



Scottish  
Commission  
on Social  
Security

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Bob Doris MSP,  
Convener,  
Social Security Committee

By email only

Dear Convener,

I am pleased to provide SCoSS's response to the Committee's questions on our scrutiny report on the draft Disability Assistance for Children and Young People regulations. Thank you for granting an extension to the Committee's deadline, which allowed us to consider the questions and our response at our May board meeting. For ease of reference, we have grouped our responses to your questions rather than answering them individually.

As our response makes clear, there have been various developments since the Committee contacted us and since I wrote to you in April, when I forwarded my letter to the Cabinet Secretary setting out our thoughts on how SCoSS might add value and provide support during the period of disruption caused by COVID -19. At our June board meeting, we will consider the Cabinet Secretary's response to our letter, and that provided by David Wallace, chief executive of Social Security Scotland.

I would be pleased to update you on our deliberations and SCoSS's ongoing work plan more generally. I am also conscious that it has been some time since we last met to discuss working relationships between SCoSS and the Committee, and I would be very happy to set up a Skype discussion with you at a time that suits. Please do not hesitate to get in touch if you would find that useful.

Kind regards,

A handwritten signature in black ink, appearing to read 'Sally Witcher'.

**Dr Sally Witcher OBE**  
**Chair, Scottish Commission on Social Security**

## **Committee questions on SCoSS's CDP report**

The Committee may wish to raise the following issues under Theme 1:

1. Whether the draft regulations published in December were in a state that allowed proper consideration by SCOSS
2. How much time would SCOSS expect to need to scrutinise regulations for disability assistance for working age people (DAWAP) and disability assistance for older people (DAOP)
3. Whether SCOSS has any concerns that policy decisions are not being taken in time for regulations to be properly drafted and scrutinised
4. Whether, and if so how, the Scottish Government needs to change its policy approach in order to ensure sufficient time for scrutiny and consultation on its social security regulations
5. How the covid-19 crisis affects the above considerations

## **SCoSS response**

In general terms, SCoSS considers it essential that the Scottish Government provides sufficient time to allow us to scrutinise and report on draft regulations. This would be in the spirit of section 97(5) of the Social Security (Scotland) Act, which, on the face of it, gives the Commission scope to decide how much time it deems 'appropriate' for scrutiny. However, as we have noted previously, the reality is that the Scottish Government has a legislative timetable with limited flexibility which means that this provision cannot always realistically be invoked. Our reports would have considerably less impact if they were not ready in time to be laid in the Parliament with draft regulations.

Based on our experiences to date, we are working with the Scottish Government to develop a protocol that will set out the information that SCoSS and the Scottish Government require from each other in order for SCoSS to scrutinise draft regulations effectively. The protocol will stress that it is crucial for SCoSS to have adequate time to thoroughly consult, consider and report on draft regulations. A period of 2-3 months, from SCoSS receiving draft regulations to reporting on them, would be optimal for more complex regulations. This will vary depending on factors such as the length and complexity of the draft regulations, whether the Scottish Government has already consulted, the nature of the interface with UK Government regulations, the extent to which they replicate regulations already in existence, etc. SCoSS is mindful of the need to get an appropriate balance between the desire for rapid

progress and the need to allow enough time for meaningful consultation and thorough scrutiny.

Turning to the CDP specifically, the draft regulations provided to us in December were sufficiently developed to allow us to undertake limited consultation with stakeholders. The timescales for doing so were tight, however. We received the second set of draft regulations on 7 February 2020 and had to report by 6 March. A considerable number of changes had been made to the first regulations provided but we did not have time to seek stakeholders' views on these developments. We would not have been able to report meaningfully to the Scottish Ministers and the Scottish Parliament on the December draft regulations. That said, it is relevant to note that some of the amendments made to the second set of CDP draft regulations were as a result of the Scottish Government taking account of early views provided by SCoSS members.

We are not in a position to comment on whether the Scottish Government needs to change its policy approach to ensure policy decisions are taken in time for regulations to be properly drafted for our consideration. We are aware that, in general, officials are working under considerable time pressures, as they work on the unprecedented task of setting up a new social security system, as quickly and as effectively as possible. However, because we are an independent body that operates outside of SG, we are not privy to its internal processes, the scale and nature of demands on Ministers and officials, whether there is insufficient capacity and resourcing or whether these could be more effectively deployed. These are issues that the Committee may wish to raise directly with the Scottish Government.

Since the Committee submitted its questions on our CDP report, the Cabinet Secretary has provided detailed information to the Scottish Parliament and to SCoSS on how Covid-19 will affect the timetable for delivering social security assistance. This may suggest that the Scottish Government has further time to develop the CDP draft regulations. Equally, however, there may well be other priorities of which we are not fully aware that would prevent this. The overall position is fluid as demonstrated by the fact that, since receiving this letter, the Scottish Government has also referred to SCoSS draft regulations on child winter heating assistance.

## **Theme 2: Reflecting case law**

The Committee may wish to raise the following issues under Theme 2:

6. The challenges involved in incorporating case law decisions into legislation
7. Whether the Scottish Government needs to go further in incorporating existing case law into CDP, and if so whether there are particular decisions that need to be included
8. The importance of clear, published guidance and when SCoSS might expect such guidance to be available prior to the launch of CDP
9. Whether tribunals' discretion whether to follow England and Wales caselaw introduces a greater level of uncertainty to Scottish social security compared to DWP benefits
10. Whether there is a similar need to incorporate caselaw for disability assistance for working age people

### **SCoSS response**

SCoSS acknowledges the difficulties in incorporating legal principles from DLA case law into CDP regulations, given the volume and complexity of existing case law. Despite that, we are clear that doing so is important to avoid losing decades of lived experience that has informed the practical application of the law. While CDP regulations have incorporated principles from some milestone cases, we considered that drafting in some places did not adequately reflect the case law, and that it was not clear to us on what basis case law was or was not considered for inclusion. For that reason, SCoSS considers that the Scottish Government, in discussion with relevant practitioners and stakeholders, should give more consideration to how case law should be incorporated into all new forms of devolved disability assistance (and if it is not incorporated, this should be made clear). To have the maximum practical benefit, this review would ideally take place before any further draft regulations are developed. The Committee may wish to ask the Scottish Government whether there is any capacity to undertake a review now, given that COVID-19 has led to a reconsideration of the social security programme.

If the Scottish Government does not intend to undertake such a review, it will be up to tribunals in Scotland to decide whether and how case law, old and new, from DLA applies to CDP. Similarly it will be up to tribunals elsewhere in the UK to decide whether and how new case law on CDP applies to DLA.

The issue of case law is also relevant to Social Security Scotland staff, who will need clear guidance to be able to make consistent decisions, as promised in the Charter. This guidance would ideally be ready in time to train staff ahead of taking the first applications for disability assistance (albeit that the guidance would be expected to evolve over time in response to significant tribunal decisions as they emerge). In line with Charter principles of openness and transparency, SCoSS would also expect this guidance to be publicly available, ideally in time for advice and support agencies to get ready to support individuals before each new form of disability assistance goes live.

The introduction of any new social security benefit inevitably creates a degree of uncertainty around how the law as stated in the Regulations will translate into practice. It will take time to see how tribunals apply the law. The fact that separate, similar, but not identical, provision will exist in Scotland and England/Wales is part of this picture, but this is nothing new for the UK social security system or legal system. In multiple areas of law, where the legislation for the two jurisdictions is similar, courts and tribunals in Northern Ireland treat decisions in England and Wales as strongly persuasive, although not strictly binding (and vice versa), and it can be anticipated that the same will apply here. How closely tribunals in Scotland adhere to interpretations of the law by those in England, Wales and Northern Ireland will gradually become clear.

### **Theme 3: Drafting issues**

The Committee may wish to raise the following issues under Theme 3:

11. Whether SCoSS is surprised at the number of drafting and technical issues with these regulations and whether SCoSS has suggestions for avoiding this in future
12. Whether the Scottish Government has underestimated the task required in converting child DLA to CDP
13. Whether the forthcoming Social Security bill should include provision for suspending (rather than ending) disability payments
14. Given the timescales involved, what kind of review of regulations might it be feasible to do before the launch of CDP
15. With the number of changes recommended by SCoSS, whether SCoSS is comfortable that they will not get to report on a further draft set of regulations

### **SCoSS response**

As with our response to an earlier question, SCoSS cannot comment on whether the Scottish Government ‘underestimated the task required in converting child DLA to CDP’; we do not have information about the Scottish Government’s planning assumptions and whether the extent of drafting issues we identified are attributable to that or to other factors.

That said, the number of drafting and technical issues highlighted in our report indicates the complexity of this task and the value of fully engaging with relevant stakeholders, including those with lived experience, in order to identify and pre-empt such issues from arising. While many of our recommendations did concern technical or drafting issues, it is fair to note that the Scottish Government was made aware of, and was seeking to address, at least some of these issues in advance of our report being published. It will be clear in due course whether the Scottish Government accepts our recommendations.

Notwithstanding the difficulties we have highlighted about the time provided for our scrutiny, we welcome that draft regulations continue to be developed in an iterative manner, with the Scottish Government taking account of our suggestions for improvement. This clearly demonstrates where SCoSS has added value.

As the Committee has noted, recommendation 24 of our report called on the Scottish Government to review the regulations before the launch of CDP. Scottish Government officials have confirmed that this work will progress but that there will be constraints given the current situation.

At this stage, we have not had a formal request from the Scottish Government to report on a further draft set of CDP regulations. Again, however, COVID may have an impact. We have expressed our willingness to produce a supplementary report on Child Disability Payment (and Scottish Child Payment) should the Scottish Government’s approach significantly change from the proposals on which we reported.

Finally, we welcome the Cabinet Secretary’s recent statement to the Committee that she is ‘minded’ to lodge an amendment to the Social Security Administration and Tribunal Membership (Scotland) Bill to allow for the suspension of disability payments.<sup>1</sup> This is in line with our report on the draft CDP regulations (recommendation 22).

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<sup>1</sup> <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12656>

## **Theme 4: Interaction between reserved and devolved systems**

The Committee may wish to raise the following issues under Theme 4:

16. Whether the Scottish Government has fully appreciated the extent of interactions between reserved and devolved systems
17. Whether SCoSS can expand on how and from whom the Scottish Government should seek wider views on this issue, as suggested in Observation 2.

### **SCoSS response**

We expect the Scottish Government to consider fully the possible interactions with the UK social security system in devising devolved forms of assistance. However, it seems possible that some unintended consequences may arise at the delivery stage given the complexities involved in developing the new Scottish system on top of the more established UK system. This may be particularly true of legislation for disability assistance, where the Scottish Government is adopting some aspects of the current UK system, whilst adopting a distinctive approach in other areas. In short, it may not be fair to expect the Scottish Government to anticipate in advance every possible interaction with the UK system. However, it is reasonable to expect the Scottish Government to consult with stakeholders in advance, including front-line welfare rights advisers who may be well-placed to identify practical delivery issues; and to expect the Scottish Government to monitor and respond to any significant challenges as the Scottish system develops. We would also expect the Scottish Government to monitor the cumulative impact of the new devolved benefits, and not simply consider interactions with the UK system on a case-by-case basis. Social Security Scotland should be involved as appropriate.

We consider that the Scottish Government could consult quite widely on the potential consequences of diverging social security systems between Scotland and the rest of the UK. Various stakeholders, including those with lived experience and, perhaps, the Committee itself, will likely have an interest given that this issue may raise a number of important policy and delivery considerations. If the Scottish Government is minded to undertake such a consultation, we suggest that it should focus on the practical consequences for those in receipt of assistance, with the aim of improving the user experience in line with relevant Charter commitments. It is clear from SCoSS's discussions to date that some

stakeholders outwith Scotland would also have an interest in this work. In particular, the Scottish Government may wish to speak to the DWP and the Northern Ireland Department for Communities given their experiences of people transferring through social security systems.

## Theme 5: Application, redetermination and appeal processes

The Committee may wish to raise the following issues under Theme 5:

18. Whether SCOSS has any suggestions for what the minimum amount of information ought to be to start a claim
19. Whether SCOSS considers that, in terms of meeting Charter obligations, appeal rights should at least match those provided in the reserved system
20. Whether SCOSS has any views on the likely behavioural impact of STA,
21. Whether SCOSS has any views on what the “welfare supplementary payment” available in Northern Ireland (see p.24) can tell us about the possible impact of STA

## **SCoSS response**

In terms of the amount of information required to start a claim for CDP, we recommended that this should be the least amount possible: there are clearly evidenced risks that people may fail to make a claim for assistance where processes are overly complex. SCoSS does not have a view on the specific level of information required – we consider that this is an operational issue for the Scottish Government/ Social Security Scotland to determine, taking all relevant factors into account.

On the question of appeal rights, SCoSS considers that the Scottish Government should seek to create a system that works best for applicants in Scotland taking into account relevant commitments made in the Charter. We reiterate our general position, that the Scottish Government should ensure that regulations and processes always contain appeal rights to fully meet Charter expectations.

## Short term assistance (questions 20 and 21)

The welfare supplementary payment for DLA claimants who are refused PIP or receive a reduced award when they transfer to PIP makes good

100% of the lost benefit until any appeal has been concluded. Almost 5,000 people received this payment in 2017-18. Thereafter, where the tribunal confirms there is a reduced (but still some) award, the supplementary payment makes up 75% of the difference for one year. Just over 9,000 people received this payment in 2017-18. This serves the twin purpose of supporting appeals and allowing claimants a period of time to adjust to a lower income; STA will presumably play a similar role.

Ideally, STA should encourage people with an arguable case, who might not otherwise have submitted an appeal, to do so. The risk is that it might prompt a large number of futile or vexatious appeals, which would have resource implications for Social Security Scotland and Tribunals, but the second objective of allowing people a period to prepare for a drop in income would still be achieved. Disability and incapacity benefit appeals in Northern Ireland have a lower success rate than in Great Britain, but the success rate has increased rather than decreased since the introduction of the supplementary payment<sup>2</sup>.

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<sup>2</sup> <https://www.niauditoffice.gov.uk/sites/niao/files/media-files/Welfare%20Reform%20Report%202019.pdf>  
<https://www.bbc.co.uk/news/uk-49891159>

## Theme 6: Monitoring and review

The Committee may wish to raise the following issues under Theme 6:

22. Whether it is important that any monitoring and review plans and findings should be published
23. If not, other ways to ensure transparency of monitoring and review activity

### **SCoSS response**

In general, SCoSS would expect any assessment, monitoring or review undertaken by or with the Scottish Government/ Scottish public bodies to be published (in accessible formats), both for the sake of transparency and to encourage an informed public discussion of how any results and insights generated could lead to an improvement in the system. This would be in keeping with Our Charter's commitment to establish a 'learning system' and to "create a culture of trust by being open and transparent".

We appreciate that there may be instances where the Scottish Government cannot commit to complete transparency, for example, where it is reliant on information provided by the DWP or where sensitive data involving people who are terminally ill are generated. However, we would expect there to be a presumption of openness unless there are clear reasons as to why this could not be achieved.