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10 September 2021

Dear Dr Witcher,

Thank you for your scrutiny report of 06 August 2021 on the Disability Assistance for Children and Young People (Scotland) Amendment Regulations 2021. I would like to express my sincere thanks to SCoSS for considering these regulations despite the challenging timescales.

I appreciate that SCoSS has been asked to consider a number of instruments concurrently and I am grateful that this has been accommodated. I am sure you will agree that the volume and complexity of work reflects the scale of the changes that we are seeking to deliver as we move forward with delivery of disability assistance.

Please find attached a copy of the Scottish Government's response to SCoSS' recommendations (set out in the accompanying annex). I have issued copies to the Convener of the Social Justice and Social Security Committee.

I am pleased to confirm that we have accepted the majority of recommendations made by SCoSS. Where we have not been able to accept a recommendation, or can only partially do so, these have been set out in the attached annex.

There are further amendments to the regulations which we have not been able to refer to SCoSS, as they were identified late in the process. These further amendments are set out in the accompanying draft instrument and are to be made using the regulation making power in section 31(2) of the Social Security Scotland Act 2018 ("the 2018 Act").

The draft amendments make changes to the regulations by extending the scenarios whereby Scottish Ministers are required to make a determination of entitlement. They also clarify that it will be the value of entitlement, rather than amount paid, which will be considered when calculating any increased award an individual was entitled to for a previous period following a subsequent determination.

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I apologise for not including these amendments when the draft amendment regulations were submitted to SCoSS for scrutiny in June. On this occasion I consider it appropriate to not delay the proposed laying timetable in order to provide SCoSS with an opportunity to report on these draft regulations before they are laid, because of the benefit of laying all the proposed amendments as part of a single instrument, and because the further amendments are considered minor and technical in nature and merely give effect to the original policy intent.

Regrettably we have also had to temporarily delay the introduction of the amendment to regulation 7 which would allow the Scottish Ministers to temporarily stop payment of CDP rather than end entitlement if the child has a temporary absence of less than 12 months from the Common Travel Area. This is because the system capability to provide this will require more development work than anticipated.

We fully agree with SCoSS' comments that this provision will reduce the possibility of unnecessary gaps in entitlement or reapplications, and will contribute to the aspiration to an efficient social security system. In recognition of the importance of this, we will seek to reintroduce this provision in a future statutory instrument.

There are certain amendments in the draft regulations which are not subject to formal scrutiny by SCoSS:

- the amendments to regulation 37 (duty to re-determine) of the principal regulations which are made under section 43(5) of the 2018 Act; and
- the amendments to part 3 of the schedule of the principal regulations, which are made under section 95 of the 2018 Act.

I should highlight that while some of the provisions made under section 95 of the 2018 Act were provided to you for information and context, further changes to these provisions have since been made that were not shared. These include some further technical fixes subsequently identified and the case transfer backdating provisions.

I am confident that the changes we have made in response to the recommendations from SCoSS will clarify our policy intention. I believe that the changes demonstrate that we are continuing to listen and that our decisions are informed by evidence of what is right for clients.

Thank you again for your continued co-operation and support. I am grateful to SCoSS Members for the helpful and constructive way in which they have engaged with officials, and in helping to scrutinise the amendment regulations.

Yours sincerely,



## **BEN MACPHERSON**

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## Response to Scrutiny Report of 06 August 2021

SCoSS Recommendation	Accept/ Partially accept/ Reject	Scottish Government Response
<p>1. The Scottish Government should routinely assess and highlight whether Regulations contain matters where people with lived experience and stakeholders may have an interest and a contribution to make, and ensure adequate time is available for this.</p>	Accept	<p><b>Scottish Government response:</b> The Scottish Government will continue to engage with the public and our Experience Panels to seek views of people across Scotland with lived experience of applying for and receiving benefits. This is done through focus groups, interviews and user testing sessions. As part of the commitment to continuous improvement and the ‘test and learn’ approach we will continue this work to help inform our approach to the CDP regulations, and the implementation of social security more widely within the devolved context.</p> <p>On-going stakeholder engagement with key organisations such as the Child Poverty Action Group, Rights Advice Scotland, Young Scot, Disability and Carers Benefit Expert Advisory Group (DACBEAG), and our Ill Health and Disability Benefit Stakeholder Reference Group – will provide the Scottish Government with an opportunity to monitor the impact of the changes made by these regulations so that our system can continue to evolve and improve.</p>
<p>2. Regulation 4 should be revised to remove any ambiguity around the ages between which an individual must first meet the eligibility criteria in order to be awarded CDP.</p>	Accept	<p><b>Scottish Government response:</b> The Scottish Government fully accepts the recommendation in relation to the age criteria, and the provisions have been revised to ensure that they meet the desired policy intention.</p> <p>The changes which have been made to accommodate this feedback make clear that the requirement that CDP may only be paid in respect of an individual who is at least 3 months old does not apply for SRTI clients.</p>

SCoSS Recommendation	Accept/ Partially accept/ Reject	Scottish Government Response
		<p>We have also sought to clarify that the limitation that payment of CDP may only be paid in respect of an individual who is under the age of 16 years on the day on which entitlement begins doesn't apply for transferring individuals who transfer after the age of 16. This will also apply for SRTI clients.</p>
<p>3. The Scottish Government should amend draft Regulation 4 to withdraw proposed DACYP Regulation 4(1A)(b) on post-18 entitlement to CDP for people undergoing dialysis.</p>	<p>Accept</p>	<p><b>Scottish Government response:</b> The Scottish Government fully accepts this recommendation and the provision enabling people undergoing dialysis to remain on CDP over the age of 18 has been removed.</p> <p>We have made further changes to this regulation which we think more clearly reflects the policy intent on post-18 entitlement to CDP. The changes include:</p> <p>Continuing payment of CDP in respect of an individual who is over the age of 17—</p> <ul style="list-style-type: none"> <li>(a) where they are an individual to whom entitlement under special rules for terminal illness applies,</li> <li>(b) until the age 19 where – <ul style="list-style-type: none"> <li>(i) the individual is awaiting a determination of their entitlement to disability assistance for working age people;</li> <li>(ii) individuals in respect of whom Disability Living Allowance is paid in another part of the United Kingdom immediately before moving to Scotland; or</li> <li>(iii) they are a transferring individual in terms of part 3 of the schedule.</li> </ul> </li> </ul> <p>We have sought to include a time limit for these individuals to whom regulation 4(b) applies to avoid the potential situation whereby individuals could remain on CDP indefinitely. We consider that allowing them to</p>

SCoSS Recommendation	Accept/ Partially accept/ Reject	Scottish Government Response
		remain in receipt of CDP up until their 19th birthday, will provide sufficient time for a decision to be made regarding their Adult Disability Payment entitlement, and in doing so will help alleviate any undue stress and anxiety.
4. In order to avoid gaps in entitlement, the DAWAP Regulations should ensure that short-term assistance is available to CDP claimants whose initial determination in respect of ADP is that they have no or a reduced entitlement.	Reject	<p><b>Scottish Government response:</b> Short Term Assistance is not available to clients applying for disability assistance when they are not already entitled to it. If Short Term Assistance were extended to CDP clients who apply for ADP the Scottish Government would potentially be treating those clients more favourably than all other clients who apply for ADP.</p> <p>Clients who are already receiving CDP who apply for ADP and receive a negative determination will continue to receive CDP until they reach age 18. Similarly, CDP clients who receive an award of ADP, while it may be lower than their CDP entitlement, will nonetheless be in receipt of payment, and will not have a gap in their entitlement.</p>
5. The Scottish Government should consider whether the wording of DACYP Regulation 5(6)(a) accurately reflects the policy intent regarding the circumstances in which certain public servants and their families should be exempt from the normal residence tests for CDP.	Reject	<p><b>Scottish Government response:</b> We believe that the existing provisions are sufficiently clear on this point. Our priority is not to make substantial changes to the eligibility criteria for CDP compared to DLA for Children, without clear evidence of a need to make such a change.</p>
6. Draft Regulation 11 should be revised to ensure it makes an appropriate distinction between individuals in legal detention transferred to a hospice and those temporarily transferred to a hospital who are not subject to a mental health order.	Reject	<p><b>Scottish Government response:</b> The Scottish Government has considered the different scenarios outlined by SCoSS. We are concerned that if we were to make the recommended change then individuals who have temporarily transferred to a hospital, who are not subject to a mental health order may be treated differently and less favourably than</p>

SCoSS Recommendation	Accept/ Partially accept/ Reject	Scottish Government Response
		<p>those individuals who are subject to a mental health order in the same situation.</p> <p>We do not consider there to be a justification in treating this particular group of individuals differently from others who have either been transferred from legal detention to a hospital under a mental health order, or to a hospice.</p> <p>We have sought therefore to retain the proposed drafting which ensures that anyone who is in hospital (for whatever reason) will not be nil rated for the time spent in hospital, and will be treated the same.</p>
<p>7. The existing wording of DACYP Regulation 28(1)(b)(iii) should be retained to avoid unnecessarily penalising individuals who are late in reporting a change of circumstances bringing about an increase in entitlement.</p>	<p>Accept</p>	<p><b>Scottish Government response:</b> The Scottish Government fully accepts this recommendation and has reverted back to the existing wording used in the DACYP Regulations.</p>
<p>8. The Scottish Government should not seek to recover any overpayment resulting from the retrospective revision of a DLA award or failure to report a change of circumstances until the conclusion of any mandatory reconsideration/re-determination and appeal.</p>	<p>Accept</p>	<p><b>Scottish Government response:</b> The Scottish Government has prepared detailed decision making guidance setting out that in all cases, checks must take place to ensure that there has not been a request for a redetermination, appeal or fraud investigation before correcting an error and seeking to recover any overpayments. In the circumstances described, the Scottish Government will wait until the outcome of any mandatory reconsideration/re-determination and appeal before any steps are taken to recover any overpayment.</p>
<p>9. The Scottish Government should clarify whether two separate determinations are required when individuals move from Scotland to England, Wales or Northern Ireland.</p>	<p>Accept</p>	<p><b>Scottish Government response:</b> We consider that the wording in Regulation 36(2) makes clear that there will be one determination to bring CDP to an end when individuals move from Scotland to England, Wales or Northern Ireland. We will make clear in our guidance to Social Security Scotland case managers that only one determination is required.</p>

SCoSS Recommendation	Accept/ Partially accept/ Reject	Scottish Government Response
<p>10. The Scottish Government should consider the merits of amending other social security Regulations to clarify when the time limit for a re-determination starts to run, following a tribunal decision that a valid request for re-determination was made.</p>	<p>Accept</p>	<p><b>Scottish Government response:</b> The Scottish Government accepts this recommendation and are grateful to the Commission for drawing this to our attention.</p> <p>The Scottish Government is aware that this amendment is needed for other social security Regulations and we will work to progress this instrument.</p>
<p>11. The Scottish Government should ensure that guidance is in place to clarify the right to request a re-determination of short-term assistance. Furthermore, the Scottish Government should consider the merits of reordering the amendment to 1(1A) of the Schedule to ensure that it is clearer.</p>	<p>Accept</p>	<p><b>Scottish Government response:</b> The Scottish Government has robust guidance in place which clearly sets out a person's rights to request a re-determination or appeal of decision on Short-term Assistance. This guidance will help ensure that clients are given transparent and accessible information and are not prevented or discouraged from exercising their rights to challenge decisions.</p> <p>The Scottish Government has also made some changes to the ordering of the amendment to 1(1A) of the schedule which we now consider reads clearer.</p>