

Social Justice and Social Security Committee

SSI cover note

2nd Meeting, (Session 6), 20 January 2022

Title of Instrument: [The Scottish Child Payment Regulations 2020 and the Disability Assistance for Children and Young People \(Scotland\) Regulations 2021 \(Miscellaneous Amendments\) Regulations 2022](#)

Laid Date: 29 November 2021

Reporting deadline: 22 January 2022

Type of instrument: Affirmative

Parliamentary procedure:

The affirmative procedure means that an instrument cannot be made and come into force unless the Parliament has voted to approve it (rule 10.6.1 of standing orders).

Affirmative instruments are first looked at by the DPLR Committee before being considered by the lead committee (usually the committee which examined the Bill for the Act that the SSI is made under or whose remit is most aligned).

It is usual practice for the lead committee to take evidence from the relevant Scottish minister in advance of considering the instrument. The committee can ask the minister and any officials questions about the SSI.

During its formal consideration, a member of the Scottish Government proposes, by motion, that the lead committee recommend that the instrument or draft instrument be approved. The committee has up to 90 minutes to debate the motion.

The lead committee must report its recommendation to Parliament within 40 days of the SSI being laid. If the committee agrees the SSI should be approved, the whole of the Parliament then gets a chance to vote on it in the Chamber. If the lead committee decides the SSI should not be approved, the Parliamentary Bureau decides whether MSPs should vote on it in the Chamber.

Background

1. According to the [Policy Note](#) (Annexe A), this instrument makes miscellaneous amendments to both the Scottish Child Payment Regulations 2020 and the Disability Assistance for Children and Young People (Scotland) Regulations 2021. Further information is available in the SPICe paper (paper 2).

Delegated Powers and Law Reform Committee consideration

2. The DPLR Committee considered the instrument at its meeting on [14 December 2021](#) and noted the following points in relation to this instrument.
3. Section 97(9) of the Social Security (Scotland) Act 2018 includes a requirement on the Scottish Ministers at the time of laying the instrument to also lay either:
 - A response to the Scottish Commission on Social Security's report on the proposals for the regulations (section 97(9)(a)); or
 - A statement explaining why the Scottish Ministers consider it appropriate to lay the draft instrument before the Commission has submitted its report on the proposals for the regulations (section 97(9)(b)).
4. The DPLR Committee noted that while the Scottish Government laid responses to two reports by the Commission on 29 November which conformed with section 97(9), a third set of minor technical amendments in this instrument were not reported on by the Commission prior to laying the instrument. While a statement under section 97(9)(b) was sent to the Social Justice and Social Security Committee on 1 December, the statement was not laid until 3 December. The Scottish Government apologised for this administrative oversight.
5. The DPLR Committee welcomed the Scottish Government's apology for the administrative oversight, and acknowledged that this oversight was only related to one set of minor technical amendments in the instrument. It did however write to the Minister for Parliamentary Business to highlight its desire for the laying requirements in section 97(9) to be complied with in full.

For decision

6. The Committee must decide whether or not to agree the motion, and then report to Parliament accordingly, by 22 January 2022.
7. The Committee is also invited to delegate responsibility for the drafting and publication of a short, factual report to the Convener and Clerk.

Annexe A**POLICY NOTE****THE SCOTTISH CHILD PAYMENT REGULATIONS 2020 AND THE DISABILITY ASSISTANCE FOR CHILDREN AND YOUNG PEOPLE (SCOTLAND) REGULATIONS 2021 (MISCELLANEOUS AMENDMENTS) REGULATIONS 2022****SSI 2022/XXX**

The above instrument is made in exercise of the powers conferred by sections 31, 36, 51, 52, 79 and 95 of the Social Security (Scotland) Act 2018¹. The instrument is subject to affirmative procedure. In accordance with section 97(2) of that Act, the Scottish Ministers have informed the Scottish Commission on Social Security (SCoSS) of their proposals to make regulations under sections 31 and 79, notified the Scottish Parliament that they have done so and made their proposals publicly available by such means as they consider appropriate.

This instrument makes miscellaneous amendments to both the Scottish Child Payment Regulations 2020 and the Disability Assistance for Children and Young People (Scotland) Regulations 2021. In respect of the Scottish Child Payment Regulations 2020, the instrument confirms the date when the period for Ministers carrying out a re-determination of entitlement begins where the First-tier Tribunal set aside a decision by the Scottish Ministers not to accept a request for a re-determination of entitlement to Scottish Child Payment. In respect of the Disability Assistance for Children and Young People (Scotland) Regulations 2021, the instrument makes it clear that individuals with refugee status are exempt from one of the residence conditions (the habitual residence test). It also removes the ability for clients who are currently in receipt of Disability Living Allowance, Personal Independence Payment or Armed Forces Independence Payment to make a pre-emptive application for Child Disability Payment. It seeks to remove potential ambiguity on the level of costs of any qualifying services that are met by a local authority for the purposes of determining if an individual is in alternative accommodation. The instrument further places a duty on Ministers to determine whether an individual is entitled to short-term assistance in circumstances where the First-tier Tribunal for Scotland set aside a decision by the Scottish Ministers not to accept a request for a re-determination of entitlement to Child Disability Payment. Finally, in respect of both the Scottish Child Payment Regulations 2020 and the Disability Assistance for Children and Young People (Scotland) Regulations 2021, it allows Ministers to suspend ongoing payments of Scottish Child Payment or Child Disability Payment in prescribed circumstances.

Policy Objectives

The policy objective for the provision on Scottish Child Payment re-determination dates is to:

- clarify the timescales for Social Security Scotland to complete a re-determination of entitlement to Scottish Child Payment, where the First-tier Tribunal find that Ministers were wrong to refuse the individual's request for a re-determination of entitlement to Scottish Child Payment.

The policy objective for the provision on residency is to:

¹ <https://www.legislation.gov.uk/asp/2018/9/contents/enacted>

- ensure that the devolved provisions reflect UK practice in respect of refugees, by providing that refugees are eligible for Child Disability Payment from the date they are awarded refugee status.

The policy objective for the provision on pre-emptive applications is to:

- address an issue in the Disability Assistance for Children and Young People (Scotland) Regulations 2021, which allows individuals entitled to Personal Independence Payment, Disability Living Allowance or Armed Forces Independence Payment to make a pre-emptive application for Child Disability Payment. The ability to do this undermines the carefully planned and negotiated process for transferring these individuals from receiving a UK Government administered disability benefit to a Scottish Government administered one.
- This kind of pre-emptive application involves applying for Child Disability Payment and notifying Ministers that that the applicant is, although not entitled to Child Disability Payment at the time of the application, expected to be entitled to it within 13 weeks because, within that time, they intend on relinquishing their entitlement to the UK Government administered disability benefit which they are currently receiving. As part of the Scottish Government's commitment to a safe and secure transition of powers to administer delivery of disability benefits, Scottish Ministers have developed a process which, wherever possible, will require no action on behalf of the individual, when transitioning from entitlement to Disability Living Allowance to Child Disability Payment. This process ensures that clients will continue to receive the right payment, at the right time, into the account that they would have previously received their Disability Living Allowance for Children.

The policy objection for the provision on the effect of time spent in care homes and legal detention is to:

- clarify that the costs of any qualifying services can be met wholly or in part by a local authority, when determining if the individual is being looked after by a local authority and is in a care home, or alternative accommodation outside the United Kingdom.

The policy objective for the provision on short-term assistance and re-determinations for Child Disability payment is to:

- require Ministers to determine entitlement to short-term assistance without receiving an application where the individual is expected to be entitled to it (on account of the First-tier tribunal finding that Ministers were wrong to refuse the individual's request for a re-determination of entitlement to Child Disability Payment).

The policy objectives of the provision on suspension of ongoing payments for Scottish Child Payment and Child Disability Payment are to:

- safeguard the individual's entitlement to assistance where Ministers have arranged for a person to receive assistance on behalf of an entitled individual and this arrangement is placing the individual at risk of financial abuse;
- safeguard the individual's entitlement to assistance in circumstances where Ministers have arranged for a person to receive assistance on behalf of an individual and the person whom Ministers have made arrangements with can no longer continue in this role;
- manage the situation where an individual who is entitled to Child Disability Payment has reached the age of 16 years and there is not yet an appropriate arrangement in

place for paying assistance to, or for benefit of, that individual (on account of the individual now being an adult);

- provide individuals with a better opportunity to provide information, which Ministers require in order to review entitlement to either Child Disability Payment or Scottish Child Payment, before Ministers will decide to end entitlement on account of the information not being provided.

Consultation

The Scottish Government have consulted extensively on matters relating to social security over a significant period of time. In July 2016 the Scottish Government launched a public consultation to support the development of a framework that would become the Social Security (Scotland) Bill. 521 formal written responses were submitted, of which 241 were from organisations and 280 from individual respondents.

In 2017 the Scottish Government set up Social Security Experience Panels, with over 2,400 people with lived experience across Scotland registering as panel members.

The ‘Disability Assistance in Scotland’ Consultation launched in March 2019. This sought the views of the people of Scotland on the three proposed disability assistance benefits. The consultation received 263 replies, of which 74 were from stakeholder organisations and 189 were from individuals.

The Scottish Government has also undertaken managed consultation with stakeholders through the Ill Health and Disability Benefits Stakeholder Reference Group, with input from Child Poverty Action Group in Scotland, Citizens Advice Scotland, Inclusion Scotland, Support in Mind Scotland and SAMH informing the high-level policy principles for suspensions.

In respect of the similar amendments which apply to the situation where the First-Tier Tribunal has found that Ministers were wrong to refuse an individual’s request for a re-determination of entitlement to Child Disability Payment or Scottish Child Payment (as the case may be), these amendments address feedback from SCoSS. These are technical amendments which, in the case of individuals entitled to Child Disability Payment, ensure that individuals access the short-term assistance which they are entitled to, and, in the case of individuals entitled to Scottish Child Payment, provide clarity on when the period for making the re-determination of entitlement begins.

In respect of the provision which clarifies that individuals with refugee status are exempt from the requirement to be habitually resident in the common travel area for the purpose of entitlement to Child Disability Payment, the Scottish Government became aware through ongoing discussions with the Department for Work and Pensions (DWP) that the DWP do not apply this test to refugees in practice, despite the test appearing on the face of relevant UK legislation. This issue was also raised by SCoSS in the context of its report on the draft Disability Assistance for Working Age People (Scotland) Regulations, which was published in October 2021.

In respect of the provision on making pre-emptive applications, Scottish Ministers are concerned that the ability to make this kind of pre-emptive application may undermine the carefully planned and negotiated managed case transfer process, and introduces perceived

inequity if individuals are seen as being able to choose when they wish to transfer. In the consultation on Disability Assistance in 2019, individuals told us that they worried about gaps or delays in their benefits, or that their payments would stop. Removing this option reduces the risk of this happening. If a client were to choose not to wait for their award to transfer automatically, there is no guarantee that they would be awarded Child Disability Payment, or that they would receive the same amount of benefit as they are currently receiving.

In respect of the provision on suspension of ongoing payments, the Scottish Government undertook an informal, managed consultation with stakeholders through the Ill Health and Disability Benefits Stakeholder Reference Group, with input from Child Poverty Action Group in Scotland, Citizens Advice Scotland, Inclusion Scotland, Support in Mind Scotland and SAMH informing the high-level policy principles for suspensions. Informal consultation was also conducted with Engender and Scottish Women's Aid. On 25 June 2020, a group of stakeholders wrote to the Cabinet Secretary for Social Security and Older People advising that they supported the Scottish Ministers suspending assistance where an individual has not provided information which is needed to review their entitlement. Stakeholders considered this a more proportionate action than immediately ending the individual's entitlement to assistance on account of the information not being provided. The individual signatories to the letter were:

- Citizens Advice Scotland
- Child Poverty Action Group (CPAG) in Scotland
- Health and Social Care Alliance Scotland (The ALLIANCE)
- Inclusion Scotland
- Carers Trust Scotland
- Coalition of Care and Support Providers in Scotland (CCPS)
- MS Society Scotland
- The Poverty Alliance
- Scottish Independent Advocacy Alliance (SIAA)
- National Association of Welfare Rights Advisors (NAWRA) Scotland
- Advocard
- The Action Group.

Stakeholders were also supportive of the suspension of assistance to protect individuals from the risk of financial abuse: public authorities who investigate matters of financial abuse routinely ask the Department for Work and Pensions to suspend assistance in this circumstance. This is because these investigating public bodies have a duty to safeguard the assets of the individual at risk.

As a result of this consultation with stakeholders, the regulation-making power allowing Ministers to make provision on suspension of ongoing payments stipulates a number of requirements that any regulations must contain:

- Ministers may only suspend assistance in narrowly defined circumstances,
- the individual has a right to require the Scottish Ministers to review the decision to suspend
- Scottish Ministers have a duty to have regard to an individual's financial circumstances before deciding to suspend assistance; and
- the right to be notified about:
 - a decision to suspend;
 - the reasons for the decision;

- any steps that the individual must take in order for the Scottish Ministers to consider ending the suspension; and
- the right to request a review of the decision.

Impact Assessments

The following impact assessments were completed on the draft regulations and accompany this policy note:

- Equality Impact Assessment,
- Child Rights and Wellbeing Impact Assessment,
- Fairer Scotland Duty Assessment, and
- Business and Regulatory Impact Assessment

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has been completed. It is not considered that the proposals in relation to the power to suspend will have any impact on Scottish business.

In respect of the amendments which apply to the situation where the First-Tier Tribunal has found that Ministers were wrong to refuse an individual's request for a re-determination it is not considered that there will be any substantive financial impact.

It is not considered that that the removal of the habitual residence test for refugees will result in material additional expenditure. As the regulations have the effect of making otherwise eligible individuals entitled to receive payment from 1-3 months earlier than would have otherwise been the case, and because delivery processes already exist which can manage applications from this client group, we expect that any additional demand-led expenditure would be negligible. The overall impact will be incorporated into future Scottish Fiscal Commission forecasts of social security expenditure. We would anticipate increased funding from the UK Government through Block Grant Adjustments as the change mirrors UK policy.

No quantifiable financial effects have been identified in removing the ability for clients who are currently in receipt of Disability Living Allowance, Personal Independence Payment or Armed Forces Independence Payment to make a pre-emptive application for Child Disability Payment. The Scottish Government does not believe that the removal of this provision will have an adverse impact on the competitiveness of Scottish companies or the third sector within Scotland, the UK, or elsewhere in Europe or the rest of the world.

It is not anticipated that exercising the power to suspend will materially result in additional ongoing administration costs to the Scottish Ministers beyond the resource already identified for the processing of applications and ongoing entitlements. The change broadly aligns with the current DWP rules and therefore the impact is built into the funding which the Scottish Government will receive from the UK Government through the Block Grant Adjustment for the relevant benefits.

Scottish Government
Social Security Directorate
November 2021