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Social Justice and Social Security Committee

12th Meeting, 2021 (Session 6), Thursday, 2 December

The Best Start Grants and Scottish Child Payment (Miscellaneous Amendments) Regulations

Introduction

The above [draft regulations](#) were laid on 12 November and are subject to a super-affirmative procedure. The Scottish Commission on Social Security (SCoSS) reported on 5 November and the Scottish Government responded on 12 November.

This paper summarises the regulations and the SCoSS report before suggesting possible themes for discussion with the Minister.

What the regulations do

These regulations change the rules on deciding who is awarded Scottish Child Payment or Best Start Grant when more than one person is eligible to claim for the same child.

Its possible for more than one person to be eligible for Scottish Child Payment (SCP) or Best Start Grant (BSG) for the same child. The original regulations set out a 'hierarchy' of claims – awarding first to the person who got tax credits, universal credit or pension credit for the child.

Where the existing hierarchy of claims does not resolve the issue then there is a 'backstop' whereby the award is made to the person who applied first.

These regulations change that 'backstop' provision. If the hierarchy of claims does not establish who gets the benefit then these regulations give Social Security

Scotland discretion to decide. The policy intention is that the benefit is always paid to the person with primary responsibility for the child.

There is nothing in the regulations setting out factors to consider when making this decision. This will be in guidance. The Scottish Government has told SCoSS that ‘this test is likely to take into account the child’s care and living arrangements.’

The regulations also make two changes to the BSG regulations. They add a ‘hierarchy of claims,’ taking the same approach as the amended SCP regulations. They also make a second change. Currently, if care of a child changes its possible for the new carers to apply for a second BSG grant. Eg If a baby is placed in kinship care then the kinship carers can get a BSG-baby grant even if one had already been issued to the mother. This provision is being extended so that a second grant can be paid even if the change in care arrangements took place before the first grant was paid. This is to take account of more fluid family relationships.¹

Why are the regulations needed?

The regulations are needed because the First-tier Tribunal has criticised deciding claims based on ‘first come first served’ even as a ‘back-stop’ provision. The SCoSS report states:

“Once a clash of claims arose, the only available means of resolving it was an arbitrary one based on which individual applied first rather than whose circumstances best matched the policy intent of the payment.”

A further eight appeals concerning competing claims have since been identified (seven for SCP, one for BSG). The problem in several of them is that tax credits or universal credit awards have been made to two individuals in respect of the same child. The Scottish Government asked the DWP to review how this came about. These disputes were still ongoing at the time the regulations were referred to SCoSS.

Previous consideration of competing claims

When SCoSS looked at the original SCP regulations in 2020 they recommended that guidance and regulations needed to be clear about how competing claims should be resolved. The Scottish Government responded ([8 September 2020](#)) that

“We have considered carefully how competing applications should be resolved and the draft Regulations set out a hierarchy of benefits that will be applied in the event that we get two applications for the same child.

[...]

the agency will pay the person receiving Child Tax Credits/Universal Credit Child Element/Pension Credit Child Addition, rather than the person receiving Child Benefit or holding a kinship care order/agreement.”

¹ See SCoSS report p.12

Dr Witcher appeared at the Social Security Committee on 30 January and noted that:

“A number of issues need to be clarified to do with who will get the payment and on what basis, particularly in the context of competing claims.”
([Committee Official Report 30 January 2020](#))

Pauline McNeil, MSP noted that;

“Perhaps we need a wee bit more scrutiny of that. Particularly where there is a separated couple and there is shared care of the child, someone will have to decide who will get the payment.” ([Committee Official Report 30 January 2020](#))

An [equalities impact assessment](#) was carried out for the original regulations in August 2020. This stated that:

“We are also doing as much as possible to ensure the payment goes to the main carer in instances where there is a competing claim.”

[...]

“where there are competing claims, we will specify that Social Security Scotland will pay the person in receipt of Child Tax Credits/Universal Credit Child Element/Pension Credit Child Addition, rather than Child Benefit.”

It did not refer to the equity or otherwise of awarding the SCP to the person who applies first if the rules don't provide a clear result.

SCoSS Report and Scottish Government Response

In common with other recent reports SCoSS mentions workload, saying that for these regulations they:

“have not been able to go as far as we usually would to investigate them and take a view.”

SCoSS made five recommendations all of which were accepted by the Scottish Government. These are summarised below.

Recommendation 1: Guidance

SCoSS recommended that guidance needs to be comprehensive and ensure the award goes to the person with the main responsibility for the child.

The Scottish Government responded that guidance “will be as clear as possible without being overly prescriptive”. They will also emphasise the client's duty to report a change of circumstance.

Recommendation 2: Identifying the person with primary responsibility for the child

SCoSS pointed out that, in the draft they were given, an award could still go to a person who does not have main responsibility for the child. For example, if the child lived with a kinship carer but the parent continued to get tax credits for the child then the parent and not the kinship carer would get SCP.

SCoSS recommended that Ministerial discretion should be applied if strict application of the rules results in the benefit going to someone without main responsibility for the child.

This has been addressed in the regulations as laid, with a new rule allowing Ministers to exercise discretion in such cases.

Recommendation 3: Achieving the same result for Best Start Grant

The regulations have been amended following SCoSS recommendation to ensure that the provisions for BSG match those for SCP more closely.

Recommendation 4: Ensure discretion is used appropriately

SCoSS discuss the potential for human rights issues to arise if the level of discretion in the system is increased. They therefore recommend that the Scottish Government monitor this.

The Scottish Government response states that management information and feedback will provide information on how these changes are working. The SCP interim evaluation will be published in summer 2022. Full evaluation is due once it is rolled out to those under 16's.

Recommendation 5: Lessons for future top-up or passported benefits

SCoSS reiterate their view that there are pros and cons to using top-up and passported benefits:

“On the one hand, going down that road can be quicker, less costly and less complex than setting up stand-alone forms of devolved assistance. On the other, it creates more reliance on the stability of DWP policy and the efficiency of its processes.”

Reflecting on the pragmatic decision to create SCP as a ‘top-up’ rather than a ‘stand-alone’ benefit, SCoSS comment that:

“The tribunal ruling reveals, and these amendments respond to, evidence about the nature of some of those potential disadvantages.”

In response, the Scottish Government refer to arrangements to learn from implementation issues:

“There is a Continuous Improvement Team in the Social Security Programme with responsibility for identifying lessons learnt and ensuring the right

processes and forums are in place to apply that learning. We have captured lessons learned on the development of the Scottish Child Payment, and we will build on them to ensure a strong and robust alignment between policy, legislation and delivery, as well as consistency, where appropriate, between regulations across all types of Scottish assistance”

Themes for discussion

The following suggests four themes for discussion:

- **Theme 1: Impact assessment**
- **Theme 2: Shared care**
- **Theme 3: Use of discretion**
- **Theme 4: Top-ups compared to ‘stand-alone’ benefits**

Theme 1: Impact assessment

The policy intent has always been to pay the SCP /BSG to the main carer. Despite this, the original rules provided that, where the hierarchy of claims did not provide an answer, the benefit was paid to the person who applied first.

The Scottish Government’s equalities impact assessment set out the extensive work with stakeholders that was undertaken to identify issues. While competing claims were identified as an issue, the impact assessment does not refer to this ‘back-stop’ rule of awarding to the first applicant.

Members may wish to discuss:

1. Why was ‘first come first served’ considered an acceptable ‘back-stop’ provision?
2. Was the potential unfairness of this raised by stakeholders at the time the original SCP regulations were being considered?
3. How many cases of competing claims are there likely to be?

Theme 2: Shared care

The policy intent is based on the premise that there is a main carer. This does not take account of separated parents who take equal share in caring for their children.

The [Social Security Advisory Committee reported in 2019](#) on separated parents and the social security system. The report recognised the complexity of the issue:

“It is hard, if not impossible, for social security rules to reflect the complexity of shared care and financial arrangements that parents enter into, willingly or

otherwise. [...] In particular policy should ensure the system does not disincentivise shared care as it may have a negative impact on the children's welfare. And policy must consider the living standards of both parents and their children and the risk of poverty and hardship when children are staying with either parent, not just the parent with main responsibility of care."

The report referred to "around 2-3% of non-resident parents have equal shared care (50-50)."

In the reserved system, the rules include allowing parents to agree which one of them should be considered the main carer. Its possible for one person to get the child benefit and the other to get the Tax Credits. If they cannot agree then HMRC /DWP decides. (For details see [annex to SSAC report](#))

Members may wish to discuss:

1. How will these rules deal with situations where there is a 50:50 split of care between separated parents?
2. Did the Scottish Government consider other options such as allowing the parents to decide or allowing benefits to be split?
3. Has the Scottish Government considered whether social security rules, including those for SCP and BSG, might disincentivise shared care?
4. Has the Scottish Government considered whether the living standards of the non-resident parent are relevant to tackling child poverty?

Theme 3: Use of discretion

The new rules will allow Social Security Scotland/Scottish Ministers to decide who gets SCP/BSG in cases where the hierarchy of claims does not provide an answer.

The regulations do not set out any factors to be considered, saying only that:

"the Scottish Ministers must determine which of the individuals is entitled to the payment having regard to the circumstances of the child"

The criteria to be applied is left to guidance. In their response to SCoSS, the Scottish Government said:

"We will ensure that the guidance Social Security Scotland uses to make decisions on applications provides clear advice on the evidence to be considered in the circumstances where a competing claim is made. We will be as clear as possible, without being overly prescriptive, whilst aligning the guidance with the policy intent. This will ensure the payment goes to the person who is responsible for the child on every occasion."

Part of what makes social security a right, is that entitlement is based on rules rather than discretion. Where discretion is introduced there is always potential for clients to find it more difficult to challenge decisions. SCoSS note that:

“Some argue there is tension between a rights-based and discretion-based approach to social security.¹⁴ [however] if this discretion is appropriately exercised it can help the two forms of social security assistance deliver some of the objectives of human rights law and other principles.”

Members may wish to discuss:

1. Did the Scottish Government consider setting out some key principles in the regulations about how discretion should be applied?
2. How closely will the Scottish Government monitor the use of discretion in these cases?
3. Will management information be easily available to allow the use of discretion to be monitored?
4. When will the guidance be published?
5. Which organisations are being consulted on the guidance?

Theme 4: Passported benefits

The need for these regulations arose, in part, because DWP and HMRC were paying low income benefits to two different people for the same child.

In their report SCoSS comment on the advantages and disadvantages of linking Scottish benefits so closely to DWP benefits saying:

“The more use is made of top-up or passporting powers, the more learning there will be to inform cost/ benefit analyses. The tribunal ruling reveals, and these amendments respond to, evidence about the nature of some of those potential disadvantages. This will be important learning to take forward when it comes to the future use of top-up powers or passporting arrangements, and any related developments or reviews.”

Top-up benefits such as Scottish Child Payment are quicker and easier to set up than starting from scratch. However, it does mean that SCP is affected by changes to qualifying benefits, such as Universal Credit. As in the case which prompted these changes, it can also be affected by problems with administration of reserved benefits.

An interim review of SCP is due to be published next year. A full evaluation will be carried out after SCP is extended to children under 16.

Members may wish to discuss:

1. How did it happen that two individuals could hold an award of Universal Credit, tax credit or pension credit for the same child?
2. Are the cases now all resolved?

3. To what extent do the advantages of linking in to DWP benefits through passporting or 'top-ups' outweigh the disadvantages?
4. Have the issues which prompted these regulations changed that balance?

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