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## Social Justice and Social Security Committee

**2<sup>nd</sup> Meeting, 2022 (Session 6), Thursday, 20 January**

### SCP and CDP Amendment Regulations

#### Introduction

[The Scottish Child Payment Regulations 2020 and the Disability Assistance for Children and Young People \(Regulations\) 2021 \(Miscellaneous Amendments\) Regulations 2022](#) ('the draft regulations') were laid on 29 November 2021. Also available online are a [policy note](#), [Fairer Scotland Assessment](#), [Equality Impact Assessment \(EQIA\)](#) and [Business and Regulatory Impact Assessment \(BRIA\)](#)

These were originally drafted as two separate sets of regulations, so there are two SCoSS reports which were provided to the Scottish Government on 18 November.

- SCoSS report on the Disability Assistance for Children and Young People (Scotland) Regulations 2021 and the Scottish Child Payment Regulations 2020 (Miscellaneous Amendments) Regulations 2022, and
- SCoSS report on the Suspension of Assistance (Disability Assistance for Children and Young People) (Scottish Child Payment) (Scotland) Regulations 2021

These reports are not available online but were emailed to members on 25 November 2021. As in previous reports SCoSS refer to the tight timescale for scrutiny.

The Scottish Government response to both reports was sent to the Committee on 1 December 2021. All the SCoSS recommendations were accepted.

Some further amendments were included in the regulations which were not sent to SCoSS. Section 97(9) Social Security (Scotland) Act 2018 requires that a statement explaining this should have been laid in Parliament when the regulations were laid. The statement was not laid until 3 December. This was raised by [DPLR Committee when it considered the regulations on 14 December 2021](#). In correspondence, the

Scottish Government told the DPLR Committee it was an administrative oversight. The DPLR Committee “will write to the Minister for Parliamentary Business to highlight its desire for the laying requirement in section 97(9) to be complied with in full.”

The Committee will hear from:

- Ben Macpherson, Minister for Social Security and Local Government
- Niall Wilson, Disability Benefits Policy Manager, Scottish Government
- Kirsten Simonnet-Lefevre, Principal Legal Officer, Scottish Government

## What the regulations do

The regulations relate to Child Disability Payment (in the regulations called Disability Assistance for Children and Young People) and Scottish Child Payment. In summary the regulations;

- Provide further detail on the power to **suspend benefit payments** which is set out in the Social Security (Scotland) Act 2018. (See discussion below). Regulation 2(2) and 2(4) cover SCP and regulation 3(9) makes the same provision for CDP.
- **Prevent pre-emptive applications** i.e prevent someone in receipt of DLA from applying for CDP. (regulation 3(8)).
- Extend exemptions from some of the **residence rules for CDP** – particularly for refugees (regulation 3(3) and 3(4)).
- Other minor and technical amendments, including
  - If Social Security Scotland reject a request for a redetermination but that rejection is set aside by the Tribunal, then the redetermination will happen. These regulations allow **Short Term Assistance** to be paid in these circumstances (regulation 3(11)).
  - Clarifying when the time-scale for **re-determination** starts in cases where the Tribunal decides that the request for re-determination of SCP is valid (regulation 2(3)).
  - Changes to legislative references and clarification of some terms

## Suggested themes for discussion.

The following suggests three themes for discussion, focusing mainly on provisions to suspend benefits.

- Theme 1: Suspending benefits
- Theme 2: Pre-emptive applications

- Theme 3: Residence

## Theme 1: Suspending Benefits

The regulations provide further detail about the power to suspend benefit payments that was introduced by the Social Security Administration and Tribunal Membership (Scotland) Act 2020. The following explains that background before summarising issues raised by SCoSS and the Scottish Government's response.

### Background: What the regulations add

When the Social Security (Scotland) Act 2018 was passed, it included a power to end the payment of benefit but no power to suspend payment. This was added by Government amendments to the 2020 Act which added a new schedule ([schedule 11](#)) to the 2018 Act.

Stakeholders had raised the need for a power to suspend as an alternative to simply ending a person's entitlement. There was little debate on the issues at the time and the 2020 Bill was subject to an expedited parliamentary timetable.

The 2018 Act, as amended, sets out circumstances in which some or all of a benefit may be suspended. These are:

- Failure to provide information
- Protection from financial abuse if the benefit is paid to a third party, such as an appointee for a child
- If the benefit is paid to a third party and they cannot continue to receive it
- If the individual has requested that Minister temporarily stop providing the benefit
- Any other reason set out in regulations.

The detail was to be set out in regulations. The 2018 Act requires that these regulations include:

- Considering financial circumstances before suspending benefit
- A right to review the suspension
- Informing the individual of the decision to suspend, the reasons for it, steps that can be taken to end the suspension and the right to review
- When the suspension ends, backdated benefits can be paid
- If an individual continues to fail to provide the required information the benefit can be ended

These regulations today set out that detail in relation to suspending Child Disability Payment (CDP) and Scottish Child Payment (SCP). A lot of the regulation repeats provision that is already in the 2018 Act. Additional detail includes:

- **Time to provide information:** There is no set timescale by which information must be provided – that is to be specified by Ministers
- **A review** of a decision to suspend must be completed within 31 days and the individual must be informed of the outcome
- **Suspension must be ended** when:
  - The required information is provided
  - When various ‘determinations without application’ are made. For example, where there has been an underpayment or overpayment, or where an additional child is added to the SCP
  - When ministers consider it appropriate taking into account the financial circumstances of the individual

## SCoSS report and Scottish Government Response

In their report SCoSS note that:

“The Act and draft Regulations set clear boundaries on the circumstances in which the power to suspend is available and do not allow for its use in a punitive manner. Nonetheless, a number of issues remain.”

These issues include the following:

- **Increasing an award.** SCoSS point out that benefit could be suspended even if the information requested is only needed to decide whether to increase a person’s benefit. SCoSS say: “It is far from clear that there is any case for suspending an existing award, or those parts of one, where eligibility is not in doubt.” Recommendation 3 was that benefit should not be suspended in these circumstances. In reply the Scottish Government said that guidance will explain that suspension will not be considered when the information is only needed to decide whether to increase the amount of benefit.
- **No minimum timescale to provide information.** The initial draft included a 14 day minimum. SCoSS recommended extending it to 28 days (recommendation 4). In reply, the Scottish Government removed the timescale and gave a commitment that 28 days will be included in guidance. The Government stated that the regulation making power in the 2018 Act was not broad enough to allow a timescale to be set for disability benefits, and for consistency, they had decided not to set one for SCP.
- **‘Aftercare’.** SCoSS raise “a wider issue concerning what ‘aftercare’ Social Security Scotland can or ought to provide individuals whose award comes to

an end” [this] “is particularly applicable where an award is terminated with overpayments outstanding.”

- **Advocacy.** The Scottish Government advised SCoSS that the legal right to advocacy does not extend to decisions to suspend SCP. SCoSS therefore recommended that it should (recommendation 6). In reply the Scottish Government accepts the need to consider it further but would have concerns about “seeking to rely on the regulation-making power to administer top-up assistance to widen the scope of section 10 of the 2018 Act.”
- **Engaging with vulnerable individuals.** SCoSS asked the Scottish Government to “explain what actions it is planning to identify and safeguard individuals who face difficulty engaging in the suspension process and to consider whether this needs to be further enhanced” (recommendation 7). In reply the Scottish Government said that: “we will look at ways to avoid suspending or ending an individual’s entitlement such as:
  - extending the period for providing the information if the individual reasonably requests this;
  - sending individuals reminder notices and trying different ways of contacting the individual before deciding to suspend assistance;
  - encouraging case managers to consider if the same or similar information could be obtained from a source other than the individual;
  - arranging for another case manager to review whether the requested information really is pertinent to reviewing entitlement before deciding to end entitlement.”
- **Having regard to financial circumstances.** Although not set out in regulations, in practice the Scottish Government plans to take a ‘self-assessment’ approach here. SCoSS state:
 

“if the individual to whom the award is made (or their parent, or an appointee) self-declares that suspension would result in hardship, the default position would be that suspension should not go ahead. SCoSS has several misgivings about this approach.”

These misgivings include:

- in cases of failure to provide information it could allow overpayments to build up, and
- in cases of suspected financial abuse, avoiding suspension may not be appropriate

SCoSS therefore recommended that the impact of this duty should be monitored (recommendation 8). The Scottish Government accepts this as it “consider (s) this matter to be finely balanced and complicated.”

The government notes that self-assessment is administratively much simpler than an objective test of financial hardship and “meets the principal policy aim, which is to prompt difficult-to-engage individuals to engage with Social Security Scotland avoiding the need to end their entitlement.”

- **Passported benefits.** The SCoSS report points out that if CDP is suspended this could result in other benefits not being paid; including Young Carer Grant, Child Winter Heating Assistance and passported benefits and premia paid by DWP and HMRC.

### **Suspending ADP**

These regulations only relate to CDP and SCP. However, ADP regulations (to be considered next week) make the same provision for suspending benefits. Members may wish to address relevant issues this week as the policy is to have a consistent approach across CDP and ADP in relation to suspending benefits.

One feature of ADP is that awards will not have a set end date. Instead there will be a date set for review. However, it is possible that if someone fails to provide information in relation to a review their benefit could be suspended, and, at some point, ended.

**On theme 1, suspending benefits, members may wish to discuss:**

- 1. Whether the 2018 Act needs to be amended including: allowing a minimum timescale to be set for providing information and extending the right to advocacy to include advocacy in relation to suspending benefits.**
- 2. How will Social Security Scotland support individuals to provide required information? For example, if someone is willing but unable to provide the information requested (perhaps because they do not have it)?**
- 3. What are the advantages and disadvantages of a ‘self-assessment’ approach to assessing financial hardship compared to an objective test – particularly in situations where overpayments may build up as a result of continuing to pay the benefit.**
- 4. Before suspending or ending benefit, will the impact on any passported benefits form part of a consideration of financial circumstances? (Particularly as an individual may not realise the impact and so not include it in their self-assessment).**
- 5. If someone fails to engage with a review of their disability benefit, at what point would the failure to provide information result in their benefit payment be stopped?**
- 6. When will detailed decision makers guidance on suspending and ending benefits be publicly available?**

## Theme 2: Pre-emptive Applications

The regulations also tidy up provisions to ensure that CDP can't be claimed while someone is claiming DLA. The SCoSS report states that during the CDP pilot some people made claims for CDP while they were still getting DLA. These regulations will remove Social Security Scotland's duty to determine (decide) these claims.

The policy is that people currently getting DLA should wait until they are selected to be transferred to CDP. The SCoSS report describes the possible impacts, if someone getting DLA applies for CDP:

“Normally, the outcome would simply be no entitlement to CDP on the grounds of existing DLA entitlement. The risk for individuals will be if they actively withdraw their DLA claim in order to apply for CDP, which at best would probably leave them with a gap in payments and at worst leave them with less money or no award at all and no access to Short-term Assistance should they challenge the decision. The risk for Social Security Scotland lies primarily in the staff time and resources required to deal with the case and communicate with the individual, which at scale could lead to delays in overall service delivery.”

While accepting that the Scottish Government is right to be alert to these risks, SCoSS consider that the proposed change may not fully address them:

“it is not clear to what extent removing the provision reduces the risk. It does not remove the choice an individual has to end their DLA in order to apply for CDP but simply puts it beyond doubt that an application made before the DLA ends is bound to fail.”

The Policy Memorandum states that:

“The ability to do this (make an advance claim) 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 issue applies equally to moving from PIP to ADP as it does to moving from DLA to CDP.

**On theme 2, pre-emptive applications, Members may wish to discuss:**

- 1. What is the Minister's view on individuals choosing to end a DLA or PIP award in order to claim CDP or ADP?**
- 2. If people think they may have to wait a long time before being selected for transfer is there a risk they might end their DWP benefit in order to make a claim to Social Security Scotland? How long will it take to transfer everyone from DWP to Social Security Scotland?**

## Theme 3: Residence

The regulations provide that refugees do not have to show they are habitually resident before they can apply for CDP. This reflects DWP practice.

SCoSS commented that: “This is a welcome simplification of complex residency rules”. However, they noted that different residency rules apply to Carer’s Allowance which:

“leads to situations where a disabled child or adult can get disability assistance but their carer cannot get Carer’s Allowance, and thus cannot get Carer’s Allowance Supplement.”

In their response, the Scottish Government noted that:

“We understand that a recent First Tier Tribunal decision has raised questions about the legality of the application of the past presence test, as amended, in the Social Security (Invalid Care Allowance) Regulations 1976. We are seeking to engage with the DWP to discuss what plans, if any, they may have to make amendments to those provisions in light of this decision”

The regulations also add two further categories of people who can claim CDP despite being subject to immigration control. These are:

- certain workers who are not UK nationals
- people whose immigration status is based on someone in the UK undertaking to provide for their maintenance and accommodation

**On theme 3, residence, Members may wish to discuss:**

- 1. What engagement has the Scottish Government had with DWP on whether they have plans to amend the ‘past presence’ test for Carer’s Allowance?**
- 2. In principle, does the Scottish Government consider that disability and carer benefits should have the same residency and ‘past presence’ rules?**

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10 January 2021