



Scottish
Commission
on Social
Security

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Scrutiny report on draft regulations:

**Scrutiny report on draft
Regulations: Winter Heating
Assistance for Children and
Young People (Scotland)
Amendment Regulations**

Submitted to the Scottish Government and the Scottish
Parliament's Social Security Committee on 16 September 2020.

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Summary of recommendations and observations

Recommendation 1

Following completion of the transition from DLA and PIP to CDP and ADP, the Scottish Government should review passporting arrangements to CWHA, to ensure consistency and equitable treatment of people with the same relevant needs, including specifically with regard to night-time care needs.

Recommendation 2

The Scottish Government should consider whether WHACYP Regulation 4(2) should be amended to ensure young people in hospital are not inadvertently excluded from CWHA.

Observation

SCoSS would welcome an explanation of the rationale for making retrospective awards of CWHA to young people who were in receipt of PIP in September 2020.

Recommendation 3

The Scottish Government should amend draft Regulation 6 so that WHACYP Regulation 5 requires that determinations of entitlement to CWHA be made by 31 December or as soon as reasonably practicable thereafter.

1. Introduction

The Scottish Commission on Social Security is pleased to present its scrutiny report on the draft Winter Heating Assistance for Children and Young People (Scotland) Amendment Regulations 2021 (hereafter the draft Regulations). These regulations make a number of amendments to the principal regulations: the Winter Heating Assistance for Children and Young People (Scotland) Regulations 2020 (SSI 2020/352, hereafter the WHACYP Regulations).

The WHACYP Regulations introduced a form of social security assistance called Child Winter Heating Assistance (CWA). This is an annual payment, of £200 at its introduction, made automatically early in the winter to every child or young person in receipt of a qualifying disability benefit. The qualifying benefits are currently the higher rate care component of disability living allowance (DLA) and the higher rate care component of child disability payment (CDP).¹ To receive CWA, the child or young person must be entitled to receive the qualifying benefit on at least one day during the qualifying week, which is the week beginning with the third Monday in September. CWA is intended to provide additional help with heating costs during the winter months, since people in receipt of these qualifying benefits are presumed to require a higher ambient temperature in the home (23C in the living room as opposed to the normal 21C), for 24 hours a day, as entitlement depends on requiring care at night. The first awards were made in winter 2020-21.²

The most significant effect of the draft Regulations will be to extend entitlement to CWA to young people (aged 16 to 18) in receipt of the enhanced rate daily living component of personal independence payment (PIP). The Scottish Government estimates that this will mean an additional 3,900 young people become entitled to CWA³. Further changes will allow payment of a CWA award to another person on

¹ The WHACYP Regulations as made conferred entitlement upon children and young people in receipt of DLA only, with CDP subsequently added as an additional qualifying benefit by Regulation 18 of the Disability Assistance for Children and Young People (Consequential Amendment and Transitional Provision) (Scotland) Regulations 2021 ([SSI 2021/73](#))

² <https://www.gov.scot/news/child-winter-heating-assistance-payments-to-start/>

³ Equality Impact Assessment – the figure of 3,900 in the EQIA appears to refer to retrospective awards of CWA for winter 2020-21. The number of young people in receipt of PIP is likely to reduce over time as the ‘Rising 16s’ policy allows them to remain on DLA after their 16th birthday.

behalf of the individual to whom the award is made and relax the deadline by which Social Security Scotland must make payments to those who receive an award.

This report is completed within the scope of SCoSS's pre-legislative scrutiny role as set out in sections 22(1)(a) and 97 of the Social Security (Scotland) Act 2018. The draft Regulations were formally referred to SCoSS on 2 August 2021 by the Cabinet Secretary for Social Justice, Housing and Local Government, Shona Robison MSP, with a request that we submit our report by 13 August (revised date agreed to report being 16 September. Our scrutiny timeline is summarized in Annex A.

2. Context: disability benefits for young people

Prior to 1 September 2020, a child who was entitled to DLA immediately prior to age 16 was required to apply for PIP on or after reaching 16. Following the devolution of competence for disability benefits, the Scottish Government amended the eligibility criteria for DLA to allow a young person to remain entitled to that benefit, before being required to apply for PIP at age 18 instead. This is known as the 'Rising 16s' policy and will also apply to CDP. However, young people (aged 16 and over) who apply for a disability benefit for the first time must apply for PIP. In addition, young people are entitled to apply for PIP at any point after their 16th birthday instead of remaining on DLA or CDP. In some cases this might lead to a higher award. There are differences between the eligibility criteria for the child and adult benefits. Most significantly, for the purposes of CWA, a child or young person is only currently entitled to the higher rate care component of DLA or CDP if they have care needs at night. Entitlement to the enhanced rate daily living component of PIP is based on the impact of the individual's impairment or condition on their day-to-day activities and care needs – the time of day at which the impact occurs or the care needs arise is irrelevant.

3. SCoSS's report on the Winter Heating Assistance for Children and Young People draft regulations

SCoSS published its pre-legislative scrutiny report on the WHACYP Regulations in July 2020⁴. We commended the introduction of CWHA as a step towards the realisation of disabled children's right to the highest attainable standard of health, their right to an adequate standard of living and their right to social security, as well as having potential to contribute towards addressing poverty and material deprivation. It is reasonable to expect that these effects will now extend to young people in receipt of PIP at the required rate.

Our report on the WHACYP Regulations noted that young people who transfer to PIP would be excluded from entitlement to CWHA. While SCoSS did not specifically recommend extending eligibility, we highlighted that this is a potential source of confusion and something that could complicate decisions on whether to move to PIP or remain on DLA at 16. There might be a risk that some young people could elect to remain on DLA in order to continue to receive their £200 CWHA award, when they might stand to gain more than £200 by moving to PIP. The amendments will eliminate these problems.

4. Extension of eligibility criteria

Most of the draft Regulations relate to the amendment of the eligibility criteria for CWHA, so that PIP (daily living component, enhanced rate, and whether initially awarded under the legislation for Great Britain or Northern Ireland) becomes a qualifying passporting benefit. Draft Regulation 5 amends WHACYP Regulation 4 to this effect. WHACYP Regulation 4(1)(a) already stipulates that entitlement depends on being a child or young person. Regulation 2 defines a young person as 'a person who is aged 16, 17 or 18'. Regulation 7 amends WHACYP regulation 8 so that Social Security Scotland must make a determination without application of retrospective entitlement to CWHA when an appeal results in an award of PIP at the qualifying rate, covering the qualifying week for CWHA

⁴ <https://www.gov.scot/publications/winter-heating-assistance-for-children-and-young-people-scotland-regulations-2020-scrutiny-report-on-draft-regulations/>

By accepting PIP as a passporting benefit, the Scottish Government is departing from the original rationale for CWHA. This was that higher rate care component of DLA (or CDP) reflects night-time care needs, and therefore a presumed need to heat the home at night. The enhanced rate daily living component of PIP does **not** require any night time care needs. Extending eligibility to people who do not have - or at least need not provide evidence of - night-time care needs and therefore do not necessarily have night-time heating-related costs, might raise questions about efficiency and value for money (principle h). However, SCoSS believes any such concerns are outweighed by the arguments in favour of the change. Indeed, our report on the WHACYP Regulations called for further clarification of why the highest rate care component of DLA had been selected as the qualifying payment.

Since there is no element of a PIP award that specifically reflects night-time care needs, an individual with extensive care needs, including if they happen to be at night, will receive the enhanced rate daily living component. Under the current WHACYP Regulations, if two young people, one in receipt of DLA and the other in receipt of PIP, had identical care needs, the first would be entitled to CWHA while the second would not. This is an equality issue that could potentially raise questions of compliance with article 14 of the European Convention on Human Rights⁵, as the positions of two individuals may be largely analogous, but one is excluded from a social security payment to which the other is entitled because they receive a different disability benefit. Addressing this disparity, then, is arguably an improvement to the devolved system in a way that advances equality and non-discrimination, in keeping with principle g(ii). The impact assessments accompanying the draft Regulations state that an alternative option of receipt of enhanced rate PIP plus night time care needs was considered but rejected due to administrative complexity for both disabled young people and Social Security Scotland. Automated payment would be impossible and each young PIP recipient hoping to be awarded CWHA would have to submit an application for consideration. That means there is also an efficiency and value for money argument in favour of the

⁵ The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

approach adopted, which allows CWA to remain an automatic payment to virtually all recipients.

However, SCoSS notes that extending entitlement to CWA to young people receiving the enhanced rate daily living component of PIP does nothing to address the equality point made in our report on the WHACYP Regulations, namely that children and young people with lower level awards of DLA, CDP or PIP may also have additional heating needs, but do not receive this assistance. This point potentially becomes more relevant than previously, given that the draft Regulations will weaken the link between night-time care needs and CWA.

Recommendation 1: Following completion of the transition from DLA and PIP to CDP and ADP, the Scottish Government should review passporting arrangements to CWA, to ensure consistency and equitable treatment of people with the same relevant needs, including specifically with regard to night-time care needs.

There is a difference in how the CWA rules operate for young people in hospital depending on whether their qualifying benefit is DLA or PIP. In general, if a child or young person is admitted to hospital before their 18th birthday, there is no change to their DLA or PIP award, however long they stay. If an individual aged 18 or older is admitted to hospital, payment of DLA or PIP stops after a spell. New WHACYP Regulation 4(5) (inserted by draft Regulation 5) protects young people in receipt of PIP from loss of CWA in these circumstances by stipulating that entitlement to PIP at the required rate confers entitlement to CWA even if the PIP award is reduced to £0 due to residence in a care home or hospital during the qualifying week. People in receipt of DLA only receive comparable protection (under WHACYP Regulation 4(2) if their payment is stopped due to admission to a care home. This means that an 18-year-old with an award of DLA, who did not receive a DLA payment during the qualifying week because of being in hospital, would miss out on CWA for that year.

Recommendation 2: The Scottish Government should consider whether WHACYP Regulation 4(2) should be amended to ensure young people in hospital are not inadvertently excluded from CWA.

5. Retrospective awards to young people in receipt of PIP

WHACYP Regulation 4(7) (inserted by draft Regulation 5) allows backdated awards to cover the first qualifying week for CWA (the week commencing 21 September 2020) if the individual would have been entitled to CWA at that time, had these amendments been in place. WHACYP Regulation 10(1A) (inserted by draft Regulation 8) clarifies that retrospective awards for the September 2020 qualifying week are to be for the amount applicable at that time (£200), not the uprated amount payable in respect of the September 2021 qualifying week (£202)⁶.

WHACYP Regulation 5A (inserted by draft Regulation 6) requires Social Security Scotland to make a determination without application of retrospective entitlement to CWA where it appears a young person would be covered by Regulation 5(7).

Retrospective awards to young people who were in receipt of PIP during the first qualifying week will undoubtedly be welcomed by those who benefit from them. Taking this approach does, however, set a potentially awkward precedent for future changes to devolved social security assistance that have the effect of widening entitlement. It might create an expectation that retrospective awards would also be made on those occasions. One possible argument for making retrospective awards of CWA, but not of other benefits for which the eligibility criteria might change in the future, could be that the Scottish Government feels the original approach could be vulnerable to challenge under article 14 ECHR (see above). Since neither the Scottish Government nor Scottish Parliament has competence to act contrary to the ECHR, a successful challenge on these grounds would mean the exclusion of young PIP recipients was unlawful and it is possible (although not inevitable) that a court or tribunal would then require retrospective awards. The Scottish Government has informed SCoSS that it believes the amended eligibility criteria comply with article 14. While officials expressed the view that young people in receipt of PIP should always have been eligible for CWA, they did not indicate whether the Scottish Government had any concerns about the compatibility of the original criteria with article 14.

⁶ The level of a CWA award was uprated by Regulation 5 of the Social Security (Up-rating) (Miscellaneous Amendment) (Scotland) Regulations 2021 ([SSI 2021/170](#))

Observation: SCoSS would welcome an explanation of the rationale for making retrospective awards of CWA to young people who were in receipt of PIP in September 2020.

6. Payment to another person

Regulation 9 amends WHACYP Regulation 11 so that an award of CWA to a child can be paid to another person (other than the parent) to be used for the benefit of the child. A similar provision in respect of an award to a young person was already in place. It seems sensible to have comparable provisions in place for children.

7. Time limit for determination of entitlement

Draft Regulation 6 amends WHACYP Regulation 5 to remove the requirement that Social Security Scotland makes a determination in favour of all individuals who are entitled to CWA in a given year by the end of December. The Scottish Government has advised SCoSS that the extension of entitlement to young people in receipt of PIP could put challenging pressure on Social Security Scotland's capacity to make determinations on behalf of all entitled individuals in accordance with this timetable while also implementing safe and secure transition to ADP. Further, SCoSS accepts that unforeseen changes, emergency legislation, and subsequent delivery challenges could arise at any time.

SCoSS would naturally prefer that everyone who is entitled to CWA receives their award as per the originally planned schedule. Our scrutiny report on the WHACYP Regulations stressed the importance of prompt payment to households who do not have access to mains gas for heating in particular. We are pleased that the Scottish Government remains committed to making as many payments as possible by 31 December. While there is little point enshrining what could well prove to be an impossible schedule in the Regulations, the Commission believes it would be preferable to retain a deadline. This could mean substituting the end of December with a later date, or allowing determinations by 'the end of December or as soon as reasonably practicable thereafter'.

Recommendation 3: The Scottish Government should amend draft Regulation 6 so that WHACYP Regulation 5 requires that determinations

of entitlement to CWHA be made by 31 December or as soon as reasonably practicable thereafter.

8. Adult claimants of CDP

The Commission notes one remaining anomaly resulting from the Disability Assistance for Children and Young People (Scotland) Amendment Regulations, which were in draft form at the time of writing⁷. Once made, these will amend the DACYP Regulations so that young people can continue to receive CDP after their 18th birthday in specific circumstances. No upper age limit for receipt of CDP in these circumstances is set, so although it is likely to be very rare for an award to continue to the 19th birthday or beyond, it may occasionally occur in the case of awards under the special rules for terminal illness or unusual administrative delays to a PIP or adult disability payment application. So it is possible that there will be a very small cohort of individuals aged 19 or older who are entitled to CDP but not to CWHA. However, it is reasonable to limit CWHA entitlements to children and young people aged 18 and under. To extend eligibility to one small group of adults would raise the question of why others should not also benefit. The Scottish Government may, of course, wish to consider in the future whether adult recipients of disability assistance or a reserved disability benefit also require additional help with winter heating costs, in which case it should ensure adults in receipt of CDP are not excluded⁸.

⁷ [SCoSS's scrutiny report](#) on the Child Disability Payment Amendment regulations

⁸ This was noted in SCoSS's evidence to the Social Security Committee on the WHACYP Regulations – <https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=12769&mode=pdf>

9. Annex – Scrutiny timeline

02 August 2021	Draft amendment regulations referred to SCoSS by the Cabinet Secretary for Social Justice Housing and Local Government.
10 August 2021	Questions on draft Regulations submitted to Scottish Government officials.
25 August 2021	SCoSS draft recommendations released to Scottish Government officials.
16 September 2021	SCoSS report published.



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