

Social Security Committee**SPICe Paper in lieu of evidence session - 3 April 2020****Child Disability Payment****Introduction**

This paper suggests issues that the Committee may wish to raise in writing with Scottish Commission on Social Security (SCOSS) on their report on the Child Disability Payment (CDP).

SCOSS [reported on the CDP](#) on 6 March, making 34 recommendations. The Scottish Government published draft regulations in December and an updated set in February. All references in this paper are to the February draft.

Child Disability Payment overview

CDP will replace [child disability living allowance](#) (cDLA) for new claims from this summer. Existing claimants of cDLA will transfer to Social Security Scotland at some point between this summer and 2025. A more precise timetable has yet to be announced.

The rules for CDP are intended to replicate those for cDLA except for a few policy changes. Like cDLA it will provide:

- A care component payable at lower, middle and higher rates
- A mobility component payable at lower and higher rates

The rates paid will be the same as the DWP rates. As with cDLA, claimants can use their higher rate mobility award to lease a vehicle through motability.

Differences from cDLA are:

- Winter heating payment of £200 for those on the higher rate care component of either CDP or cDLA (regulation 17)
- Short term assistance during a redetermination or appeal against a benefit being reduced or stopped (Part 7: regulations 18 to 21).
- Those getting CDP at their 16th birthday can continue to get it until their 18th birthday
- A different approach to terminal illness, which, under [schedule 5 to the Social Security \(Scotland\) Act 2018](#) will be based on clinical judgement rather than a particular time limit

The SCOSS report also points out that the different legislative framework for Scottish social security means that various issues, particularly around applications, redeterminations, appeals and case law definitions of various terms cannot just be 'cut and paste' from the UK regulations, saying:

“It is not always possible to exactly replicate the DLA provisions for children [SCOSS] “have highlighted areas where we believe there are, nonetheless, material differences which could have unintended consequences” (SCOSS report p.10).

Policy Development

The general approach is 'safe and secure transfer' with minimal policy change.

The Scottish Government [consulted on all three forms of disability assistance from March to May 2019](#), receiving 293 submissions and issuing a [response in October](#). This was not a consultation on detailed proposals, but rather focused on those broad areas where it is proposed to differ from the current DWP rules.

The Scottish Government gathered [views from their experience panels](#), publishing a summary in October 2019.

Draft regulations were provided to SCOSS on 12th December.

[A policy position paper 7 February 2020](#) included a summary of differences between CDP and cDLA.

[Revised regulations](#) were provided to SCOSS and to the Committee in February 2020.

SCOSS [reported](#) on 6 March.

The intention is to launch CDP for new claims this summer.

The following suggests issues to raise with SCOSS:

Theme 1: Consultation and scrutiny

One of the statutory principles for social security is that: “it is designed with the people of Scotland and based on evidence.”¹

As noted above, the broad policy proposals were consulted on from March to May 2019, and a response published in October. Draft regulations were published in December and February.

¹ [Social Security \(Scotland\) Act 2018 s.1\(f\)](#)

While welcoming the ‘fluid and iterative’ engagement with the Scottish Government SCOSS state that:

“the difficulties we experienced in scrutinising these draft regulations were similar to those we faced in considering the Scottish Child Payment. [...] the tight deadline for the Commission to report meant that our ability to consult on the further version of the draft regulations was very restricted.” (SCOSS p.12).

SCOSS refer to the ‘length and complexity’ and ‘very draft nature’ of the disability regulations provided in December and suggest that, in future, the Scottish Government should refer an early set of regulations, for initial consultation, followed by a more complete set for detailed scrutiny.

“The Scottish Government should also ensure that we have sufficient time for undertaking both those stages.” (SCOSS p.13)

After CDP, the next disability benefit to be created is disability assistance for working age people (DAWAP). The regulations are expected to be sent to SCOSS in ‘late summer/early autumn 2020’. These will need the standard 40 day period of Parliamentary consideration and are due to come into force in ‘early 2021.’ The Scottish Fiscal Commission too, are waiting for draft regulations before forecasting spend on DAWAP ([Committee Official Report 27 February 2020](#)).

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 been 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**

Theme 2: Reflecting case law

Although there are detailed regulations for cDLA, important concepts and definitions of key terms have been developed through case law. Some “milestone decisions” have been incorporated into the regulations but for anything else, as SCOSS notes:

“in Scotland, tribunals and courts will decide to what extent, if at all, DLA caselaw from the rest of the UK is binding or persuasive for CDP.” (SCOSS p.28)

SCOSS makes two recommendations on this issue (recommendations 12 and 13).(SCOSS report p.28-29). SCOSS recommends (recommendation 13) that the Scottish Government:

“undertake a thorough review of caselaw and how it is incorporated into legislation. This review should be in time to inform drafting of the very similar legislation for disability assistance for older people.”

The report notes that:

“Social Security Scotland staff deciding entitlement will need clear guidance [...] organisations who will be spreading information and learning about CDP will need access to this guidance.” (SCOSS p.29)

The report makes one specific recommendation, (recommendation 20) asking the Scottish Government to consider whether the formulation “significantly impaired capacity for judgement” adequately reflects the case law.

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

- 1. The challenges involved in incorporating case law decisions into legislation**
- 2. 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**
- 3. The importance of clear, published guidance and when SCOSS might expect such guidance to be available prior to the launch of CDP**
- 4. Whether tribunals’ discretion whether to follow England and Wales caselaw introduces a greater level of uncertainty to Scottish social security compared to DWP benefits**
- 5. Whether there is a similar need to incorporate caselaw for disability assistance for working age people**

Theme 3: Drafting issues

Throughout their report, SCOSS highlight numerous technical and drafting issues with the regulations.

SCOSS has noted in a number of places where the regulations as drafted do not appear to match the policy intent or do not follow the DWP rules. For example SCOSS point out difficulties in relation to the rules on:

- Residence (p.30-31 and recommendation 14)
- mobility component (seven recommendations 15 to 21, p.31 - 35). Areas of concern include:
 - the comparison used to determine that a child has a greater need for supervision
 - children with a visual impairment

- children with severe mental impairment
- children with prosthetic legs
- Entitlement while in a care home or residential school. The policy is that entitlement should be suspended, not ended, when someone is in a care home (or similar) for more than 28 days. However, this is not provided for in the Social Security (Scotland) Act 2018. Suspending payment allows certain passported benefits to continue, whereas ending payment does not. SCOSS note that “one option may be to amend the Act to introduce a power to suspend payments.” (SCOSS p.45-6)
- Various issues relating to:
 - Terminal illness (recommendation 7)
 - Short term assistance (recommendation 10)
 - Child winter heating assistance (recommendation 11)
 - ‘determinations without an application (Recommendation 32)

Example: Residence

The policy intention is to replicate existing cDLA rules on how temporary absence affects entitlement. However, the SCOSS report points out five instances where the residence rules depart from the current cDLA approach.

For example, CDP would require people going abroad on holiday to “demonstrate a genuine and sufficient link to Scotland” rather than, as the DWP rules provide, simply continue payment for up to 13 weeks (SCOSS p.30 - 31).

Example: Mobility component

A large number of issues are identified in relation to the drafting of rules for the mobility component. In summary, the issues identified are:

- Inconsistency between the care and mobility component rules (recommendation 15)
- There is no requirement that mobility needs for lower rate mobility need to relate to an impairment (recommendation 16)
- Some of the terms taken from DLA may need to be updated to reflect current best practice (recommendations 18 and 19)
- A number of issues with the rules for higher rate mobility for children with severe mental impairment (p.33 – 35 Recommendation 19, 20)
- The need to ensure that children with prosthetic legs who use walking aids are not disqualified (Recommendation 21)

In some places, SCOSS note that officials had agreed to make the changes suggested, but these changes had not been made in the regulations provided to SCOSS. (SCOSS p.32 re: recommendation 15 and 17)

While making specific recommendations on a wide range of technical issues, SCOSS also makes a broader recommendation that: “in view of the inevitable challenges of drafting regulations that adequately cater for all eventualities”, the Scottish Government should:

“continue to review the draft regulations before and after CDP is launched to identify and rectify any immediate issues arising and to ensure a robust

basis for developing future disability assistance regulations.”
(recommendation 34)

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

- 1. 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**
- 2. Whether the Scottish Government has underestimated the task required in converting child DLA to CDP**
- 3. Whether the forthcoming Social Security bill should include provision for suspending (rather than ending) disability payments**
- 4. Given the timescales involved, what kind of review of regulations might it be feasible to do before the launch of CDP**
- 5. 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**

Theme 4: Interaction between reserved and devolved systems

Child Disability Payment will interact in numerous ways with the reserved system. For example:

- It will qualify families for additional amounts in reserved benefits such as universal credit
- It means families aren't subject to the benefit cap
- When families re-locate across the UK, the two systems need to ensure there are no gaps in entitlement

SCOSS recommend:

“The Scottish Government should investigate and risk assess the many different aspects of the interface between devolved and reserved benefits, and the implications of divergence for people receiving assistance, to ensure these are identified before further policy changes are identified.” (Recommendation 1)

SCOSS observe:

“there would be value in seeking wider views to help develop understanding of the potential consequences of diverging systems between Scotland and the rest of the UK when it comes to benefit transfers and beyond.” (Observation 2, p.39)

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

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

Theme 5: Application, redetermination and appeal processes

As SCOSS note, it is particularly difficult to just ‘cut and paste’ rules on the administration of CDP – i.e issues related to making an application and asking for a redetermination or appeal. This is because the Social Security (Scotland) Act 2018 creates a different framework from the UK rules. In addition the 2018 Act provides for ‘Short Term Assistance’ (STA) which doesn’t exist in DWP rules. This allows someone to continue to receive the same amount of benefit while their payment is being redetermined or appealed. SDA in relation to CDP payments is provided for in Part 7 of the regulations.

Issues raised by SCOSS on administrative and process issues include:

- A lack of clarity about the minimum information required to lodge a claim. This affects how quickly CDP can start to be paid (SCOSS p.41 and recommendation 27)
- Differences between reserved and devolved rules about the time limits to ask for redetermination and appeals. In particular, DWP rules give someone who misses the reconsideration deadline an unqualified right to ask for an appeal for up to 13 months, whereas the rules for Scottish benefits require someone to have ‘good reason’. (SCOSS p.43-44 recommendations 29 and 30)
- Lack of clarity about appeal rights where, for example a parent thinks a child’s needs have increased (SCOSS p.45, recommendation 31)
- Various drafting issues with the provisions for Short Term Assistance (STA) which continues benefit payments when someone is making an appeal or redetermination
- The impact on the Tribunal service of providing STA and that “the potential impact of STA of driving more appeals may not have been fully considered.” (SCOSS p.23) The report suggests looking at similar provisions in Northern Ireland (p.24)

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

- **Whether SCOSS has any suggestions for what the minimum amount of information ought to be to start a claim**
- **Whether SCOSS considers that, in terms of meeting Charter obligations, appeal rights should at least match those provided in the reserved system**
- **Whether SCOSS has any views on the likely behavioural impact of STA,**
- **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**

Theme 6: Monitoring and review

In a number of places throughout the report SCOSS recommends that various aspects CDP are monitored and/or reviewed. Recommendations 6, 9, 29, 30 and 34 all refer to this. Recommendations include:

- Joined up monitoring and evaluation between the NHS, DWP and Social Security Scotland for how the system works for people who are terminally ill (recommendation 6)
- Assess the behavioural impacts of offering STA, monitor how STA removes barriers to appeal or results in unintended consequences (recommendation 9)
- Time limits for appeals and redeterminations should be kept under review (recommendations 29, 30)
- The CDP regulations should be reviewed both before and after CDP is launched (recommendation 34)

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

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

**Camilla Kidner
SPICe
25 March 2020**