

Disability Assistance for Children and Young People (Scotland) Regulations

Explanatory Note – October 2020

Introduction

1. The Social Security (Scotland) Act 2018 (the 2018 Act) sets out the broad framework for the delivery of devolved social security in Scotland. The draft Disability Assistance for Children and Young People Regulations 2021 describe the detailed entitlement and administrative rules for delivery of this form of Disability Assistance (now known as Child Disability Payment).

Key Policy Divergence from DLAC

2. As part of the process of devolution, the Scottish Government will deliver CDP which will replace DLAC in Scotland. There are a number of key areas of policy divergence from the existing DLAC system including:

- the extension of the entitlement age from 16 to 18, where a young person is in receipt of CDP immediately prior to their 16th birthday, as we recognise age 16 is a key transition point in a young person's life;
- the introduction of Short-Term Assistance (STA), a new form of assistance that ensures that clients can continue to receive their previous payment amount, where an award is reduced or stopped, until the conclusion of any challenge of the decision to reduce or stop the award;
- extending the time limit for requesting a re-determination of a decision to 42 calendar days, to allow individuals time to access support with the re-determination process;
- if Social Security Scotland does not complete a re-determination within 56 calendar days, the individual may appeal against a decision directly to the First-Tier Tribunal for Scotland, reducing the uncertainty and delays associated with the equivalent process for DLAC; and
- the implementation of a new definition of terminal illness, removing the existing requirement that a person must reasonably be expected to die within 6 months and placing greater emphasis on the advice of doctors and registered nurses involved in the child or young person's care.

3. In addition to these areas of significant policy divergence from the existing DLAC benefit, there are a range of proposed operational and administrative measures that will ensure that DACYP is delivered in a way that is consistent with the values of Social Security in Scotland. These include:

- the provision of a range of application channels which clients can select based on preference including online, paper applications and face to face;
- the delivery of a local delivery service that will provide support and information to clients and stakeholders at a local level; and
- that the decision making process is holistic and considers each client's individual circumstances.

Current Draft Regulations

4. The draft regulations that this paper accompanies are provided to the Scottish Commission on Social Security (SCoSS) to discharge the duty placed on Scottish Ministers under section 97 of the 2018 Act to send policy proposals to SCoSS in the form of draft regulations.

Explanatory Notes

Part 1: Introductory and Interpretation

5. **Regulation 2** sets out the interpretation, for the purposes of the CDP regulations, key terms used in the regulations. Definitions of specific terms from DLA case law have been added here to ensure that existing DLA case law is reflected in the interpretation of specific phrases. These include the addition of interpretation of the use of the phrase, 'attention' and 'bodily function.' Other terms and phrases have been defined specifically in later provisions, generally within the regulation the term or phrase is used.

Part 2: Disability Assistance for Children and Young People

6. **Regulation 3** provides an overview of the eligibility rules for this form of assistance, which comprise:

- the requirement to be a child or young person;
- meeting the residence and presence conditions;
- the care component criteria; and
- the mobility component criteria.

7. An individual may be entitled to the care component, the mobility component, or both.

8. An individual is not entitled to CDP if they are entitled to Disability Living Allowance for children (DLAC), Personal Independence Payment (PIP) or Armed Forces Independence Payment (AFIP). An individual is also not entitled to CDP if they are entitled to Disability Assistance for Working Age People.

Part 3: Eligibility

Residency and Presence

9. **Regulation 4** sets out the entitlement rules relating to residing in Scotland and the exceptions to the residency tests. The residence and presence rules require that individuals must:

- be ordinarily resident in Scotland;
- be habitually resident in the Common Travel Area (comprising the United Kingdom, Ireland, the Isle of Man, and the Channel Islands);
- not be subject to immigration control; and

- have been present in the United Kingdom for a prescribed number of weeks as described by paragraphs (2)(a), (b) and (c), depending on the age of the child (the 'past presence' test).

10. A number of children in receipt of CDP are likely to live with parents or step-parents who do not meet the residency test set out in above because their parent or step-parent is:

- a serving member of the UK armed forces;
- a civil servant.

11. In these circumstances, an individual is treated as meeting the requirements to be ordinarily resident in Scotland, habitually resident in the Common Travel Area, and having met the 'past presence' test, provided the individual can demonstrate a genuine and sufficient link to Scotland.

12. An individual may also be treated as meeting the 'past presence' test where that individual is outside of the United Kingdom in their capacity as an airman (this term is used in the legal sense and is applies in a gender-neutral context) or mariner, or is in employment in connection with continental shelf operations, provided that the individual can demonstrated a genuine and sufficient link to Scotland.

13. Paragraph (5) provides that where an individual does not meet the 'past presence' test on the date the application is received, but will meet it within three months of the date the application is received, the individual may be treated as entitled to CDP from the date when the individual will meet the test.

14. Paragraph (7) provides that an individual may remain entitled to CDP where they are temporarily absent from the United Kingdom for the first 13 weeks of that absence, for any reason.

15. This paragraph also provides that an individual may remain entitled to CDP where they are absent from the United Kingdom for the first 26 weeks of that absence, and where the absence is solely in connection with arrangements made for medical treatment of a disease or disability which commenced before the client leaves UK.

16. Paragraph (8) defines a 'temporary absence' as one that is not expected to last more than 52 weeks at the beginning of that absence.

17. Paragraph (9) provides that individuals who meet the definition of being terminally ill, as set out in regulation 9, and individuals who have been granted refugee status or humanitarian protection are also exempted from the 'past presence' test.

18. Paragraph (11) disapplies the residence and presence conditions where the individual is ordinarily resident in Scotland and habitually resident in the UK, provided that a relevant EU regulation applies, and the individual can demonstrate a genuine and sufficient link to Scotland.

19. Paragraph (12) disapplies the residence and presence conditions where the individual is habitually resident in an EEA state or Switzerland, provided that a relevant EU regulation applies, and the individual can demonstrate a genuine and sufficient link to Scotland.

Care Component

20. **Regulation 5** sets out the entitlement rules for the care component of the benefit, paid to clients who require support from another person in relation to either personal care, prompting or motivation in relation to bodily functions, or the presence of another person to ensure their safety or assistance with communication needs.

21. The care component is provided at three different levels: lowest rate, middle rate and highest rate depending on what level of needs the client has. The purpose of the care component is to provide financial assistance to mitigate some of the costs that disabled people, and those with long-term conditions, incur in meeting their care needs.

22. Paragraph (1) provides that an individual must satisfy at least one of the following conditions to be entitled to the care component, in that they must:

- require attention for a significant portion of the day (either for a single period, or several periods);
- be unable to make a cooked main meal if provided with the ingredients (only applicable to clients who are 16 or older);
- require frequent attention throughout the day or continual supervision throughout the day in order to avoid substantial danger to the individual or others;
- require prolonged or repeated attention at night; or
- require another person to be awake for a prolonged period or frequent intervals to avoid substantial danger to the individual or others.

23. Paragraph (2) describes how these conditions are only taken to be satisfied where the individual requires attention or supervision that is substantially in excess of the usual requirements someone their age might require. Alternatively, the individual must require attention or supervision that a younger person might be expected to require, but which someone of the individual's age would not be expected to have.

24. These requirements do not apply in respect of any period after the client reaches age 16.

25. Paragraph (3) sets out that an individual must have met one of the conditions in paragraph (1) for a period of 13 weeks immediately before the date on which an award of the care component would begin (the 'qualifying period'). This paragraph also provides the individual must be likely to satisfy those requirements throughout the period of 26 weeks beginning from that date (the 'prospective test'). This does not apply to a client who is applying for CDP under the special rules for terminal illness (see paragraph (4)).

26. Paragraph (5) sets out an exclusion to both the qualifying period and the prospective test for individuals who have made an application shortly in advance of turning 16. This exclusion ensures that people approaching the age of 16 are not excluded from the benefit because they cannot meet the prospective test because a portion of it falls after their 16th birthday.

27. Paragraph (6) sets out the entitlement rules for the different rates of the care component. Individuals will be entitled to:

- the highest rate of the care component if the person requires attention or supervision, both during the day and at night;
- the middle rate of the care component if the person requires attention or supervision, either during the day or at night, but not both; and
- the lowest rate in any other eligible case.

28. Paragraph (7) provides a definition of 'day' and 'night,' reflecting existing DLA case law. The test is subjective and it is intended that 'night' should be assessed in relation to when the parent or primary carer usually goes to bed.

29. Paragraph (8) defines 'supervision,' reflecting DLA case law, as meaning the presence of another person to monitor the client's physical, mental or emotional health, including monitoring for obstacles, dangerous places, or situations.

30. Paragraph (9) defines 'require,' reflecting existing DLA case law. It is intended to be a subjective test, and is defined by what is reasonable in the individual client's circumstances.

Mobility Component

31. The mobility component is paid at one of two rates depending on what level of needs a client has: lower or higher rate. The mobility component is paid to clients to provide some mitigation of the additional costs they incur as a result of requiring support with their mobility needs.

32. **Regulation 6** sets out the entitlement rules for the lower rate mobility component, paid to individuals who require guidance or supervision from another person most of the time when moving around outdoors.

33. Paragraph (1) describes the broad entitlement criteria for the component as well as the age restriction that it can only be paid to individuals from the age of 5 years old.

34. Paragraph (2) sets out that to qualify for the component, the guidance or supervision required must either be:

- substantially in excess of the usual requirements of a person of the same age; or
- of the type that young persons in usual physical and mental health or non-disabled may also need, but someone of the individual's age in usual physical and mental health or non-disabled would not need.

35. Paragraph (3) sets out an exclusion to both the qualifying period and the prospective test for individuals who have made an application shortly in advance of turning 16. This exclusion ensures that people approaching the age of 16 are not excluded from the benefit because they cannot meet the prospective test because a portion of it falls after their 16th birthday.

36. Paragraph (4) sets out that, in considering whether the individual requires guidance and supervision, no consideration should be given to routes or journeys that the individual is familiar with and where they may not require guidance or supervision.

37. Paragraphs (5) and (6) read together have the effect that a client will not be entitled to the lower rate of the mobility component where they cannot move around outdoors because of fear and anxiety, unless the fear and anxiety is a symptom of a mental health condition, and so severe as to prevent the individual from moving around outdoors.

38. Paragraph (7) sets out that an individual must have met the condition in paragraph (1) for a period of 13 weeks immediately before the date on which an award of the lower rate of the mobility component would begin. This paragraph also provides the individual must be likely to satisfy that requirement throughout the period of 26 weeks beginning from that date.

39. Paragraph (8) defines 'guidance', to reflect existing DLA case law.

40. **Regulation 7** sets out the entitlement criteria for the higher rate mobility component.

41. Paragraph (1) describes how only people aged 3 or over can qualify for the higher rate mobility component because, for all children under 3, it is expected that significant support will be required in relation to mobility.

42. To qualify for the higher rate mobility component, individuals must meet at least one of the following conditions, that:

- they are unable to walk as a result of a physical disability;
- they are virtually unable to walk as a result of a physical disability when speed, time taken, manner of walking and ability to cover distance, including how far without experiencing severe discomfort, are considered;
- the exertion required to walk would lead to a danger to the individual's life;
- they have no legs or no feet (regardless of the use of artificial limbs);
- they have a severe visual disability;
- they are blind and deaf; and
- they have a severe learning disability, autism or other cognitive disability, and are entitled to the highest rate of the care component of CDP.

43. Paragraph (3) ensures that where someone has no legs and feet, they are not prevented from meeting the eligibility criteria for the higher rate mobility component because they usually use artificial limbs or other aids to walk.

44. Paragraph (4) defines a 'severe visual impairment', in relation to meeting the Visual Impairment Network for Children and Young People (VINCYP) criteria and being unable to mobilise safely without the help or supervision of another person.

45. Paragraph (5) defines the term 'blind and deaf.'

46. Paragraph (6) defines 'severe mental impairment' in relation to the entitlement criteria.

47. Note that the legal terminology used is different from the social model of disability, and is expressed differently to ensure consistency with the eligibility criteria for DLAC. The Scottish Government intends to undertake a longer term review of how the CDP regulations set out entitlement rules for clients as part of the policy evaluation process. We will also provide guidance to case managers, as part of the decision making guidance, to ensure that this test is interpreted in a way consistent with the values of social security.

48. Paragraph (7) defines 'severe behavioural difficulties' in relation to the entitlement criteria as an individual exhibiting behaviour which:

- is extreme;
- requires another person to intervene and physically restrain the individual, or undertake another intervention as described by their positive behavioural support plan, to prevent injury to themselves or others or damage to property; and
- is so unpredictable that the person requires another person to be awake during the night to provide support if required.

49. Paragraph (8) defines a range of terms including 'visual impairment' within the meaning of the Visual Impairment Network for Children and Young People definition, as meeting one or more of the following conditions:

- best corrected visual assessment, both eyes open 0.500 or worse;
- visual field loss, both eyes open, which significantly affects function;
- any eye movement disorder which significantly affects function;
- any form of cognitive visual dysfunction due to disorders of the brain which can be demonstrated to significantly affect function; or
- N18 print or larger required for comfortable reading.

50. Paragraph (9) sets out that an individual must have met one of the conditions in paragraph (1) for a period of 13 weeks immediately before the date on which an award of the higher rate mobility component would begin. This paragraph also provides the individual must be likely to satisfy those requirements throughout the period of 26 weeks beginning from that date.

51. **Regulation 8** sets out an exclusion relating to both mobility components, that a person in a coma or a person who cannot be moved safely because of their condition are not entitled to either level of mobility component.

Part 4: Entitlement Under Special Rules for Terminal Illness (SRTI) and when undergoing dialysis

Terminal Illness

52. CDP, as the first form of devolved disability assistance to be delivered by the Scottish Government, will introduce the first payments to people with a terminal illness who will be entitled under the terminal illness provisions as set out in the 2018 Act.

53. **Regulation 9** sets out that individuals under the age of 18 who meet the definition of having a terminal illness in the 2018 Act are entitled to the highest rate of the care component of CDP and, from their third birthday, the higher rate mobility component.

54. Paragraph (2) sets out the exclusion that individuals who meet the definition of having a terminal illness in the 2018 Act do not need to have had their health condition for at least 13 weeks, as required in the entitlement rules for each component, and will be entitled regardless of time spent in a hospital or hospice while in receipt of assistance.

55. Paragraph (3) sets out that, subject to paragraphs (4) and (5) people who meet the definition of having a terminal illness, as defined in the 2018 Act, are entitled to CDP from the date at which a medical practitioner makes a judgement that they meet the definition, or the date of receipt of the client's application for CDP (whichever is earlier).

56. Paragraph (4) provides that if a judgement mentioned in paragraph (3) is dated up to 26 weeks prior to the date the client's application is received, entitlement can only begin up to a maximum of 26 weeks before the date the application is received. This paragraph also sets out that entitlement cannot begin under these provisions before these regulations come into effect.

57. Paragraph (5) states that if the judgement mentioned in paragraph (3) is dated more than 26 weeks prior to the date the client's application is received, and an appropriate healthcare professional confirms that judgement is still accurate, entitlement can only begin up to a maximum of 26 weeks before the date the application is received. This paragraph also sets out that entitlement cannot begin under these provisions before these regulations come into effect.

58. Paragraph (6) provides that a child has a terminal illness if an appropriate healthcare professional confirms that the child has a progressive disease that can reasonably be expected to cause the child's death.

59. Paragraph (7) sets out the requirement that in exercising the judgment that a person is terminally ill, for the purpose of entitlement to CDP, appropriate healthcare professionals must take account of guidance prepared and made publically available by the Chief Medical Officer of the Scottish Administration.

60. Paragraph (8) sets out that an appropriate healthcare professional need not take account of the guidance set out at paragraph (7) where it is not reasonable to do so, and where the individual is not resident in Scotland.

61. Paragraph (9) defines who can act as an ‘appropriate healthcare professional’. This may be a registered medical practitioner (doctor) or a registered nurse, who is involved in the diagnosis or care of the patient, and acting in their professional capacity.

Entitlement to care component when undergoing dialysis

62. Children and young people undergoing dialysis at least twice a week will be entitled to receive the relevant level of the care component, recognising the additional support and care they require to undergo this form of treatment, or help required during treatment.

63. The dialysis must be of a type that usually requires the attendance or supervision of another person, even if only minimally, or due to the individual’s health condition or disability, they require attention in connection with the bodily functions, or supervision to avoid substantial danger.

64. The definition of dialysis would include, for example, intermittent peritoneal dialysis and haemodialysis, and is intended to simplify the criteria.

65. **Regulation 10** sets out entitlement criteria for individuals undergoing dialysis, that where the individual undergoes dialysis:

- either by day or by night, they are entitled to the middle rate care component;
or
- both by day and by night, they are entitled to the highest rate care component.

Part 5: Effect of Admission to a care home, residential educational establishment and in legal detention

Effect of admission to a care home or residential educational establishment on ongoing entitlement to the care component

66. **Regulation 11** sets out how admission to a care home or residential educational establishment impacts the ongoing payment of the care component. Where a care home or residential educational establishment is publicly funded, the care needs of the individual are met by public funds and payment of CDP would create a duplication of public funding.

67. Paragraph (2) sets out that an individual will be paid £0.00 in respect of the care component of CDP on the day after they have been resident in either a care home or in a residential education placement for 28 days.

68. Paragraph (3) sets out that the 28 day period may consist of consecutive days or may be made up of two or more periods, provided there is no more than 28 days in between each period. Where there is a break of more than 28 days between two periods of residence in a care home or residential educational establishment, the 28 day period is reset and starts again.

69. Paragraph (4) sets out exclusions from the 28 day rule where the care home or residential educational services are paid:

- entirely from the funds of the individual to whom the services are provided;
- partly out of the resources of the individual for whom the services are provided and partly out of the resources of another person (other than a local authority) or from a charity; or
- entirely out of the resources of another person (other than a local authority) or from a charity.

70. Paragraph (5) sets out a number of exceptions to the definition of being resident in a care home or residential educational establishment and, therefore, situations where the individual will continue to be entitled to the care component:

- where the individual has been placed temporarily in private dwelling with a family or other while under the age of 16 or, where aged 16 to 18 is receiving services specified by the Child (Scotland) Act 1995 sections 93(4)(a)(ii) or 93(4)(a)(iii);
- where the individual is accommodated in a care home or residential educational establishment outside the United Kingdom, where the costs of that service are met by a local authority exercising powers under section 25 of the Education (Additional Support for Learning)(Scotland) Act 2004.

71. Paragraph (6) defines terms specific to this regulation including:

- 'qualifying services' are defined as accommodation, board and personal care;
- 'looked after by a local authority' is to be interpreted in accordance with section 17(6) of the Children (Scotland) Act 1995, section 105(4) of the Children Act 1989 or article 25 of the Children (Northern Ireland) Order 1995.

Calculation of periods of time spent in a care home or a residential educational establishment

72. **Regulation 12** describes how periods of time spent in a care home or residential educational establishment are to be calculated for the purpose of making a determination of entitlement to CDP.

73. Paragraph (1) sets out that, for the purpose of calculating the 28 day period, both the day that someone enters a care home or residential educational establishment and the day that they leave that accommodation are not to be counted as part of the calculation.

74. Paragraph (2) sets out that where an individual takes leave from a care home or residential educational establishment, both the day that the individual leaves and the day the individual returns to the accommodation are not to be counted as days resident in that form of accommodation.

75. Paragraph (3) sets out that where an individual enters or returns to a care home or residential educational establishment either by transferring from another care home or residential educational establishment, the day of transfer is counted as a day of residence in a care home or residential educational establishment.

Effect of legal detention on entitlement to care component of CDP

76. **Regulation 13** covers the impact of detention in legal custody on the care component of the benefit. Under existing DLA regulations, where a child or young person is detained in legal custody, their entitlement to both the mobility and care components of the benefit ceases. Under CDP, children and young people detained in legal custody will continue to be entitled to the mobility component.

77. Paragraph (2) sets out that an individual will be paid £0.00 in respect of the care component of CDP the day after the individual has been detained for 28 days in legal custody. This period is taken to have begun on the day after the day the individual was initially detained.

78. Paragraph (3) provides that the period of 28 days referred to in paragraph (2) may consist of two or more periods, provided they are separated by no more than 28 days between each period.

Entitlement beginning while resident in a care home or residential educational establishment

79. **Regulation 14** relates to applications made where the client is applying whilst resident in a care home or other residential educational establishment.

80. Paragraph (2) sets out that where an application for CDP is treated as made on a date whilst the individual is resident in a care home or residential educational establishment, entitlement to the care component is taken to begin on the day after the individual leaves the care home or residential educational establishment.

81. Paragraph (3) sets out that this regulation does not apply where any of the costs of any qualifying services are met:

- entirely from the funds of the individual to whom the services are provided;
- partly out of the resources of the individual for whom the services are provided and partly out of the resources of another person (other than a local authority) or from a charity; or
- entirely out of the resources of another person (other than a local authority) or from a charity.

82. Paragraph (4) sets out a number of exceptions to the definition of being resident in a care home or residential educational establishment and, therefore, situations where the individual will continue to be entitled to the care component:

- where the individual has been placed temporarily in private dwelling with a family or other while under the age of 16 or, where aged 16 to 18 is receiving services specified by the Child (Scotland) Act 1995 sections 93(4)(a)(ii) or 93(4)(a)(iii);
- where the individual is accommodated in a care home or residential educational establishment outside the United Kingdom where the costs of that service are met by a local authority exercising powers under section 25 of the Education (Additional Support for Learning)(Scotland) Act 2004.

Entitlement to the care component of CDP while on leave from a care home or residential educational establishment

Regulation 15 has been drafted to ensure that where an individual's payment of the care component of CDP has been set as £0.00 as a result of being in a care home or residential educational establishment for more than 28 days, there is a suitable mechanism to enable them to access assistance when they are on leave from that accommodation at the previous rate of assistance.

Entitlement to care component of CDP while an inpatient

83. **Regulation 16** sets out that periods where a person is an in-patient in a hospice or hospital have no effect on entitlement to the care component of CDP.

Part 6: Short-Term Assistance (STA)

84. The 2018 Act introduced provision for Short-Term Assistance, a new form of assistance that will be paid to clients who have their principle form of assistance reduced or stopped and are undergoing either a re-determination or appeal of that decision.

85. Short-Term Assistance will pay individuals the difference between their previous benefit award and their current entitlement, whilst a challenge is undertaken. This assistance will be non-recoverable, regardless of the final outcome of the client's re-determination or appeal.

86. **Regulation 17** refers to **Part 1 of Schedule 1**, which makes provision for STA.

87. **Paragraph 1(1)** sets out the entitlement rules for Short-Term Assistance where an application is received from a client:

- where a determination of entitlement in respect of the individual has been superseded by a subsequent determination which has the effect that the individual is no longer entitled to CDP or is entitled to less of either component of CDP; and

- the superseding determination is under review either by a redetermination or an appeal; and
- the individual continues to meet residence and presence requirements or has transferred to another part of the United Kingdom and is currently in receipt of CDP as part of a cross-border payment having moved not more than 13 weeks prior from Scotland to the rest of the United Kingdom.

88. **Paragraph 1(2)** sets out that an individual is not entitled to short-term assistance where they are no longer entitled to CDP as a result of a determination that was made:

- because the individual has died; or
- where Social Security Scotland is informed by DWP that an earlier award of DLA was, on balance of probability, mad as a result of the commission of an offence under the Social Security Administration Act 1992.

89. **Paragraph 1(3)** sets out that an individual is not entitled to short-term assistance in respect of changes to the level of payment of the care component under regulations 11(2) or 13(2).

90. **Paragraph 1(4)** sets out that an individual must make an application for short-term assistance.

91. **Paragraph 1(5)** sets out that entitlement to short-term assistance begins on the earlier of the following dates:

- the day that a request for a redetermination is made;
- the day a notice of appeal is accepted;
- the day a decision is made by Social Security Scotland not to accept a request for a redetermination is set aside by the First-Tier Tribunal for Scotland; or
- the day that a request is made for permission to appeal.

Value and Form

92. **Paragraph 2** sets out the value of Short-Term Assistance as being the difference between the level of assistance paid under the earlier determination and the level paid under the determination which is superseded. The reference to 'level,' refers to the total sum of both mobility and care components, rather than individual components.

93. **Paragraph 2(2)** provides that the form in which Short-Term Assistance is given must be the same as that given under the previous determination.

End of Entitlement

94. **Paragraph 3(1)** sets out that entitlement to short-term assistance ends on the day a redetermination is concluded, on the day the First-Tier Tribunal for Scotland concludes an appeal of the determination or on the day that the First-Tier Tribunal for Scotland makes a decision to refuse permission to bring an appeal.

95. **Paragraph 4** sets out that where a further determination is made that increases the level of assistance the person receives, in relation to a period in which the client received Short-Term Assistance, any arrears payable relating to this assistance will be reduced by the amount of Short-Term Assistance they have already received.

Part 7: Making of applications and payments and duration of eligibility

Age Criteria

96. **Regulation 18** sets out that, subject to exceptions for clients applying under terminal illness rules and clients undergoing dialysis, CDP may be paid to individuals aged 3 months to 18 years.

97. Paragraph (2) sets out that where an individual's entitlement to DAWAP is yet to be determined the person may continue to receive CDP until the earlier of:

- their entitlement to DAWAP is determined; or
- their 19th birthday.

98. Paragraph (3) sets out that the age limit of 19 in the previous paragraph does not apply where the client receives assistance under SRTI rules.

99. Paragraph (4) sets out that CDP may only be paid in respect of an individual who is under the age of 16 on the day on which entitlement is taken to have begun.

100. Paragraph (5) sets out how paragraph (4) applies when a person was born during a leap year.

Making Payments

101. **Regulation 19** sets out rules relating to the making of payments.

102. Paragraph (1) sets out that where CDP is paid in respect of an individual, the Social Security Scotland may pay someone else (where appropriate) and the payment is to be used for the benefit of the client.

103. Paragraph (2) provides that if it is no longer appropriate to continue to pay a person under paragraph (1), Social Security Scotland may cease paying it to that person and pay it instead to another person.

When an application is to be treated as made and beginning of entitlement to assistance

104. **Regulation 20** sets out that Scottish Ministers may treat an application as having been made on a date that is different to the date it was actually submitted or completed. This regulation ensures that in specified situations, the day entitlement begins may be different from the day when the application was completed.

105. This is important to ensure that, for instance, applications made in advance of meeting certain criteria are determined with an entitlement date set on the date those criteria will be met, rather than making a determination that the client is not entitled and requiring them to make a new application for assistance at a later date.

106. Paragraph (2) sets out that where an application is made from a client who does not meet the qualifying period that they must have had the relevant needs for a period of 13 weeks, a determination may be made on the basis that entitlement begins from the date when the qualifying period criteria would be met.

107. Paragraph (4) sets out that the day of entitlement will begin on the date that the initial registration is completed online, or over the phone, to make an application. The application must be completed within 6 weeks of that date. The Scottish Ministers will publish guidance as to what the minimum level of information is required in order to commence this process, and this will be publically available as part of the application process.

108. Paragraph (5) sets out that where an application is completed after the 6 week period has passed, the application is treated as being made on the day it is completed.

109. Paragraph (6) provides discretion to extend the 6 week period described above in cases where there is good reason for making the application later than the 6 week period.

110. Paragraph (7) provides that where an individual in legal detention makes an application for CDP, the application is to be treated as made on the day after the individual leaves legal detention.

111. The 2018 Act sets out the framework for assistance as paid to individuals in respect of either an event or a period. For CDP, applications are made in respect of a period, which paragraph (8) defines.

112. Generally, the period begins on the day the application is treated as having been made, and ending on the day the determination is made.

113. Where the application is made in advance of the client meeting the requirements in relation to regulation 5(3), 6(5), 7(10) or 22, the application period is deemed to begin on the day before the determination is made, and ends on the day on which the determination is made.

Time of Payment

114. **Regulation 21** sets out that CDP will be paid 4-weekly in arrears or, for clients applying under special rules for terminal illness, weekly in advance.

Continuing Eligibility

115. **Regulation 22** sets out that entitlement to CDP is made on the basis that the individual has ongoing entitlement to assistance.

116. Such a determination can be cancelled under s. 26 of the Social Security (Scotland) Act 2018 (i.e. an individual's right to stop receiving assistance). This allows an individual to voluntarily relinquish their entitlement to CDP.

Part 8: Re-consideration of entitlement to CDP: determination without application

117. Section 52 of the 2018 Act provides Scottish Ministers with powers to prescribe in regulations situations where they may make a determination of entitlement without having received an application. This function allows determinations to be made in a number of situations including:

- as part of the review process;
- where a client notifies a change of circumstances;
- where an earlier determination should be superseded; or
- where a client wishes to voluntarily relinquish their award.

Consideration of entitlement after specified period

118. **Regulation 23** describes the review process for CDP. It is intended that clients will be provided with a review date with each determination but that their entitlement is taken to be on-going, subject to meeting the eligibility criteria on an ongoing basis. If a review identifies a change in entitlement, a determination without application will be used to effect the change.

Other situations requiring a determination without an application

119. **Regulation 24** implements a framework for making determinations without application, under s. 52 of the Social Security (Scotland) Act 2018.

120. Paragraph (1) sets out the situations in which a determination without application must be made in relation to an individual's assistance, including:-

- (a) if, during the period specified in the individual's determination of entitlement, Scottish Ministers become aware:
- of a change of circumstances which could possibly result in a change in the level of CDP paid to the individual;
 - that the individual has died;
 - that a determination about the individual's entitlement was made in ignorance of, or by mistake as to a material fact which existed at the time the determination was made;
 - of an alteration of the level of Disability Living Allowance which an individual was in receipt of immediately before transferring to Scotland in accordance with **regulation 33**;
 - that a person has been admitted to a care home or residential educational establishment for a period of 28 days or more, that the individual is in legal detention, or that the individual has a liability to Scottish Ministers for assistance given in error;

- that an application is received that is not in the required form, as set out in guidance; or
 - are notified that the individual has left a care home or residential educational establishment permanently.
- (b) Scottish Ministers are informed that an individual in respect of whom Child Disability Payment is payable, has transferred from another part of the United Kingdom to Scotland, and is in receipt of Disability Living Allowance, or from Scotland to another part of the United Kingdom;
- (c) entitlement is altered as a result of a change of eligibility criteria for Child Disability Payment; or
- (d) the Upper Tribunal for Scotland, the Court of Session, the Supreme Court or the Court of Justice of the European Union has decided that an error on a point of law has been made.

121. Paragraph (2) sets out that the preceding paragraphs only apply where Social Security Scotland has previously made a determination of the individual's entitlement to CDP.

Determination following official error

122. **Regulation 25** sets out that Scottish Ministers must make a determination without application where they have previously made a determination of entitlement, and they establish that due to an error made by the Scottish Ministers (or a Minister of the Crown), that the individual was given an award that was lower than it should have been or no award at all when they should have been.

123. **Regulation 26** sets out that Scottish Ministers must make a determination without application where they have previously made a determination of entitlement, and they establish that due to an error made by the Scottish Ministers (or a Minister of the Crown), that the individual was given an award that was higher than it should have been, or should not have been given an award at all.

124. The error must not have been materially contributed to by anyone else, or it must have either been made on the basis of incorrect information, or an assumption which proves to be wrong.

When changes of entitlement take effect

125. **Regulation 27** describes the point in time at which determinations made as a result of a determination without application are applied in a range of scenarios.

126. Paragraph (1) sets out that where a determination without application is made:

- as a result of a change in the law, the change of entitlement takes effect from the date the relevant provisions are in force;

- in the case of an increase in the rate of award of Disability Living Allowance that the individual received at the point of transferring to Scotland as part of a cross-border move, using the date of the individual's first determination to assistance as part of that transfer;
- in the case of a determination without application under reg. 25(1)(a), entitlement begins on the day when:
 - Scottish Ministers make the determination;
 - where the individual reports the change within one month of the change occurring, such that the individual qualifies for a higher rate of the care or mobility component; or
 - where the individual reports the change after one month but before 13 months, on the date when the individual reports the change; or
- in the case of an earlier incorrect determination as a result of official error or made in ignorance of, or mistake as to a material fact, using the date of the earlier determination.

127. Paragraph (2) sets out that where the Scottish Ministers consider it would be unjust not to do so, they may set an earlier date under paragraph (1), except where the change has resulted from a change in the law. This is consistent with the principle that the law is generally not intended to have retrospective effect.

128. Paragraph (3) sets out that where the amount of CDP payable is decreased, or entitlement ceases, the change in entitlement begins on the date of the determination. In the case of a change in the law, the change takes effect from the date on which the change comes into force.

129. Paragraph (4) sets out that regulation 28 is subject to regulation 29 that relates to when clients are expected to notify a change of circumstances.

Timing of notification of change in circumstances

130. **Regulation 28** sets out the date of the change in entitlement where a client fails to notify a change of circumstances as at the point the change takes effect.

131. Paragraph (1) sets out that where it is a change that increases the level of entitlement, the determination is made on the date that the client notified the change. Where a change decreases the level of entitlement, or results in entitlement ceasing, the date of determination will be the date that Scottish Ministers consider that notification would have been received if the client had notified at the point the change took effect.

132. Paragraph (2) provides discretion for both scenarios above, where the date of determination should be different to those specified because the client had good cause for not notifying at the point the changes took effect.

Part 9: Procedural Matters

Periods in respect of a re-determination request

133. **Regulation 29** prescribes the period for requesting a re-determination of entitlement as 42 days, starting from the day after Scottish Ministers make a determination of entitlement.

134. Paragraph (2) prescribes the period for Scottish Ministers to make a re-determination of entitlement as 56 days, beginning with the day Scottish Ministers receive the request for a re-determination.

Part 10: Assistance to be given

Amount and form of CDP

135. **Regulation 30** provides the component rates and levels for CDP as well as for payment to be made on a daily basis where a client is temporarily on leave from a care home or residential educational establishment.

136. Paragraph (3) provides that the care component of CDP may be payable at a daily rate when the client is temporarily absent from a care home or residential educational establishment.

137. Paragraphs (4) and (5) provide that any amount of CDP payable to the client may be reduced by any entitlement to Constant Attendance Allowance (and potentially resulting in a payment of £0.00 in respect of the individual).

138. Paragraph (6) provides that where a child or young person dies whilst entitled to CDP, a payment is made equivalent to the weekly rate for the last eight weeks' of the child or young person's life.

Part 11: Provision of vehicles

Payment of mobility component to authorised providers of vehicles for individuals with disabilities

139. The Scottish Government has introduced the Accessible Vehicle and Equipment Scheme (AVE) an accreditation framework that allows accredited providers of accessible cars, scooters and powered wheelchairs to receive the direct transfer of the mobility component of CDP.

140. Where individuals (or someone who has authority to act on their behalf) enter into lease agreements for accessibility vehicles, the mobility component of their CDP award will be transferred directly to the provider to pay for the vehicle lease. These leases will be zero-rated for VAT purposes, will be at significantly lower rates than the mainstream market, and no clients will be required to undergo a credit check to access credit.

141. **Regulation 31** allows for the higher rate mobility component of CDP to be paid to an accredited provider where the client has entered into an agreement for the hire of an accessible vehicle.

142. Paragraph (2) sets out that the transfer of the mobility component should stop if the lease agreement is brought to an end.

143. Paragraph (3) defines an ‘authorised provider of vehicles’ as a supplier of vehicles for disabled people accredited as part of the Scottish Government’s AVE framework.

144. Paragraph (4) allows Short-Term Assistance paid under **Schedule 1** following the loss of entitlement to the higher rate of the mobility component of CDP to be paid on the client’s behalf to an authorised provider. The agreement must have commenced before:

- the date the client’s entitlement was reduced; or
- must have been extended pending an outcome of a redetermination or appeal against that determination.

Part 12: Transfer of claims between Scotland and the rest of the United Kingdom

Individuals in respect of whom Disability Living Allowance is paid in another part of the United Kingdom immediately before transferring to Scotland

145. **Regulation 32** allows for an individual to be paid DLAC for 13 weeks from the date they transfer to Scotland from another part of the United Kingdom. Social Security Scotland will then assume payment of CDP after that time, with equivalent components and levels of entitlement.

146. Paragraph (4) defines the date of transfer as the date that the individual moves within the United Kingdom for the purposes of this regulation and the following regulations, regardless of the date when this is actually notified to Scottish Ministers.

Individuals in respect of whom CDP is paid at the time of transferring to another part of the United Kingdom

147. **Regulation 33** provides for a 13 week ‘run on’ of CDP (and Short-Term Assistance) from the date that a client moves from Scotland to another part of the United Kingdom. The intention is to ensure that, as far as possible, disabled people can move across borders within the United Kingdom without experiencing a break in their disability assistance.

148. The 13-week period is set to ensure that clients have sufficient time to make an application for Disability Living Allowance and receive a determination so that, when the period expires, they will begin receiving Disability Living Allowance, if they have met the entitlement criteria.

149. Paragraph (3) ensures that where a client notifies they are to move to another part of the United Kingdom but subsequently notifies that they are no longer due to move, the earlier notification is treated as not being made.

Part 13: Liability for overpayment

150. **Regulation 34** sets out the rules relating to recovery of overpayments.

151. Paragraph (1) sets out that a determination may be made to make deductions at a reasonable level for a period from payments of CDP, STA, or both.

152. Paragraph (1) also sets out that this applies where the individual has agreed to the deductions and the amount to be deducted, or where they have unreasonably refused to agree to the amount to be deducted.

153. Paragraph (2) clarifies that the legal standard of reasonableness is subjective, in that it considers the individual's financial circumstances.

154. Paragraph (4) sets out that liability is limited to the difference in value between what was actually paid, and what should have been paid had the error not been made.

155. Paragraph (5) provides that where assistance is given in a form other than money, its value is what giving that assistance cost the Scottish Ministers.

156. Paragraph (6) defines what an error is for the purposes of this regulation.

157. **Regulation 35** describes how Scottish Ministers must make a determination of an individual's entitlement to CDP or STA, or both, where an individual is paid by way of deduction, or has been paid by way of deduction and this may no longer be appropriate.

158. Paragraph (3) sets out that a determination without application may be made to:

- increase or decrease the amount of a deduction;
- amend the length of the period that deductions are to apply; or
- to stop making deductions.

159. Paragraph (4) sets out that a client may:

- withdraw their agreement to deductions;
- request to increase the amount deducted;
- request to decrease the amount deducted; or
- request to amend the length of the period the deductions are to apply.

Part 14: Consequential Amendment

Consequential Amendment

160. **Part 2 of Schedule 1** contains a consequential amendment to the Social Security Contributions and Benefits Act 1992 to amend entitlement rules for Carer's Allowance, for Scottish clients. Responsibility for carer benefits is devolved to Scottish Ministers.

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