctions correct.

- It was noted that the EQIA for the draft regulations needs to take account of mental health issues.

### **Topic 6: Transitions aged 16**

- Policy will diverge from DLA because DACYP will be available up to age 18 and, in some cases, to age 19.
- This raises specific, big issues for looked after children, for whom local authorities have responsibility up to the age of 25. But 16 to 18 is a really key gap.
- There is an intersection with payment issues, and what changes and safeguarding are needed to make sure someone's entitlement is not abused: a young person may want their own payment but an abusive carer may want to keep the money.
- At age 16, a parent is no longer the appointee for a child, unless the child cannot manage claim her/ himself. In the draft regulations there is no clear process as how to decisions are made, which could cause problems at age 16. It is not clear who can claim for whom.

### **Participants**

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