



Scottish
Commission
on Social
Security

Scottish Commission on Social Security

Scrutiny report on draft Regulations:

The Disability Assistance (Scottish Adult Disability Living Allowance) Regulations 2024

Submitted to the Scottish Government and the Scottish Parliament's Social Security Committee on 14 June 2024.

SCoSS/2024/04

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Summary of recommendations and observations

Recommendation 1: Given the significance of the decision facing some Scottish Adult DLA recipients as to whether to remain on Scottish Adult DLA or to claim Adult Disability Payment, and the unpredictability of the outcome, SCoSS recommends that the Scottish Government works with stakeholders to consider what adjustments may be needed to ensure that recipients have access to appropriate and timely advice and support.

Recommendation 2: The Scottish Government and Social Security Scotland should work with the Department for Work and Pensions to put in place a monitoring system to consider the rate and efficiency of transfers from Disability Living Allowance to Scottish Adult DLA in circumstances where an individual on Disability Living Allowance has reported a terminal illness.

Recommendation 3: The Scottish Government should set out an approach to work directly with organisations supporting people in circumstances where an individual on Disability Living Allowance has reported a terminal illness and publish guidance on what they should be able to expect.

Recommendation 4: There should be provision to extend the two-year grace period when an individual makes a late application with good reason.

Recommendation 5: The Scottish Government should place particular attention on communicating the risk to individuals when they choose to apply for Adult Disability Payment. This should emphasise that they will not be able to reclaim Scottish Adult DLA if they make this decision.

Recommendation 6: The Scottish Government should work with a range of stakeholders to develop inclusive communications to both the 'working age' and '65+ groups' transferring to Scottish Adult DLA to ensure that information about case transfer, entitlement and access to advice and advocacy is tailored as far as possible to individual circumstances.

Recommendation 7: SCoSS recommends that further equality analysis relating to the "working age group" is undertaken so as to further evaluate potential impacts on them of needing to decide whether to remain on Scottish Adult DLA or claim Adult Disability Payment. Having a choice to claim can be seen as mitigating (for example, by giving claimants more autonomy) the Department for Work and Pensions approach of a mandatory move. However, SCoSS believes that consideration of further actions which could help to give due regard to the public sector equality duty could usefully be undertaken with stakeholders.

Recommendation 8: Draft regulation 3 should be amended to include the Upper Tribunal and courts in the list of routes to entitlement to Scottish Adult DLA.

Recommendation 9: The Scottish Government should consider removing the extra test in draft regulation 9(3)(a)(ii) and (b)(ii) for those transferring to Scottish Adult DLA over pension age who are terminally ill.

Recommendation 10: The Scottish Government should consider amending the definition of 'supervision' for the care component in draft regulation 12 to align with Pension Age Disability Payment.

Recommendation 11: Draft regulations 12, 13 and 14 should be amended to align the qualifying period over pension age with the pension age provisions in Disability Living Allowance and Pension Age Disability Payment.

Recommendation 12: The Scottish Government reviews the test of severe visual impairment in draft regulation 14 to ensure it is compatible with rights under the European Convention on Human Rights.

Recommendation 13: The Scottish Government should amend draft regulation 25(3) to restrict awards of the mobility component based on entitlement before pension age.

Recommendation 14: The Scottish Government should consider whether the policy intention for awards of the lowest rate of the care component after pension age is met in the draft regulations.

Recommendation 15: The Scottish Government should consider flexibility in the 12 months deadline to reinstate an award where there is good reason for a late request.

Recommendation 16: The Scottish Government should monitor and consult with stakeholders on the potential impact on people who cannot reinstate entitlement to Scottish Adult DLA because of the restrictions in draft regulation 28(5), for example that they have an appeal pending. The results of this consultation could also assist the Scottish Government in meeting the social security principle of continuous improvement and when revising its impact assessments of Scottish Adult DLA.

Recommendation 17: The Scottish Government should review and clarify how changes of circumstances reported by an individual on Scottish Adult DLA are taken into account if they go on to apply for Adult Disability Payment.

Recommendation 18: Cross references in the draft regulations should be checked for accuracy.

Observation 1: SCoSS notes that, where possible, breaking down claimant data by protected characteristics such as age, sex and disability, would be helpful to include in the revised Equality Impact Assessment to assist in the understanding of the intersection between different protected characteristics.

Executive summary

This report details our views on Scottish Adult Disability Living Allowance (Scottish Adult DLA) as per the draft Disability Assistance (Scottish Adult Disability Living Allowance) Regulations 2024. The draft regulations provide for the introduction of Scottish Adult DLA as a closed benefit to replace Disability Living Allowance (DLA) in Scotland, solely for the 66,000 people who are still in receipt of DLA.

Many of the provisions in the draft regulations are broadly the same as the existing regulations for DLA – and this reflects the Scottish Government’s policy of ensuring that awards are transferred in a safe and secure fashion. There are, however, some changes, largely aiming to align the rules with existing rules for other disability benefits in Scotland. This includes the consideration of terminal illness under the Scottish rules, seeking to expedite these cases where a diagnosis has been given during the transfer process. We believe that close monitoring to ensure appropriate handling of these situations may be necessary.

Some clients will have the option to apply for Adult Disability Payment (ADP) if they wish to do so, within two years of transfer to Scottish Adult DLA. Whilst recognising both the risks and potential gains of doing so, stakeholders have expressed some concern about the level of understanding of the significance of this decision and called for tailored advice on this matter to be central. Particular attention should be placed on communicating the risks that are shouldered by individuals and the resulting need for clear messaging shared with charities, advice organisations and independent advocacy bodies of the importance of this decision and its consequences.

Our report also notes a number of technical and drafting issues with the regulations requiring to be addressed ahead of the regulations being presented to the Scottish Parliament.

To understand the views of stakeholders, SCoSS issued a targeted call for evidence with organisations with relevant experience to comment on the draft regulations. Their feedback is represented throughout our response. We would like to publicly recognise the stakeholders’ contributions as invaluable to informing our position.

In addition to this, SCoSS asked a significant number of written questions of officials which received responses to a short timescale. We would like to express our thanks to officials for the detailed responses they have given which have been helpful in improving our understanding of decisions they have made and the policy intention behind the draft regulations.

1. Introduction

1.1 Overview

The Scottish Commission on Social Security (SCoSS) is pleased to present its report on the draft Disability Assistance (Scottish Adult Disability Living Allowance) Regulations 2024 (henceforth referred to as the ‘draft Regulations’).

As part of the ongoing process of devolving disability benefits, the Scottish Government has replaced Disability Living Allowance (DLA) for children with Child Disability Payment (CDP), and is in the process of replacing Personal Independence Payment (PIP) with Adult Disability Payment (ADP) for eligible people in Scotland. Attendance Allowance (AA) will begin to be replaced by Pension Age Disability Payment (PADP) later in 2024.

Whilst the UK Government began the process of replacing DLA with PIP in 2013, some people have continued to receive DLA from the Department for Work and Pensions (DWP). These people come within two groups:

- Firstly, people who born on or before 8 April 1948, making them over the age of 65 when PIP was first introduced in 2013. This group previously received a commitment from the Department for Work and Pensions (DWP) that they could continue to receive DLA for as long as they are eligible to do so. They have never been in scope for transfer to PIP or ADP, and have continued to have any change in their circumstances managed by the DWP under the DLA rules.¹ This group is referred to as “the 65+ group” throughout this report.
- The second group is people born after 8 April 1948, who would have been in scope to transfer to PIP before 29 August 2022 and ADP thereafter,² but have yet to do so. This cohort is understood by the Scottish Government to have “long-standing, persistent needs” related to a disability and is referred to as “the working age group” throughout this report.³

The Scottish Government is introducing a new replacement benefit, Scottish Adult Disability Living Allowance (Scottish Adult DLA), which will be launched in Spring 2025.⁴ The rules and eligibility criteria for Scottish Adult DLA are set out in this set of draft regulations. This includes honouring the commitment DWP previously made to the 65+ group to continue to pay DLA so long as they remain eligible.

While a DWP scan of their case management system in July 2023 showed that there are around 85,000 remaining adults in Scotland in receipt of Disability Living Allowance, it is anticipated that around 66,000 people will be in receipt by the start of the case transfer process.⁵ The Scottish Government has decided that there will be no new applications for Scottish Adult DLA, so the size of the DLA caseload is

¹ Scottish Adult DLA draft Equality Impact Assessment, March 2024

² [Social Security Scotland - Case transfer guide: WADLA to Adult Disability Payment](#)

³ We use the terms “65+ group” and “working age group” to reflect the position of these groups as they were in 2013, although some of the “working age” group will be over pension age at the time of transfer or will reach pension age while in receipt of Scottish Adult DLA.

⁴ [Stat-Xplore, Department for Work and Pensions](#)

⁵ Scottish Government response to SCoSS questions, received 3 May 2024 and 4 June 2024

expected to steadily reduce over time.⁶ Around 50% of the overall expected caseload come from the “65+ group” and 50% from the “working age group”.⁷

In 2020, following the devolution of responsibility for DLA, the Scottish Government and the DWP entered into an agency agreement through which the DWP has continued to deliver DLA to people in Scotland. The agreement with the DWP is expected to remain in place until everyone in receipt of DLA in Scotland is transferred to Scottish Adult DLA.⁸

It is worth noting that additional complexity is created (which we refer to throughout this report) as some of the rules relate to restrictions on eligibility based on whether someone is over state pension age when they have a change in their condition which interrelate with rules pertaining to each cohort transferring to Scottish Adult DLA, whether under or over 65 in 2013. The report attempts to make this clear throughout, however it is important to note the differences between the two specific cohorts and these state pension age rules.

1.2 Human rights and principles

As required by the Act, our scrutiny was undertaken with regard to the Scottish social security principles⁹ and relevant provisions of human rights law.

1.2.1 Human Rights Treaty principles

The role of Scottish Adult DLA cuts across dedicated international instruments covering the human rights of both disabled and older people.¹⁰ The human rights of disabled people are promoted and protected by the UN Convention on the Rights of Persons with Disabilities (UNCRPD) adopted by the UN in 2006, whilst the United Nations Principles for Older Persons (UNPOP) was adopted in 1991.¹¹

The UNCRPD principles include respect for dignity individual/autonomy; non-discrimination; participation; respect for differences; equality of opportunity and accessibility.¹² Action to support these principles includes modifying existing laws/practices which constitute discrimination against disabled people¹³ and ensuring that steps are taken to make reasonable accommodations.¹⁴ As a non-means-tested benefit aimed at mitigating additional disability-related costs, Scottish Adult DLA will largely maintain the same level of contribution towards fulfilment of these principles as DLA currently provides. However, the draft Regulations have potential to make an additional contribution in specific areas due to the Scottish Government’s aim of improving processes and rules (such as for terminal illness). There may, however, be areas where additional accommodations could be considered, whether in the Regulations themselves or in their implementation, such

⁶ Scottish Government response to SCoSS question, received 3 May 2024

⁷ Scottish Government response to SCoSS question, received 3 May 2024

⁸ [Disability Living Allowance in Scotland: Agency Agreement - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/disability-living-allowance-in-scotland-agency-agreement)

⁹ Social Security (Scotland) Act 2018 asp 9 s1.

¹⁰ The intersection between disability and age is relevant because all of “65+ group” and many people in the “working age group” are likely to be in the older age groups (“working age group” up to age 76).

¹¹ This statement of principles is not a legally binding set of rights (as would be the case for a human rights convention or covenant), but many of the principles broadly reflect rights protected by various conventions.

¹² Article 3 UNCRPD

¹³ Article 4 (b) UNCRPD

¹⁴ Article 5 (3) UNCRPD

as communications and access to support/advice for people in the “working age group” who may be deciding whether to move from Scottish Adult DLA to ADP, as considered in further detail at section 3.3.1.

The UNPOP refers to principles of independence, participation, care, self-fulfilment and dignity.¹⁵ Scottish Adult DLA should contribute to these principles in making a contribution to meeting the additional costs of disability, and continuing entitlement for many recipients. However, the age restrictions discussed above, which can limit entitlement, can have an impact on the extent to which particular principles (e.g. participation of older people) can be met, as we have previously noted in relation to exclusion from entitlement to the mobility component.¹⁶

1.2.2 Social Security principles

The Scottish social security principles are listed in Annexe A. The principles are embedded in Our Charter which sets out what people can expect from the social security system.¹⁷ When viewed through the lens of the social security principles, the introduction of Scottish Adult DLA can represent an investment in the people of Scotland (principle (a)), though with the risk that the decision about whether or not to claim ADP by people in the “working age” cohort could result in reduced or lost entitlement for some claimants, even though others may gain. Such a decision also brings a reliance on independent advice on the risks and rewards of making such a choice.

The implementation of Scottish Adult DLA can contribute towards the principle that the Scottish social security system is efficient and delivers value for money (principle (h)) by having a case transfer programme based on broadly the same eligibility criteria as DWP’s DLA, in place of any new application process. Scottish Adult DLA will be a closed benefit which will not be open to new claims, so numbers receiving it are likely to diminish over time. However, efficiency and value for money also entails considering what is best for those who need assistance.¹⁸

There are challenges for principle (c) (delivery of social security as a public service) in the complexity of aspects of this benefit for recipients and advisers, in particular the significance and potential unintended consequences for people in the “working age group” to decide whether to remain on Scottish Adult DLA or claim ADP, and the difficulty of predicting whether someone would be better off or otherwise on ADP as these benefits have different criteria. Whilst the move is not mandatory (as is the case for DLA-PIP transfers), assumptions of a strength of knowledge and capacity in the independent advice sector to be able to support people to make informed choices should be avoided. These risks could, potentially, be significant given that this cohort appears to include many people with learning disabilities and complex needs. These issues are considered further in section 3.3.1.

Recommendation 1: Given the significance of the decision facing some Scottish Adult DLA recipients as to whether to remain on Scottish Adult DLA

¹⁵ [United Nations – OCHR and older persons](#)

¹⁶ Also discussed in [Scottish Commission on Social Security - Scrutiny report – The Disability Assistance for Older People \(Scotland\) Regulations 2024](#)

¹⁷ [Social Security Scotland - Our Charter](#)

¹⁸ See the Scottish Government’s 2017 policy position paper on the principles: <https://www.gov.scot/publications/social-security-principles-and-a-rights-based-approach/>

or to claim Adult Disability Payment, and the unpredictability of the outcome, SCoSS recommends that the Scottish Government works with stakeholders to consider what adjustments may be needed to ensure that recipients have access to appropriate and timely advice and support.

Scottish Adult DLA can contribute to the principle of social security as a human right (principle (b)), as the intention is that the availability of Short-term Assistance should reduce any disincentive to challenging a decision, thus supporting the right to appeal. The intention is to keep Scottish Adult DLA as close to DLA as possible, so that clients do not experience any significant changes. There are some notable exceptions to this, for example, aligning some rules and processes with other Scottish disability benefits, such as changes to terminal illness rules (improving the experience for claimants, although we note that there are differences between the two cohorts concerning the case transfer process for those who become terminally ill).

Scottish Adult DLA can contribute to the principle of social security as a human right (principle (b) and advance equality (principle (g)(ii)), however differential treatment across the “65+ group” and the “working age group” creates the potential for confusion, complexity and perceptions of unfairness between groups of disabled people even if this approach mirrors DWP age rules.

Proposals for process changes such as light touch reviews should contribute to the delivery of social security as a public service (principle (c)) and related charter expectations to support people with their claims, though if many people have indefinite awards reviews are less likely to take place compared with other disability benefit case transfers. Aligning the definition and process for terminally ill people with other Scottish disability benefits should also help to meet principle (c) (public service), continuous improvement putting the needs of those who require assistance first (principle g (ii)).

This report discusses some of these issues in more detail in later sections of this report, for instance, terminal illness rules (section 3.2) and moving from DLA to ADP (section 3.3).

2. Choice to remain consistent with Disability Living Allowance

Scottish Adult DLA is intended to be a closed benefit with no new application route and the draft regulations, largely, propose similar eligibility criteria to DLA.

“As part of the commitment to a safe and secure transfer, Scottish Ministers do not propose to make significant changes to the existing Disability Living Allowance eligibility criteria when introducing Scottish Adult Disability Living Allowance.”¹⁹

SCoSS is clear, as we have stated in previous reports, that good operational delivery that gives people confidence in the continuity of their payments and can effectively administer new claims is critical. Changing the rules too much before the transfer is

¹⁹ Scottish Adult DLA draft Equality Impact Assessment, March 2024

completed could risk undermining delivery with detrimental consequences for disabled people.

There are, however, a number of changes to Scottish Adult DLA, set out in more detail in section 3 of this report, which amend the approach – largely to bring certain Scottish Adult DLA rules into line with rules for other Scottish disability benefits e.g. applying the Scottish terminal illness rules.

While stakeholders agreed that the principle of retaining the DLA conditions of entitlement for Scottish Adult DLA was positive, some highlighted that the inconsistencies in approach between the UK and Scottish systems being applied in these circumstances risked the creation of a “two tiered” system, where some people in Scotland can stay on DLA while others only have the option of ADP with its different eligibility criteria.

“..the majority of people with MS in receipt of ADP, including new applicants, were assessed for disability assistance using eligibility criteria that were designed to reduce the financial burden... Scottish Ministers have repeatedly stated the main reason that they have not changed the eligibility criteria for ADP is that they didn’t want to create a two-tier system of disability assistance benefit in Scotland. With the introduction of Scottish Disability Living Allowance this is exactly what they are creating.”²⁰

This was further emphasised by Age Scotland who noted that whilst supportive of the approach taken to Scottish Adult DLA, a two tiered system would be created for those over pension age who would not be able to newly qualify for a mobility component if their mobility needs increase, but entitlement over pension age could be achieved for those in receipt of Scottish Adult DLA who transfer to Adult Disability Payment – see section 3.3.1. Age Scotland noted that “this further highlights the need for mobility support to be given to disabled people above state pension age”.²¹ The issues around the creation of a mobility component are discussed more fully in SCoSS’s response to the Disability for Older People (Scotland) Regulations 2024.²²

Both of these concerns emphasise the importance of clear, concise and accessible communication about why these decisions have been made, who they affect and what their consequences are in order to avoid confusion and doubt over the approach being taken. These issues are considered in further detail in section 5 of this report.

3. Policy changes from Disability Living Allowance

There are, however, some changes from DLA which are intended to be introduced from Scottish Adult DLA’s launch. These are explored in more detail below.

3.1 Aligning with other Scottish benefits

A number of the policy changes align Scottish Adult DLA rules with existing rules for other disability benefits in Scotland.

²⁰ MS Society Scotland response to SCoSS call for evidence, received 23 May 2024

²¹ Age Scotland response to SCoSS call for evidence, received 24 May 2024

²² [Scottish Commission on Social Security - Scrutiny report – The Disability Assistance for Older People \(Scotland\) Regulations 2024](#)

3.1.1 Ongoing reviews and awards

The Scottish Government has signalled its intent to provide ongoing awards, subject to light-touch reviews, for Scottish Adult DLA. As such, any individual who has an indefinite award will not have a review date set but where there is a change of circumstances a review of their award will be carried out.²³ This reflects the Scottish Government's existing policy on indefinite awards and how these align with reviews of ADP.²⁴ It is worth noting that the Scottish Government expects that over 99% of Scottish Adult DLA clients will have indefinite awards at the point of transfer.²⁵

Many of those in receipt of DLA, especially in the "working age cohort", will not have had any change of circumstance considered since, at least, the change to PIP in 2013. It would make sense to use this opportunity to encourage this group to come forward if their care or mobility needs have increased but they have been reluctant to report them previously when a report would have triggered a transfer to PIP or ADP. This would fit with the Scottish Government's commitment to delivering value for money as per principle (h) in the social security principles.

In addition, the case transfer process will aim to align a client's initial review process with the timescale at which their DLA award would have been reviewed. Indefinite awards, therefore, will not be subject to a review after their award transfers to Scottish Adult DLA. While we expect this will be reassuring for individuals, it does miss an opportunity to check whether those on lower or middle rate awards might now be eligible for a higher rate.

3.1.2 Short-term Assistance

Short-term Assistance will be available when Social Security Scotland has made a determination to reduce or stop an individual's longstanding award to Scottish Adult DLA, and that determination is subject to a request for re-determination or an appeal.

This approach supports social security principles (d) (respect for the dignity of individuals is to be at the heart of the Scottish social security system) and (g) (i) (that opportunities are to be sought to continuously improve the Scottish social security system in ways which put the needs of those who require assistance first). It also encourages the use of redetermination and appeal processes, contributing to realising the right to equal access to justice.

The aim of STA is that people are not discouraged from challenging a decision by having to manage on a reduced income. As a payment to help avoid a sudden drop in income, STA could help to realise the right of disabled people to have decent living conditions, as well as contributing to realising the right to appeal and access to justice (principle (b)).

3.1.3 Decision making

There are a handful of cases where scheduled reviews will be required for Scottish Adult DLA.²⁶ Clients may also trigger unscheduled reviews by reporting a change of circumstances. In these circumstances, Case Managers will speak to individuals to

²³ Scottish Government response to SCoSS question, received 20 May 2024

²⁴ [Adult Disability Payment reviews - mygov.scot](https://mygov.scot)

²⁵ Scottish Adult DLA draft Equality Impact Assessment, March 2024

²⁶ As noted elsewhere in the report, the Scottish Governments expects 99% of clients to be in receipt of an indefinite award.

gain additional information or to clarify details of their application and supporting information. While this reflects the existing policy for disability benefits, we would, however, encourage the Scottish Government to ensure that signposting for advice and advocacy support is prioritised for this group.

3.2 Terminal illness

The definition of terminal illness for Scottish Adult DLA is the same as other Scottish disability benefits but different from DLA and other UK benefits. Unlike DLA where there is a 12-month time limit on life expectancy, for Scottish Adult DLA, the judgement as to whether a person should be considered terminally ill (in draft regulation 26) will be made by clinicians, based on guidance prepared by the Chief Medical Officer.²⁷ The Scottish Government considers this change should mean a wider range of conditions will be supported.²⁸

Adopting this approach should support principles (d) (respect for the dignity of individuals is to be at the heart of the Scottish social security system) and (g) (i) (that opportunities are to be sought to continuously improve the Scottish social security system in ways which put the needs of those who require assistance first).

People who become terminally ill before reaching state pension age will automatically receive the highest rate of both components of Scottish Adult DLA. People who become terminally ill after reaching state pension age (including those in the “working age group” who become terminally ill after reaching state pension age) will automatically receive the highest rate of the care component but not the mobility component. This is in order to maintain parity with others of the same age in receipt of Pension Age Disability Payment. In these circumstances, an individual who is already in receipt of the mobility component of DLA will not lose their eligibility.

3.2.1 Transfers when people have a terminal illness

For both cohorts of DLA claimants, when someone becomes terminally ill they are required, to report it to the DWP. Where the individual is in the “65+ group” they will be considered first under the DWP’s Special Rules for End of Life, which currently takes around 3 days, and then have an expedited case transfer (4 to 5 weeks) to Scottish Adult DLA.

For people in the “working age group”, a report that a client in Scotland has become newly terminally ill will trigger an expedited case transfer to Scottish Adult DLA without the DWP first assessing them under the special rules. Because changes for this age group in England and Wales trigger a transfer to PIP, the DWP no longer has a mechanism to consider changes within DLA. To do so, would require the DWP to create a new protocol.

SCoSS accepts the need to first transfer the case when someone in the “working age group” on DLA becomes terminally ill before Social Security Scotland can assess their entitlement under the special rules. We accept the explanation that the intention is to expedite the payment to the individual. However, the 4 to 5 weeks it is likely to take is in contrast with the 3 days it would normally take to assess a new claim under the special rules. It is therefore particularly important to ensure that these transfers are being appropriately handled and that a reliable and speedy

²⁷ [Social Security Scotland - Chief Medical Officer's guidance for clinicians completing a BASRIS form](#)

²⁸ Scottish Adult DLA draft Equality Impact Assessment, March 2024 (para 7.5)

timescale for their movement from DWP to Social Security Scotland is being achieved.

Recommendation 2: The Scottish Government and Social Security Scotland should work with the Department for Work and Pensions to put in place a monitoring system to consider the rate and efficiency of transfers from Disability Living Allowance to Scottish Adult DLA in circumstances where an individual on Disability Living Allowance has reported a terminal illness.

Recommendation 3: The Scottish Government should set out an approach to work directly with organisations supporting people in circumstances where an individual on Disability Living Allowance has reported a terminal illness and publish guidance on what they should be able to expect.

3.3 No mandatory move to Adult Disability Payment

While the DWP previously committed to enable anyone over 65 in receipt of DLA when PIP was introduced (e.g. anyone born on or before 8 April 1948) to remain on DLA so far as long they are eligible, the Scottish Government has opted to allow all adults still in receipt of DLA, regardless of their age when PIP was introduced, to remain on Scottish Adult DLA for as long as they continue to fulfil the care- and mobility-related conditions.

3.3.1 Option to transfer to Adult Disability Payment

Clients who were born after 8 April 1948 (the “working age group”) will, once they have transferred to Scottish Adult DLA, have the option to apply for ADP if they wish to do so.

As part of the transition from Disability Living Allowance to Personal Independence Payment, in England and Wales, anyone in the “working age group” can make a Personal Independence Payment application at any time and have full access to the mobility component even if they claim after state pension age. The DWP intends to complete the transition from Disability Living Allowance to Personal Independence Payment for the “working age group” by the end of 2025, at which point this policy lifting state pension age restrictions will no longer have effect.²⁹

The Scottish Government has noted that it intends to include a similar provision in its own regulations, introducing a ‘grace’ period of two years within which to apply for ADP.

“This will allow those in the ‘working age’ group who apply for Adult Disability Payment to be treated as though they are under State Pension age for their first full determination of entitlement to Adult Disability Payment.”³⁰

The Scottish Government has provided some rationale for the decision to introduce a grace period, noting that this “will allow individuals time to adjust to being on Scottish Adult Disability Living Allowance, and to consider, with the help of independent advice, whether they would be better off on Adult Disability Payment, with a cut-off date providing clarity as to when they must make this decision by.”³¹ This does not,

²⁹ Scottish Adult DLA draft Equality Impact Assessment, March 2024

³⁰ Scottish Adult DLA draft Equality Impact Assessment, March 2024

³¹ Scottish Adult DLA draft Equality Impact Assessment, March 2024

in our view, justify fully the decision to provide a hard cut-off date for an individual to make this decision by.

In effect the existence of a grace period prevents, after two years, people who are over pension age and likely to have complex needs from, potentially, having the mobility component of their award increased or awarded for the first time through a move to Adult Disability Payment. We believe that this could put pressure on people whilst they are weighing up a decision.

It may, also, be valuable and justifiable in some circumstances to include a clause allowing them to apply after the cut off date if there is a valid reason for delay to their application. It is possible that there will be circumstances during which an individual may be unable to make that decision, or unable to access support to make that decision, e.g. following a period in hospital or care.

Recommendation 4: There should be provision to extend the two-year grace period when an individual makes a late application with good reason.

In response to questions from SCoSS the Scottish Government highlight that it is not possible “to draw reliable conclusions” on what Scottish Adult DLA to ADP review outcomes may look like in future under Social Security Scotland. Reassessment rates from DLA to PIP, however, suggest that the outcomes may be unpredictable for clients. The equality impact assessment notes that while 47% of those transferring from DLA to PIP see an increase in their awards, around 35% see a decrease. On request of further analysis by SCoSS, the Scottish Government noted that:

“Analysis from 2017³² indicates that 6,400 people who were in receipt of the highest rate for both care and mobility on DLA lost over £7,000 each per year when they were re-assessed for PIP and their award was disallowed. This represents the highest rate of financial loss to individuals, however it is worth noting that these outcomes relate only to initial outcomes, and does not account for redeterminations and appeals. This analysis also indicates that 20,200 individuals who were in receipt of middle rate care and lower rate mobility on DLA gained over £3,000 each per year when they were awarded the enhanced rate for both daily living and mobility on PIP. Further, 10,800 individuals saw no change to the amount they received when they were re-assessed from middle rate care and higher mobility on DLA to standard rate daily living and enhanced rate mobility.”³³

Targeted communications will be particularly important for those people who may make the choice to apply for ADP, outlining both the benefits and risks of doing so and underlining the importance of obtaining independent advice and support whilst going through this process. We are pleased to note that the Scottish Government has committed to signposting to independent advice with particular reference to Citizen’s Advice Scotland for advice and Voiceability for advocacy support.³⁴ While tailored advice on this matter will be vital, advice should also extend to other areas that will be affected by any change, for example as ENABLE commented in their response to our call for evidence:

³² [Scottish Government - UK welfare policy: impact on disabled people](#)

³³ Scottish Government response to SCoSS question, received 3 May 2024

³⁴ Scottish Government response to SCoSS question, received 3 May 2024

“Both the DWP and Social Security Scotland should do their utmost to communicate what is happening and when, but only the independent advice sector can provide claimants with the level of advice required on both their disability benefit entitlement and the impact on other benefits... Advice should not be solely focused on the potential ADP v DLA entitlement, but look at the wider potential impacts on other benefits such as Carers Allowance, Universal Credit, Council Tax Reduction etc.”³⁵

SCoSS acknowledges that, while this is a complex and important decision to be able to make, it will be helpful to some individuals. It is, however, crucial that the Scottish Government facilitates people to make a truly informed choice when considering their options.

The Scottish Government notes that it intends to provide clear, easy to understand information in a range of different online and offline channels. These include award and transfer letters and social media as well as hosting roadshows with relevant stakeholders. As noted above, and reiterated in ENABLE’s response to our call for evidence, this information must include signposting to “high quality, independent welfare rights advice”.³⁶

Some stakeholders noted that the risk in making an application for ADP, by an individual with an existing DLA entitlement, was increased by the lack of any opportunity to have the Scottish Adult DLA award reinstated after an application to ADP results in no award or a lower award than the ended Scottish Adult DLA award. In response to questions on this matter, the Scottish Government noted that draft regulation 28 (5) intends to preclude this from happening (also discussed in section 7.7). This is “because Scottish Adult DLA is a closed benefit (not open to new application), meant only to ease the transition to Social Security Scotland for those still receiving DLA from the DWP and to honour the commitment DWP made to those over 65 when PIP was introduced.”³⁷

While we accept the Scottish Government’s rationale for not opening renewal claims in these situations, the consequence of this is to place a significant burden on individuals, who may or may not be better off in receipt of ADP, entering a scenario where the outcome is uncertain. It, also, places a further risk on independent advisors to give people strong and solid advice on what they may be entitled to – but may discourage people from maximising their award in some cases where the risk of making an application is so high. Appropriate communication of the risk and rewards in this scenario should receive significant attention from the Scottish Government.

Recommendation 5: The Scottish Government should place particular attention on communicating the risk to individuals when they choose to apply for Adult Disability Payment. This should emphasise that they will not be able to reclaim Scottish Adult DLA if they make this decision.

³⁵ ENABLE response to SCoSS call for evidence, received 21 May 2024

³⁶ ENABLE response to SCoSS call for evidence, received 21 May 2024

³⁷ Scottish Government response to SCoSS question, received 31 May 2024

4. Change of circumstances during case transfer

Stakeholders have informed us that, during the case transfer of disability benefits from DWP to Social Security Scotland, reporting a change of circumstances is one of the significant sources of confusion for people, an area where things tend to go wrong and where delays are often experienced.

“...many have found the process difficult, overwhelming, confusing, and stressful in terms of understanding what they had to do and how this would impact them financially (including the potential impact on other benefits).”³⁸

“Claimants in Scotland are generally unclear about who has responsibility for the administration of disability benefits in Scotland and where we are in the process of the devolution of these... We have seen a small number of clients who were incorrectly advised that changes in circumstances should be reported to Social Security Scotland rather than the DWP.”³⁹

Whilst recognising that issues in reporting changes of circumstances affect clients across the social security system, and the Scottish Government’s attempts to clarify the reporting process for clients⁴⁰, the proposed Scottish Adult DLA rules regarding handling of a change of circumstance between DWP and Social Security Scotland suggest that particular focus on individual’s understanding of this process is required in this instance.

Anyone in the “working age cohort” who reported a change of circumstances to the DWP since the transfer of DLA to PIP and PIP to ADP began would have been automatically moved on to PIP or ADP. The fact that the “working age group” continues to receive DLA suggests that they have not reported a significant change in their circumstances since 2013. Until Scottish Adult DLA is introduced, draft regulation 10 ensures that individuals in the “working age group” who report a relevant change of circumstances will continue to transfer to ADP.⁴¹

As the National Association of Welfare Rights Advisors note in their response to us.

“Prior to devolution, reporting a change to DWP triggered a transfer from DLA to PIP and necessarily involved a new assessment under the latter statutory scheme... If we are not mistaken, the draft version of Regulation 10 would potentially remove this dynamic for a cohort of claimants. This would be welcomed, but we note that this would potentially create a lottery of winners and losers based merely on quirks of circumstance: i.e. the date a medical change has happened, and the date that an administrative transfer takes place.”⁴²

Communication with this group should provide as much certainty as possible about the process and how it will be handled.

³⁸ Age Scotland response to SCoSS call for evidence, received 24 May 2024

³⁹ ENABLE response to SCoSS call for evidence, received 21 May 2024

⁴⁰ For instance, the Disability Assistance (Miscellaneous Amendments) (Scotland) Regulations 2023 made changes to clarify that relevant changes of circumstance will continue to be reported to the Department for Work and Pensions after a case has been selected for transfer until the transfer determination is made and the ADP award begins.

⁴¹ Scottish Adult DLA draft Equality Impact Assessment, March 2024

⁴² National Association of Welfare Rights Advisors response to SCoSS call for evidence, received 29 May 2024

5. Communications

Throughout this report we have noted the complexity of the transfer process between DLA and Scottish Adult DLA and the circumstances surrounding transfer of some cases to ADP. This demands a priority be placed upon clear communication with clients, advice agencies and independent advisers about the new rules and their role in ensuring others understand the likely outcomes.

In response to SCoSS questions on this matter, the Scottish Government said:

“We will formally notify each relevant individual of our intention to transfer their entitlement from DLA to Scottish Adult DLA by sending them a transfer notice... this informs people that their award has been selected for transfer from DLA to Scottish Adult DLA, explains what case transfer is, and how long the transfer should take.”⁴³

Alongside this, the Scottish Government will provide information on the case transfer process through www.mygov.scot, raise awareness through media and social media channels and marketing resources, as well as holding launch roadshows.

For many clients their entitlement to DLA has remained constant for some time, despite the wider changes to disability benefits in the intervening period. As expressed in the Scottish Government’s Equality Impact Assessment, their continued receipt of DLA may signal some concern on their part about the differences in rules between new benefits, which has caused them not to transfer previously.

Recent SCoSS engagement with clients who are moving at different paces through the PIP to ADP case transfer process has highlighted some confusion as to the different timelines that people are being transferred at and requests for further information as to when they will be moved on to the new benefit. The Scottish Government noted, in response to SCoSS questions, that:

“DLA awards will be selected for transfer to Scottish Adult DLA where there is a Scottish postcode as part of the DLA record, and awards will be selected randomly but in agreed volumes, so this process can be monitored.”⁴⁴

We have received feedback in the course of our wider charter research that in some circumstances, particularly for couples who are both in receipt of disability benefits, these differences in timelines can be confusing. Particular care should be taken to communicate the reasons why this is the preferred approach and that people should expect changes to happen at different times.

There is a significant proportion of the adults in receipt of DLA in Scotland who are people with learning disabilities (9%)⁴⁵ and who are, therefore, more likely to require tailored messaging and support from advisers and independent advocates to consider their options.

ENABLE noted, in response to our call for evidence, that “while some claimants with a learning disability would be likely to be worse off on the Adult Disability Payment,

⁴³ Scottish Government response to SCoSS question, received 20 May 2024

⁴⁴ Scottish Government response to SCoSS question, received 3 May 2024

⁴⁵ Scottish Government response to SCoSS question, received 3 May 2024

there are a greater number who would be likely to see an increase in entitlement.”⁴⁶ This strengthens the requirement for clear advice and support to this group to ensure that they can make informed choices, particularly where choosing to move to ADP.

In these circumstances, stakeholders have highlighted that there is a risk of people choosing to move to ADP because of a positive perception of Social Security Scotland. This may cause them to decide to move to ADP when it could result in a worse outcome.

“...in general terms, ADP is viewed positively when compared to PIP due to the more collegiate approach Social Security Scotland adopts in comparison to the DWP. This may result in people wanting to make this change without fully understanding the impact that this may have.”

Given the possible consequences of this decision, we would like to see clear messaging shared with charities, advice organisations and independent advocacy bodies of the importance of this decision and its consequences. Recommendations are included throughout this report on the importance of clear communication (with particular emphasis in section 1.2.2 on the social security principles and section 3.3.1 on the option to transfer to ADP).

Recommendation 6: The Scottish Government should work with a range of stakeholders to develop inclusive communications to both the ‘working age’ and ‘65+ groups’ transferring to Scottish Adult DLA to ensure that information about case transfer, entitlement and access to advice and advocacy is tailored as far as possible to individual circumstances.

6. Equality issues

SCoSS welcomes having sight of the draft impact assessments and is very grateful to officials for further information provided in answer to our questions on these matters.

The three aims of the public sector equality duty are: to give due regard to the need to eliminate discrimination, advance equality, and to foster good relations.⁴⁷ This is the framework within which data can be deployed to assess the impact of a particular policy.

6.1 Data

Whilst recognising the value of statistics which can help to give a picture about claimants’ protected characteristics, SCoSS notes that there is limited equality data specifically about people who are in the two cohorts transferring to Scottish Adult DLA. Without such data, assumptions that the impact of changes which align aspects of Scottish Adult DLA with other devolved disability benefits will be positive can only be at a high level of generality as there is limited evidence on which to base this assumption.

The draft equality impact assessment (EQIA) refers to lack of data (for example on race) which renders it difficult to assess the impact of Scottish Adult DLA on meeting the three aims of the public sector equality duty. In particular it would be useful for

⁴⁶ ENABLE response to SCoSS call for evidence, received 21 May 2024

⁴⁷ [Equality and Human Rights Commission - The Public Sector Equality Duty \(PSED\)](#)

the revised EQIA to include disaggregate data by age, sex, and by disability where it is possible to do so. It can be helpful to disaggregate disability data, such as by impairment type (though we note the limitations of the current categorisation of ‘qualifying condition’ used in DWP official statistics on DLA). SCoSS welcomes the additional information about qualifying condition sent to us by officials using DWP data.

Observation 1: SCoSS notes that, where possible, breaking down claimant data by protected characteristics such as age, sex and disability, would be helpful to include in the revised Equality Impact Assessment to assist in the understanding of the intersection between different protected characteristics.

6.2 Age differences

SCoSS was pleased to see reference to the intersection between age and disability in the EQIA. As we also noted in relation to Pension Age Disability Payment (PADP), however, retaining parity with DLA rules means that potential age discrimination remains as people getting benefit before reaching state pension age can continue to receive it so long as they remain eligible. In contrast the general rule is that who are above state pension age cannot claim the mobility component or lower rate of care for the first time, nor increase their award if their needs increase, except for those in the “working age group” who transfer during the planned grace period.

Our report on The Disability Assistance for Older People (Scotland) Regulations 2024⁴⁸ raised concerns about the lack of a mobility component which relates to the potential for differential treatment by age unless it can be objectively justified (e.g. as a proportionate means of achieving a legitimate aim). Retaining age distinctions sits uneasily in the context of the Scottish Government’s human-rights based approach to devolved social security.

SCoSS notes that Scottish Adult DLA will be a closed benefit, following parity with DLA, and with no new claims. As such it may not carry the same implications as the development of an entirely new benefit (such as PADP). We believe, however, that some of the issues raised in our PADP scrutiny report could also benefit from further consideration.

Whilst retaining age restrictions has been justified by the need to ensure a safe and secure case transfer and retain equivalent passporting within reserved benefits, it may be necessary to consider further mitigations. And, although introducing changes to the process has the potential to improve the experiences of Scottish Adult DLA claimants some of these may be of less relevance to the two cohorts (for example light touch reviews may not be relevant to the expected 99% of claimants who are already on indefinite awards). Also, whilst broadly positive, these changes should not be perceived as negating the need to consider mitigations in other policy areas.

6.3 Cohort differences

There are also distinctions between cohorts, this also cuts across the different eligibility criteria as between DLA and PIP (and thus also between Scottish Adult DLA and ADP). Whilst it could be argued that giving the “working age group” the choice to claim ADP is advantageous to individuals in that group (rather than having

⁴⁸ [Scottish Commission on Social Security - Scrutiny report – The Disability Assistance for Older People \(Scotland\) Regulations 2024](#)

a mandatory transfer, as is the case for those under the DWP system who will move from DLA to PIP) this choice can be a risky one (as highlighted in section 3.3.1 above). The choice is also time-limited with a 'grace' period of two years which ends on a set date (thus those transferring early will in theory have longer to decide than those transferring later).

Recommendation 7: SCoSS recommends that further equality analysis relating to the “working age group” is undertaken so as to further evaluate potential impacts on them of needing to decide whether to remain on Scottish Adult DLA or claim Adult Disability Payment. Having a choice to claim can be seen as mitigating (for example, by giving claimants more autonomy) the Department for Work and Pensions approach of a mandatory move. However, SCoSS believes that consideration of further actions which could help to give due regard to the public sector equality duty could usefully be undertaken with stakeholders.

7. Technical issues

7.1 Overview of entitlement

Draft regulation 3 gives an overview of the ways to qualify for Scottish Adult DLA. They include meeting the care or mobility conditions and qualifying under special rules for terminal illness. The list should also include qualifying for the care component when undergoing dialysis.

Draft regulation 3 also provides for Scottish Adult DLA to be a closed benefit with no route to qualify through making a claim. It sets out the routes to entitlement e.g. through a transfer determination or on appeal to the First-tier Tribunal. The list does not include awards made by the Upper Tribunal or courts. Although, commonly, if the Upper Tribunal quashes a decision of the First-tier Tribunal, it would remit the case back for a new hearing at the First-tier Tribunal, it also has the power to re-make the decision, which, for example, it may do if no more fact finding is required. We, therefore, believe that reference to Upper Tribunal determinations should be included in the list that current spans draft regulations 3 (1) (d-i). The Scottish Government has, in correspondence with SCoSS, accepted this point and intends to amend the regulations accordingly.

Recommendation 8: Draft regulation 3 should be amended to include the Upper Tribunal and courts in the list of routes to entitlement to Scottish Adult DLA.

7.2 Transferring over pension age with a terminal illness

Draft regulations provide for people with a terminal illness to transfer to the highest rate of the care component and, if under pension age when they transfer, also to the higher rate of the mobility component. There is no automatic entitlement to the higher rate of the mobility component for those over pension age. Instead, they remain on the same rate of the mobility component they were already getting on DLA. Draft regulation 9(3) provides for this restriction but adds an extra test to transfer to the same rate of the mobility component as they were getting on DLA – that the individual must have 'substantially the same condition' for which that rate was awarded in DLA. Given that those without a terminal illness would transfer

automatically to the same rate of mobility component as they were getting on DLA without any extra test, there is a case for removing the extra test for those with a terminal illness.

Recommendation 9: The Scottish Government should consider removing the extra test in draft regulation 9(3)(a)(ii) and (b)(ii) for those transferring to Scottish Adult DLA over pension age who are terminally ill.

7.3 Eligibility criteria, ‘supervision’

One way to qualify for the care component of Scottish Adult DLA is because of a need for ‘continual supervision’ and one way to qualify for the mobility component is because of a need for ‘guidance or supervision’. The eligibility conditions are very similar to those for DLA. For DLA, what counts as supervision has been considered in case law. DLA case law considers the meaning in context so ‘supervision’ means something different in the context of the mobility component and the care component. For example, CDLA 42/1994 emphasises that the context for the need for ‘supervision’ for the mobility component is providing something that enables the individual to take advantage of the faculty of walking. Whereas ‘supervision’ in the context of the care component is concerned with continual supervision to avoid substantial danger to the individual or others, which is not a limitation for the mobility component. While DLA case law is not binding in relation to Scottish Adult DLA (or the similar rules in Child Disability Payment and Pension Age Disability Payment) it does provide guidance to how the law should be interpreted and, in the case of devolved disability payments, to how the law should be drafted.

‘Supervision’ in Scottish Adult DLA is defined in the same way for the care component as for the mobility component in draft regulations 12 and 13, that is as:

“...the precautionary or anticipatory presence of another person to monitor an individual’s physical, mental or emotional health including monitoring for obstacles or dangerous places or situations.”⁴⁹

This definition appears to have been informed by DLA case law on the mobility component. For the care component, it would be better to align with the equivalent provision in Pension Age Disability Payment, which is informed by DLA case law on the care component and defines supervision as ‘the continual presence of another person for the purpose of reducing the real risk of harm to the individual and to others’. Changing the definition for the care component in Scottish Adult DLA from the way it is currently drafted to match the PADP definition would mean that DLA case law on supervision could continue to inform entitlement to Scottish Adult DLA.

Recommendation 10: The Scottish Government should consider amending the definition of ‘supervision’ for the care component in draft regulation 12 to align with Pension Age Disability Payment.

7.4 Qualifying period

The usual qualifying period for entitlement to Scottish Adult DLA, the same as in DLA, is 13 weeks before the start of the award and 26 weeks after. In DLA, this changes when someone reaches pension age. It is intended to align the qualifying conditions with Attendance Allowance. To mirror this approach in Scottish Adult DLA

⁴⁹ Draft regulations 12(5)(e) and 13(6)(iii)

as intended, the qualifying period over pension age should be 6 months before the start of the award and no forward qualifying period. As drafted, regulations 12(3), and 13(5) and 14(11) incorrectly add a 6 month forward qualifying period. This should be removed, and consequential references in regulation 12(4)(a)(ii) and (b)(ii) amended accordingly.

In practice, this would only apply in a small number of cases, those who newly qualify for a higher rate or different component because of a change in circumstances.

Recommendation 11: Draft regulations 12, 13 and 14 should be amended to align the qualifying period over pension age with the pension age provisions in Disability Living Allowance and Pension Age Disability Payment.

7.5 Eligibility criteria for the mobility component, ‘severe visual impairment’

Someone with a severe visual impairment can qualify for the higher rate mobility component of Scottish Adult DLA. Severe visual impairment is defined as visual acuity of less than 3/60 or, in some cases, 6/60. These figures correspond to results from the eye chart used by ophthalmologists measured on the ‘Snellen scale’.

A DLA case in the Upper Tribunal ⁵⁰ has held that relying solely on the Snellen test, a test only conducted indoors, is discriminatory for the purposes of Article 14 of the ECHR. and adversely affects people whose visual acuity is worse outdoors than it is indoors e.g. people with the eye conditions achromatopsia or retinitis pigmentosa. In this case, the judge considered whether the DLA regulation defining visual acuity was compatible with the claimant’s rights under Article 14 of the ECHR and concluded that ‘the regulation cannot be read in a manner that is compatible with Convention rights’.⁵¹ Draft regulation 14(5) uses the same definition for Scottish Adult DLA relying on the Snellen test alone, albeit without explicitly referring to Snellen, and so may also be incompatible with Convention rights.

It is outside the competence of the Scottish Parliament to legislate in a way that is incompatible with any of the Convention rights.⁵² However, DLA case law does not offer an alternative approach and the DWP has not amended the DLA regulation on which draft regulation 14(5) is based. We note that the Snellen scale is also used to decide who should be certified as severely sight impaired but in addition clinicians have flexibility to use their judgement where appropriate. Guidance to ophthalmologists says that “where acuity cannot be accurately measured, a patient may be certified if, in the consultant’s judgement, there are clinical findings/investigations consistent with significantly impaired acuity and/or restricted visual fields.”⁵³ This suggests a way to add flexibility to the definition of severe visual impairment in Scottish Adult DLA to make it fairer for people whose vision is worse outdoors.

⁵⁰ [YR v SSWP \[2014\] UKUT 80 \(AAC\)](#)

⁵¹ Regulation 12(1A) The Social Security (Disability Living Allowance) Regulations 1991 SI 2890; YR v SSWP [2014] UKUT 80 (AAC) paragraph 39

⁵² [Section 29 of the Scotland Act 1998](#)

⁵³ [Para 33 Certificate of Vision Impairment Explanatory Notes for Consultant Ophthalmologists and Hospital Eye Clinic Staff in England, August 2017](#)

Recommendation 12: The Scottish Government reviews the test of severe visual impairment in draft regulation 14 to ensure it is compatible with rights under the European Convention on Human Rights.

7.6 Restrictions from pension age

As noted earlier in section 6.2 on equality issues arising from age differences, in DLA, some rules change at state pension age so that there are fewer differences between DLA and Attendance Allowance. For example, DLA has a mobility component whereas Attendance Allowance does not, but once an individual reaches pension age they cannot receive a new or increased award of the mobility component. They *can* continue to receive mobility component at the same rate if they already receive it. Mirroring DLA, the policy intention is that the mobility component of Scottish Adult DLA is capped at the rate an individual already had before reaching pension age. Draft regulation 25(3) restricts awards of the mobility component after pension age based on entitlement before the day of transfer. However, it seems to be incorrect to refer to entitlement before the day of transfer. What matters is entitlement before the individual reaches pension age which may be later than the day of transfer. For example, someone may transfer to Scottish DLA at age 60 and get the care component only. At age 63, they qualify for the lower rate mobility component. At age 67, over pension age, their mobility deteriorates. They can stay on the lower rate, but they cannot qualify for higher rate mobility. As drafted, at age 67, there could be no award of mobility component at either rate.

Recommendation 13: The Scottish Government should amend draft regulation 25(3) to restrict awards of the mobility component based on entitlement before pension age.

Another difference between DLA and Attendance Allowance is that Attendance Allowance has no lowest rate of the care component. Accordingly, we assume that the policy intention to mirror DLA is that individuals can stay on the lowest rate of the care component if their award already included it before pension age but otherwise cannot get the lowest rate e.g. if care needs go down. However, draft regulations do not seem to provide for this restriction.

Recommendation 14: The Scottish Government should consider whether the policy intention for awards of the lowest rate of the care component after pension age is met in the draft regulations.

7.7 Reinstatement of entitlement after a year

If entitlement to Scottish Adult DLA stops, draft regulation 28 makes it possible for it to be reinstated provided the individual requests this within 12 months of the award ending. Outside of this period, the option would be to claim another benefit instead – e.g. ADP or PADP depending on age. We note that the request must be ‘in such form and with such evidence’ as may be required and there is no provision to extend the deadline. In practice it can take weeks to submit a fully completed form, particularly for applicants who need assistance. This provision is not likely to be much used – there are no fixed term awards ending entitlement as there are in DLA – nonetheless it seems more in keeping with principles (d) (dignity at the heart of social security) and (g)(i) putting the needs of people needing assistance first) to allow some flexibility to accept a late application.

Recommendation 15: The Scottish Government should consider flexibility in the 12 months deadline to reinstate an award where there is good reason for a late request.

The rules allowing reinstatement are more restrictive in Scottish Adult DLA than in DLA for people who were aged 65 or over in 2013. In DLA, there is no bar to making a renewal claim if you have an appeal pending or have made an unsuccessful claim to another disability benefit in the meantime. In practice it is not easy to identify situations that may arise where an individual could be disadvantaged by the Scottish Government's proposed approach. However, given the potential to remove access altogether to the mobility component, because the alternative to reinstatement would be a claim for PADP which has no mobility component, more consultation on this issue would be reassuring.

Recommendation 16: The Scottish Government should monitor and consult with stakeholders on the potential impact on people who cannot reinstate entitlement to Scottish Adult DLA because of the restrictions in draft regulation 28(5), for example that they have an appeal pending. The results of this consultation could also assist the Scottish Government in meeting the social security principle of continuous improvement and when revising its impact assessments of Scottish Adult DLA.

7.8 Applying for ADP after reporting a change of circumstances

Someone whose condition worsens may report a change of circumstances with a view to being assessed for a higher award of Scottish Adult DLA. They may also apply for ADP if they think they may be better off on ADP, for example, because of access to the mobility component after pension age. As drafted, regulations suggest that Social Security Scotland must take account of the change for the award of Scottish Adult DLA (draft regulation 50), but if they have not done so by the time they are determining entitlement to ADP, they must ignore the reported change for the previous award of Scottish Adult DLA and only take it into account for ADP (draft Schedule 1, Part 1, paragraph 15H(5)). If this is the intention, it would seem to result in some people losing money because of an official delay in acting on a reported change.

Recommendation 17: The Scottish Government should review and clarify how changes of circumstances reported by an individual on Scottish Adult DLA are taken into account if they go on to apply for Adult Disability Payment.

7.9 Miscellaneous drafting issues

There are several places where references to regulations or paragraphs are misnumbered in the draft regulations referred to SCoSS for scrutiny, for example:

- Draft regulations 3, 12, 13, 14 refers to regulation 38 instead of regulation 37.
- References in draft regulation 7(4) and (6) to paragraph (4) should be to paragraph (3)
- Reference in draft regulation 8(1)(c) to regulation 8(4) should be to regulation 9(4).
- Draft regulation 37 contains an inconsistency in wording between paragraphs 1 and 2. Paragraph 1 refers to "the weekly rate of payment of the care component" whereas Paragraph 2 refers to "the weekly rate of the mobility component". This should be amended for consistency.

- References in draft regulation 44 to regulation 38 should be to regulation 39.
- In draft regulation 59(2, 'Pension Age Disability Payment' should read 'Scottish Adult Disability Allowance'.
- Parts 12 and 13 are incorrectly titled Parts 2 and 3.
- Draft regulation 59(6) should make reference to there being no entitlement to short-term assistance in respect of 'the component or components for which the value is to be £0'
- Draft regulation 60 omits reference to short-term assistance being paid to an authorised provider of vehicles in respect of a Motability car.
- In Schedule 1, paragraph 1(4)(a)(i), '48(c), 48(d), 48(c) or 48(f)' should read '48(c), 48(d), 48(e) or 48(f)'.
- In Schedule 1, Part 1, inserting paragraph 15F(b), the reference to paragraph 15G(4) should be 15G(2).

Recommendation 18: Cross references in the draft regulations should be checked for accuracy.

8. Approach to scrutiny

This report has been completed in accordance with the Commission's pre-legislative scrutiny function, set out in sections 22 and 97 of the Social Security (Scotland) Act 2018⁵⁴ (henceforth referred to as 'the Act'). Section 97 states that the Commission must report on draft Regulations proposed to be made under any section in Chapter 2 of Part 2 or Section 79 of the Act.⁵⁵ The draft Regulations are made under powers conferred by sections within this part and chapter.

In keeping with our role to scrutinise social security regulations, this report provides commentary in connection with human rights and the social security principles set out in Section 1 of the Social Security (Scotland) Act 2018,⁵⁶ as operationalised via Our Charter.⁵⁷

The Cabinet Secretary for Social Justice referred the draft regulations to SCoSS⁵⁸ along with a Policy Note⁵⁹ on 11 March 2024. We were given a deadline for reporting of 10 June 2024 and we agreed an extension to 14 June 2024 with officials during the scrutiny process.

Drafts of the Equality Impact Assessment, the Island Communities Impact Assessment, the Fairer Scotland Duty Assessment and the Business and Regulatory Impact Assessment were received from the Scottish Government on 28 March 2024.

To understand, and represent, the views of stakeholders in relation to the draft regulations, SCoSS also undertook a written stakeholder exercise during the scrutiny period. SCoSS would like to express its thanks to the organisations who responded.

⁵⁴ [Social Security \(Scotland\) Act 2018 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

⁵⁵ Other than in relation to regulations made only for the purpose of the consolidation of earlier regulations (section 97(11)).

⁵⁶ [Social Security \(Scotland\) Act 2018 \(www.legislation.gov.uk\)](https://www.legislation.gov.uk)

⁵⁷ [Social Security Scotland - Our Charter](#)

⁵⁸ [Scottish Commission on Social Security - Referral of draft regulations from the Cabinet Secretary for Social Justice](#)

⁵⁹ [Scottish Commission on Social Security - Referral of draft regulations from the Cabinet Secretary for Social Justice - Policy Note](#)

We asked a significant number of written questions to officials during the scrutiny period and we are grateful for the efforts made by officials to respond quickly to these and to keep us apprised of developments throughout.

Annexe A: About the Scottish Commission on Social Security

The Scottish Commission on Social Security (SCoSS) plays an essential role in the development and delivery of a Scottish Social Security system based on fairness, dignity and respect.

We provide independent scrutiny of the Scottish social security system and our full functions are set out in section 22 of the Social Security (Scotland) Act 2018.⁶⁰

We provide detailed analysis of proposed social security regulations which are referred to us by Ministers, making recommendations for improvement where necessary.

Our role is also to scrutinise the Scottish Government's delivery of the commitments set out in the Social Security Charter.⁶¹

We are separate from the Scottish Government, and we carry out our work independently of both Scottish Ministers and the Scottish Parliament.

The Scottish social security principles

SCoSS takes the Scottish social security principles, as laid out in the Social Security (Scotland) Act 2018, into consideration when scrutinising proposed social security legislation and regulations. The Scottish social security principles are:

- (a) social security is an investment in the people of Scotland,
- (b) social security is itself a human right and essential to the realisation of other human rights,
- (c) the delivery of social security is a public service,
- (d) respect for the dignity of individuals is to be at the heart of the Scottish social security system,
- (e) the Scottish social security system is to contribute to reducing poverty in Scotland,
- (f) the Scottish social security system is to be designed with the people of Scotland on the basis of evidence,
- (g) opportunities are to be sought to continuously improve the Scottish social security system in ways which—
 - (i) put the needs of those who require assistance first, and
 - (ii) advance equality and non-discrimination,
- (h) the Scottish social security system is to be efficient and deliver value for money.

⁶⁰ [Social Security \(Scotland\) Act 2018 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2018/11/section/22)

⁶¹ [Social Security Scotland - Our Charter](#)

Annexe B: Scrutiny timeline

11 March 2024	Draft Regulations and Section 86A formally referred to SCoSS by the Cabinet Secretary for Social Justice.
28 March 2024	SCoSS Board attended by Social Security officials for Scottish Adult DLA discussion. Board also considers approach to scrutiny.
18 April 2024	Ad hoc meeting on the draft regulations.
26 April 2024	External stakeholders written call for evidence began.
24 May 2024	External stakeholders written call for evidence closed.
30 May 2024	SCoSS Board meeting to discuss report.
14 June 2024	SCoSS report signed off and laid.