



Written submissions on the revised draft Disability Assistance for Children and Young People (DACYP) regulations 2020.

[Child Poverty Action Group in Scotland](#)

[Citizens Advice Scotland](#)

[Inclusion Scotland](#)

[One Parent Families Scotland](#)

[Royal National Institute of Blind People](#)

## **One Parent Families Scotland**

**The Scottish Commission on Social Security (SCoSS)**<sup>1</sup> is scrutinising and will report on the revised draft Disability Assistance for Children and Young People (DACYP) regulations 2020. SCoSS has requested written views on the draft regulations which will help to inform SCoSS's scrutiny. The regulations have only been revised in a few areas. OPFS previously provided our views on the Scottish Government's original DACYP draft regulations and we are happy to give further feedback on the revised draft regulations.

**One Parent Families Scotland (OPFS)** is the leading charity working with single parent families in Scotland. With 75 staff, we provide expert advice, practical support and campaign with parents to make their voices heard. For over 75 years we've been supporting single parent families find a way forward through difficult times.

OPFS gives support to over 7000 parents, children and young people each year through our national advice and information service, online information and resources, training for practitioners and local services in Edinburgh, Dundee, Glasgow, Falkirk, Lanarkshire and Aberdeenshire.

COVID-19 is a global public health crisis which is rapidly developing into an unparalleled economic catastrophe. Before this crisis single parent families already faced significant challenges: poverty, isolation and loneliness, poor health or disability and judgemental attitudes. The majority of single parents are women, so gender inequality is a key issue. In the UK single parents and their children face around twice the risk of poverty as couples – 48% compared to 26%.<sup>2</sup>

- A third (36 %) of all children in poverty in Scotland live in a single parent family<sup>3</sup>
- Almost half of children (50%) in single parent families live below the poverty line<sup>4</sup>
- Before this crisis this was predicted to rise to over 62 % by 2021<sup>5</sup>

When disability is combined with the experience of living in a single parent household, inevitably social disadvantages are magnified. Around

---

<sup>1</sup> <https://www.gov.scot/groups/scottish-commission-on-social-security>.

<sup>2</sup> <https://socialmetricscommission.org.uk/wp-content/uploads/2020/06/Measuring-Poverty-2020-1.pdf>

<sup>3</sup> <https://povertyinequality.scot/Poverty-Delivery-Plan-advice> p41 table 2

<sup>4</sup> <https://www.gov.uk/government/statistics/households-below-average-income-199495-to-201617>

<sup>5</sup> <https://www.equalityhumanrights.com/sites/default/files/cumulative-impact-assessment-report.pdf> p153

34% of single parents are looking after a disabled child.<sup>6</sup> In this context we are extremely troubled about the impact of this crisis on every child affected by poverty. We are also concerned about the longer-term impact on Scotland's aspiration to reduce child poverty by 2030. The steps we take should not only support families now but also underpin progress towards ending child poverty. Those steps must also be consistent with a children's rights approach by continuing to protect children's economic and social rights as set out in the UN Convention on the Rights of the Child<sup>7</sup>.

Poverty and isolation have an impact on parent's and children's wellbeing, causing stress, anxiety and poor mental health. The challenge of being both sole carer and breadwinner has been magnified by the impact of the present Covid 19 crisis.

Money in parents pockets matters - research shows its impact on children's education and health, and how it makes parenting easier. Social security has a crucial role to play in reducing child poverty among both out-of-work and in-work families. That will be even more important now, as financial pressures increase - yet children's benefits have been ignored in the UK government's support package. We are therefore very pleased to be able to contribute evidence to this consultation.

## **OPFS Submission**

SCoSS have said in referring the revised draft regulations, the Cabinet Secretary for Social Security and Older People, Shirley-Anne Somerville<sup>8</sup> has highlighted **three specific areas** on which she would welcome SCoSS's views:

- the provisions relating to the periods for requesting and making re-determinations (Part 9)
- the provisions applicable to the mobility component (regulations 6 to 8)
- the provisions relating to temporary absences from home, including non-payability of assistance (Part 5).

As the third area is mainly covering provisions relating to about care homes and live in education units this submission gives our views on the first two provisions.

---

<sup>6</sup> Office for National Statistics.

<sup>7</sup> <https://www.unicef.org.uk/what-we-do/un-convention-child-rights/>

<sup>8</sup> [https://en.wikipedia.org/wiki/Shirley-Anne\\_Somerville](https://en.wikipedia.org/wiki/Shirley-Anne_Somerville)

## **The provisions relating to the periods for requesting and making re-determinations (Part 9)**

*29.—(1) The period prescribed for requesting a re-determination of an individual's entitlement to Child Disability Assistance under section 41 of the 2018 Act is 42 days beginning with the day after the day on which a notice of determination under section 40 of the 2018 Act was issued by the Scottish Ministers. (2) The period prescribed for making a re-determination of an individual's entitlement to Child Disability Assistance under section 43 of the 2018 Act is 56 days beginning with the day that the request for a re-determination is received by the Scottish Ministers.*

We believe in order to provide a speedy response to the claimant the time span for both requesting a redetermination and making a redetermination should be the same. While we welcome the more generous period for individuals to re-quest a re-determination, our advisors have found that single parents with mental health issues can be particularly affected while waiting on the re-determination decision . They can be terrified of losing their benefit or not being entitled to it and 56 days is a long time to wait. Their anxiety can then cause them to contact their support agency (such as OPFS) and the government department dealing with the request multiple times. By cutting down the time to respond this will reassure the claimant and also reduce the contact between the claimant and advice agencies who are struggling to cope with demand.

If it is not possible to reduce the 56 days wait then we would ask that in the interests of being fair and reasonable that the 42 day period for claimants is extended to 56 days to give both an equal time period.

## **The provisions applicable to the mobility component (regulations 6 to 8)**

*Reg 6.*

*Mobility requirements: lower rate mobility component*

*6.(1) An individual aged 5 years or more is entitled to the lower rate of the mobility component if that individual, though able to walk, cannot move around outdoors without having guidance or supervision from another person most of the time.*

*(2) The guidance or supervision required must be substantially greater than would typically be expected for a person of that age.*

*(3) In considering entitlement under paragraph (1), no account is to be taken of any ability which the individual has to use routes with which they are familiar, without guidance or supervision from another person.*

*(5) In this regulation, "guidance" means direction or leading by physical means or verbal suggestion or persuasion.*

*Reg 7*

*(1) An individual aged 3 years or more is entitled to the higher rate of the mobility component of Child Disability Payment if the individual satisfies at least one of the conditions mentioned in paragraph (2)*

*(7)(d) the individual is entitled to the highest rate care component of Child Disability Payment and has a mental impairment, accompanied by significant behavioural difficulties arising from the impairment. mental health or learning difficulties can have varying degrees of supervision and support needs.*

We believe that there should not be an age difference between lower and higher rate mobility. Apart from this causing confusion for applicants, children with mental health or learning difficulties can have varying degrees of supervision and support needs. Children who are 3years and under can have extreme care needs.

We also feel the idea of an assessment to check if a child has support needs *substantially greater than would typically be expected for a person of that age* is intrusive and stress making We are also concerned by the assessment being based on the use of the term "significant *behavioural difficulties* " as this is very much open to interpretation . NHS paperwork is available and can be accessed electronically without further invasive assessments.

In conclusion child poverty is a public health issue. It can lead to poorer health outcomes in children, and to poorer health and social outcomes in adulthood for those children.<sup>9</sup>Addressing child poverty will require a greater attention to in-work poverty, lack of appropriate job opportunities, costs of living and, crucially, the role of the social security system.<sup>10</sup>

It's not right that almost one in four children in Scotland currently live in poverty and that it is much higher among priority groups. It's not fair that it is expected to rise to more than one in three by 2021. This is not inevitable. Successfully tackling child poverty, particularly for families where a child has a disability can help contribute to a healthier, fairer Scotland.

It is time for a social security system that prevents poverty, treats people with dignity and respect and supports everyone to flourish.<sup>11</sup> We welcome the steps the Scottish Government have made to contribute towards achieving this goal.

---

<sup>9</sup> <http://www.healthscotland.scot/media/2186/child-poverty-impact-inequalities-2018.pdf>

<sup>10</sup> <http://www.healthscotland.scot/media/2185/child-poverty-drivers-oct2018.pdf>

<sup>11</sup> [Scottish Campaign on Rights to Social Security - Principles for Change](#)

## **Royal National Institute for Blind Persons**

Thank you for inviting us to reply to the SCoSS call for views on the draft regulations, especially relating to the provisions applicable to the mobility component (regulations 6 to 8). You are interested in our views on the regulations concerning severe visual impairment as you understand that the new definition is wider than that provided under DLA.

Regulation 7 sets out the entitlement criteria for the higher rate mobility Component. In terms of sight loss criteria, individuals must either have a severe visual disability or be blind and deaf to qualify for the higher rate mobility component.

Paragraph (8) defines a range of terms including 'visual impairment' within the meaning of the Visual Impairment Network for Children and Young People (VINCYP) definition. This meets 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.

The definition used in the regulations reflects changes to how sight loss is registered in Scotland. As of 1 April 2018, the Scottish Government introduced the new Certificate of Vision Impairment (CVI) Scotland form, replacing the BP1 form.

However, the CVI form does not include children and young people under the age of 16 years. Instead, arrangements for supporting them follow the VINCYP Pathway (a clear pathway to access specialist assessments and support).

VINCYP aims to improve the care and outcomes for children and young people with visual impairment by better co-ordinating services across health, education, social work and voluntary organisations.

Once a child or young person is diagnosed as having a sight impairment then - with their parent's/carer's consent - the ophthalmologist or paediatrician will notify the VINCYP contact within their Health Board.

This person will then refer them on to the appropriate visual impairment professionals in health, education, habilitation, social work and voluntary organisations for the services and support required.

The ophthalmologist or paediatrician will also issue a letter confirming the diagnosis. This can be used when requesting possible entitlement to further support (such as disability benefits and travel assistance) and RNIB Scotland thinks it appropriate that the regulations on the Child Disability Payment cite the VINCYP definition.

Regulation 7, paragraph (4) defines a 'severe visual impairment':

“(4) An individual is to be taken to have a severe visual impairment, for the purposes of paragraph (2)(e), if the individual—  
(a) has a severe visual impairment fulfilling the definition from the Visual Impairment Network for Children and Young People, and  
(b) the individual is unable to mobilise safely without help or supervision of another person due to severe sight impairment, taking into account their age.”

We would like to clarify whether both criteria must be met as we think that a severe visual impairment should satisfy the criteria.

A child or young person with severe sight loss may be able to mobilise safely using a long cane or a guide dog but this would not diminish their need for benefits assistance due to their visual impairment.

We hope these comments are helpful and please do not hesitate to contact us for any further information.

## **Citizens Advice Scotland**

### **Summary**

Citizens Advice Scotland (CAS) welcome changes within the revised regulations that address many of the concerns raised in our previous submission, including on the suspension rather than ending of entitlement and terminal illness requirements.

To further improve the social security support that will be provided to disabled children and young people we make the following recommendations:

- › The statutory timescale for Social Security Scotland to make a re-determination should be reduced to no longer than 42 days.
- › The past presence requirements should be removed.
- › Amendments should be made to ensure that children and young people who face barriers as a result of a mental health condition can qualify for disability assistance on a fair basis.

### **Part 9: The provisions relating to the periods for requesting and making redeterminations**

CAS is disappointed that the statutory time limit for Social Security Scotland to respond to a request remains set in the regulations at 56 days.

Evidence from CAB clients has consistently shown that detriment has been caused due to lengthy waits for a decision to be made on a mandatory reconsideration request, both in terms of hardship and causing stress and worry.<sup>12</sup> CAS is concerned that setting the time limit at 56 days (8 weeks) is too long, given that a person will have already had to wait for an original determination on their application, and that evidence will already have been gathered in making the original determination, so will not need to be re-sought.

Additionally, the Social Security (Scotland) Act provides an option for the period to be extended with the person's consent, which would cover more complex cases and avoids a requirement for an extended period to be set due to concern about these cases.

---

<sup>12</sup> Page 20 – 21, Citizens Advice Scotland response to Consultation on Disability Assistance in Scotland, May 2019 <https://www.cas.org.uk/publications/cas-response-consultation-disability-assistance-scotland>

CAS strongly recommends the statutory time limit to respond to a redetermination request is reduced to no more than 42 days, the same time that is given to people to make the request. Regulation 29 (2) should be amended to change the number of days from 56 to 42.

### **Regulations 6 – 8: The provisions applicable to the mobility component**

CAS notes the addition of paragraphs (5) and (6) to Regulation 6. CAS raises concern around the need for these additions and clarity on the policy intent of this would be welcome. The Social Security Advisory Committee when responding to the addition of the paragraphs in existing DLA Regulations in 2002 noted the issues arising from the inclusion of the regulations.<sup>13</sup> CAS recommends that paragraphs (5) and (6) are removed from Regulation 6.

CAS recommends that the regulations are amended to provide clarity that children who have a mobility impairment due to a mental health issue can qualify for disability assistance, distinct from a learning disability ('severe mental impairment') or physical condition. This could be achieved by adding 'psychological distress' to the conditions at regulation 7(2).<sup>1415</sup>

An additional test related to visual impairment has been added to the mobility component eligibility criteria by Regulation 7(4)(b); the requirement for help or supervision to mobilise safely whilst taking into account age. CAS questions the need for this additional test and raises concern that this restriction of the criteria, without precedent in current DLA rules, may result in less children qualifying for CDP.

### **Part 5: The provisions relating to temporary absences from home, including non-payability of assistance**

CAS welcomes the changes to the regulations making provision for the suspension of payment rather than removal of entitlement when a child or young person is resident in a care home, educational establishment or has been legally detained.

We were also pleased that the regulations have been amended, as recommended in our previous submission, to make explicit that when a

---

<sup>13</sup> See Reg 12(7) and (8) of The Social Security (Disability Living Allowance) Regulations 1991 No. 2890

<sup>14</sup> The Social Security (Disability Living Allowance)(Amendment) Regulations 2002(S.I. 2002 No. 648) [Report](#) by the Social Security Advisory Committee

<sup>15</sup> SAMH [response to Consultation on Disability Assistance in Scotland](#), May 2019

person is an in-patient in a hospital or hospice this has no effect on entitlement to the care component of CDP (Regulation 16).

CAS notes that Regulation 11(3) and Regulation 13(3) are new additional paragraphs in the regulations. The impact of the additional paragraphs allows for the value of CDP to be set at £0 if a person is temporary absent from home for 28 days on separate occasions, provided there is no more than 28 days between each period. In practice it appears that for example a person who has three stays in a care home, totalling ten days each over a three-month period, would meet the threshold for payment to be set at £0 despite there being substantive time between each temporary absence. CAS would welcome information surrounding the impact and intent of this change.

CAS would welcome amendments to Regulation 13 (read with Regulation 20 (7)) and Regulation 14 to allow for the child to become entitled to SDP whilst in a care home, residential educational establishment or in legal detention. This could be achieved by redrafting regulations to allow entitlement to begin with payment set at £0. As well as aiding towards benefit take up in line with the duty in the Act,<sup>16</sup> this change would allow a parent to access entitlements to premiums in reserved benefits as is currently the case with DLA.

#### **Regulation 4: Residence and presence conditions**

CAS recommends that the past presence test, Regulation 4 (2), is removed. It is unclear whether the provisions paragraphs (11)(c) and 12(c): 'the individual can demonstrate a genuine and sufficient link to Scotland' effectively removes the past presence test. For clarity, the past presence test 4 (2) should be removed from the regulations, as it is an unnecessary barrier to people receiving social security support.

The past presence test requires a person to have been present in Great Britain for two out of the last three years to be eligible to claim PIP, DLA or Attendance Allowance, and is proposed to be replicated in the new system. However, CAS recommends that the requirement is removed.

The past presence condition is not currently included in any of the other benefits due to be devolved (with the exception of Carer's Allowance) and has not been proposed to be included in any of the Scottish social security payments introduced so far.

---

<sup>16</sup> Part 1, Section 3 – Social Security (Scotland) Act 2018  
<http://www.legislation.gov.uk/asp/2018/9/section/3/enacted>

The condition can mean that disabled people who are in need of social security support, and who would otherwise be entitled to disability assistance would miss out. For instance, if a family living abroad had a child who became disabled in an accident and moved home to Scotland to be closer to extended family for support, they would not become eligible for Disability Assistance for Children and Young People until up to two years later.

The past presence condition does not seem to serve a reasonable purpose other than to reduce the number of people who are eligible to claim. This seems somewhat at odds with the Scottish Government's welcome ambitions for the new system, and is penalising people who have recently moved to or returned to Scotland at odds with the Government's ambition to use inward migration as a mechanism to drive economic growth and counter-act demographic decline.<sup>17</sup> There is also a duty placed on Ministers to promote take-up.<sup>18</sup>

CAS recommends the past presence condition is removed to ensure that people who would be otherwise eligible to receive Disability Assistance for Children and Young People are allowed to claim it.

### **Regulation 18: Age criteria**

The draft regulations make provision for an award of disability assistance for children and young people to continue past the age of 18 if a person has applied for disability assistance for working age people but has not yet received a determination. Regulation 18 (2)(b) however makes the caveat that the payment would stop once a person turned 19, even if no decision had been made on their application for DAWAP.

This risks creating a 'cliff edge' in the scenario that a decision was substantially delayed, a delay in notifying a person that they should make an application for the working age benefit, or because their application and assessment was delayed for a medical reason. This means that a person may lose their entitlement and their right to social security through no fault of their own. CAS recommend the withdrawal of paragraph (2)(b); that SDP will end when a person turns 19, if they have

---

<sup>17</sup> Scotland's Population Needs and Migration Policy: [Discussion Paper on Evidence Policy and Powers for the Scottish Parliament](#) – Scottish Government, February 2018

<sup>18</sup> Part 1, Section 3 – Social Security (Scotland) Act 2018  
<http://www.legislation.gov.uk/asp/2018/9/section/3/enacted>

applied for DAWAP, but no determination has been made on their application.

**Regulation 20: When an application is to be treated as made and beginning of entitlement to assistance**

As currently drafted Regulation 20(2)(b) seems to permit for discretion to treat the application as being made on any day after the entitlement conditions are met. It is unclear whether this is a drafting error. CAS recommend that this is redrafted to ensure that entitlement begins on the first day that requirements are satisfied.

**Regulation 30: Recovery of liability**

As currently drafted the regulations do not cap the rate at which a deduction for a liability can be given in explicit terms. Not making provision to limit the rate at which a deduction can be made would allow the First-tier Tribunal to determine a deduction at a higher rate than the agency's policy may allow for. CAS would welcome the inclusion of a maximum deduction rate within the regulations.

## **Child Poverty Action Group in Scotland**

CPAG in Scotland welcome the opportunity to provide our views on the draft Disability Assistance for Children and Young People (Scotland) Regulations 2020. We are happy for our submission to be published. We welcome the fact that the revised regulations address many of the concerns that we raised in our previous submission, however we still have some concerns over the some of the provisions of the draft regulations.

### **The provisions relating to the periods for requesting and making re-determinations (Part 9)**

In our previous submission we noted that the regulations limited the period in which an individual can request a redetermination to 42 days, less than the 13 months that has become the defacto time limit for requesting an 'any grounds' revision of a DLA award. We still have this concern.

We agree that 31 days can be insufficient time for an individual to get help. We have not seen any evidence that allowing the individual 42 days will be sufficient for then to access support.

The fact that the time periods are different for different benefits<sup>19</sup> may cause confusion both amongst individuals and advisers. Reg 29(2) is still drafted very differently from the equivalent provision in other sets of regulations, including the most recent ones.<sup>20</sup>

The risk here is that if the individual has to make a process appeal in order to get their redetermination request considered, the time limit for the agency to consider that request will have already expired by the time that the process appeal has been heard.

### **The provisions applicable to the mobility component (regulations 6 to 8)**

A definition of 'physical impairment' would be helpful in order to ensure that conditions such as Down's Syndrome and autism spectrum disorders, which caselaw has confirmed are physical disablements for the purpose of DLA higher rate mobility entitlement, continue to count as such for CDP following the change in terminology<sup>21</sup>.

---

<sup>19</sup> For example the time limit for requesting a redetermination of Scottish Child Payment is 31 days

<sup>20</sup> See for example Reg 9(2) of the Winter Heating Assistance for children and Young People (Scotland) Regulations 2020 no. 352

<sup>21</sup> See for example the Commissioner's decisions R(M) 2/78, R(M) 1/83 and the more recent R(DLA) 4/06

We welcome the additional provision made by Reg 7(7)(b) to move beyond the current requirement for ‘another person to [regularly be required to] physically restrain’ the individual. However, the new provision read with the definition in Reg 7(8)(b) requires that intervention must be described in a health, social care or education plan. This is different to the current approach within DLA creating a requirement that must be satisfied beyond the individual simply having a reasonable need for the relevant support. It is also not clear if the provision requires that all interventions must be described in a health, social care or education plan.

Additional subparagraphs (5) & (6) have been added to Regulation 6. We would question the need for this. We note that this mirrors the existing DLA rule.<sup>22</sup> These were introduced in 2002, and at the time were criticised by Social Security Advisory Committee (SSAC) who recommended that the regulations should not be made.<sup>23</sup> This advice was not taken up by the SSWP.

We welcome the changes made to the regulations that allow blind and partially sighted children and young people to be entitled to the highest rate of the mobility component. However we have concerns that:

- Reg 7(5) still makes use of the concept of ‘degrees of disablement’. It is difficult to understand how a test that caselaw has established relates to the industrial injuries benefit scheme can have useful application to a benefit for under 18s.
- Reg 7(4)(b) introduces a new test of requiring guidance and supervision and age-appropriateness into the severe visual impairment test. This is without precedent in the DLA scheme and may result in less children qualifying through this route.

### **The provisions relating to temporary absences from home, including non-payability of assistance (Part 5)**

We welcome the changes that have been made to Part 5 to allow payment to be suspended, whilst the entitlement continues, e.g. when individuals are resident in care homes, residential educational establishments and in legal detentions.

The addition of Reg 11(3) & Reg 13(3) link periods away from home that are less than 28 days apart. Whilst we note this is in line with the rules

---

<sup>22</sup> See Reg 12(7) and (8) of The Social Security (Disability Living Allowance) Regulations 1991 No. 2890

<sup>23</sup> The Social Security (Disability Living Allowance)(Amendment) Regulations 2002(S.I. 2002 No. 648) [Report](#) by the Social Security Advisory Committee

for children entitled to DLA who are in a care home or residential school we would ask what analysis was done to assess the impact of this change since publishing the previous draft of the regulations.

Unlike DLA there are no provisions to allow children and young people who are remanded in custody and then released without charge, or sentenced to a non-custodial prison sentence, to receive a backdated payment.<sup>24</sup>

Regs 13 and 14 (the former read with Reg 20(7)) are more restrictive than the current DLA rules, which allow a child in a care home or prison to become entitled to DLA whilst there, even though payment would not start until the child had returned home.<sup>25</sup> These regulations should be redrafted to ensure that entitlement can begin, even if assistance is paid at a value of £0, whilst a child is in a care home or prison. This will allow a parent to benefit from entitlement to premiums in reserved benefits, as they can under DLA rules at present. It will also give effect to the policy intent that the mobility component is not affected by time spent in legal detention.

### **Re-consideration of entitlement to Child Disability Payment: determination without application (Part 8)**

SCoSS has previously expressed concern about the inconsistency of approach between different sets of regulations it has scrutinised. The approach taken here to setting out the situations in which a determination without application must be made, and the effective date of that determination, is completely different to that for the Scottish child payment. This is likely to lead to difficulty for both advisers and individuals in understanding how the regulations should apply in a particular situation.

Regulation 27(2) gives Scottish Ministers discretion to make changes to the dates prescribed in Regulation 27 (1). Even with clear guidance, this could be an area that is subject to legal challenges. It also may result in individuals in very similar circumstances receiving very different decisions.

We note that whilst there is a time limit for the agency to carry out a redetermination there is no time limit for the agency to carry out a

---

<sup>24</sup> The rules are set out in the Social Security (General Benefit) Regulations 1982 No. 1408

<sup>25</sup> See for example Reg 10 of the Social Security (Disability Living Allowance) Regulations 1991 No. 2890

determination without application (DWA). Guidance on the time limits to carry out a DWA would be in line with the principles in the Act.

SCoSS' previous report noted that the previous draft regulations: 'provide for full backdating if new facts come to light that would have given a child a higher award ... . This is more generous than in the current DLA system where arrears would not be awarded.'

The current draft regulations remove this provision. We agree with the SCoSS report's conclusion that the previous approach would have been in line with the principles in the Act, so it should be restored. It is unclear what assessment was done when revising this policy.

Furthermore, Regs 25 and 27(1)(d) of the current draft regulations provide that if there has been an underpayment due to an official error the correct CDP award is not fully backdated. This is significantly less generous than the current DLA system and contrary to the principles in the Act.

It appears there could be a contradiction between Regulations 28(1)(a) & 27(1)(c)(ii) when an individual reports a change of circumstance, depending on the duty imposed on the individual under s56 of the 2018 Act. It is also not clear what date a DWA takes effect when the change is reported more than 13 months after it occurred, but Regulation 28 does not apply.

It is unclear what the intention of Reg 24(1)(viii) is in practice. On its face it appears to require a determination of entitlement where an attempt to claim CDP is made in the wrong way. However, the effect of Reg 24(2) is that Reg 24 only applies following a previous determination of entitlement to CDP. As such a determination is made on the basis of continuing entitlement (see Reg 22), Reg 24(2) appears to deprive Reg 24(1)(viii) of any meaningful effect.

#### **Residence and presence conditions (regulation 4)**

Regs 4(11) and (12) still lift all of the tests set out in Reg 4, including the exclusion of most people who are 'persons subject to immigration control'. The current drafting risks allowing people without recourse to public funds to claim child disability payment – which may risk an impact on their future leave to remain as a result of attempting to claim a public fund.

The opportunity should be taken to amend the past presence test (Reg 4(2)) for children. The DWP's current past presence test (requiring children over 3 to have been resident in the UK for 104 weeks) has recently<sup>26</sup> been found to be in breach of the European Convention on Human Rights (ECHR), the United Nations Convention on the Rights of the Child (UNCRC) and potentially to be in breach of the Public Sector Equality Duty (PSED). The remedy to avoid such a breach was to disapply Reg 4(3)(c) Social Security (AA, DLA and CA) (Amendment) Regulations 2013 so as to leave intact the earlier past presence test of 26 weeks. If the Scottish Government adopts the position of retaining the 104 week test for children over 3 they will create a harsher test for children ordinarily resident in Scotland than in the rest of UK. They would also a risk of a legal challenge to the past presence test in Scotland on ECHR grounds.

## **Other matters**

### **Definitions**

In Reg 2 the definition of 'recipient' has mistakenly been made a subparagraph of the definition of 'legal detention'.

Also in Reg 2, the definition of 'disability assistance for working age people' may no longer be necessary now that it is to be named 'adult disability payment'. Similarly, the use of the acronym 'DAWAP' in reg 18 is hopefully only a placeholder – not least as the acronym is not defined in either Reg 2 or Reg 18.

The definition of 'young person' in Reg 2 would require every young person getting CDP to make an application for ADP, and do so before they turns 18. Otherwise some people will move into and out of the definition as drafted.

### **Regulation 9 (terminal illness)**

Reg 5(4) explicitly disapplies the qualifying period for the care component if the individual is terminally ill. The lack of a similar provision disapplying Reg 7(9) leaves uncertain whether the policy intent of granting automatic entitlement to the higher rate mobility component to terminally ill individuals will be fulfilled.

---

<sup>26</sup> TS (by TS) v SSWP (DLA); EK (by MK) v SSWP (DLA) [2020] UKUT 284 (AAC). The UT decided that it didn't have jurisdiction to look at the PSED, had it had so it would have found the DWP's policy to be in breach.

The drafting of Reg 3(4) and Reg 9(1) suggest that the intention is that Regs 5 to 7 are simply irrelevant if an individual is terminally ill. If this is the policy intent, then the simplest amendment will be to remove Reg 5(4) - as it would be without any effect. Leaving it in place risks the Upper Tribunal attempting to read some meaning into the provision, where it appears that none is intended.

### **Age criteria**

Reg 18(2)(b) prevents CDP entitlement from continuing beyond the 19<sup>th</sup> birthday in any case. Whilst it is to be hoped that there will be no equivalent to the delays in PIP assessments seen in the reserved system, there may be cases where there is a legitimate reason for a significant delay, and the individual may lose their entitlement through no fault of their own. This will have a knock-on impact on other entitlements. A more helpful provision would be a rule fixing the end of CDP entitlement to the date on which an adult disability benefit determination takes effect. It is unclear what the policy is around the transfer at this point. If necessary, such a rule could be amended as and when that policy has been finalised.

### **Beginning of entitlement**

The drafting of Reg 20(2)(b) gives discretion to treat the application as being made on *any* day after the entitlement conditions are satisfied. To meet the policy intent it should be amended to ensure that entitlement always begins on the first day on which the entitlement conditions are satisfied

### **Updating of references following the passage of the Social Security Administration and Tribunal Membership (Scotland) Act 2020**

Reg 27(1) only sets an effective date where the rate of CDP 'payable' increases. If a child is in residential care at the point s/he becomes entitled to the high rate care component, this may increase a parent's entitlement to universal credit. So there is a need to be clear that Reg 27 also deals with changes to entitlement, even if no additional CDP is payable.

Reg 24(1)(vii) requires a determination of entitlement when an individual reaches the age of 16 and has not given their bank details. This would appear to be a situation in which the use of the power to suspend payment of CDP would be useful, as there is no suggestion that there has been a change to the individual's entitlement, and payment could then be released once the individual had got in contact.

Both Reg 32 and Reg 33 appear to require updating to take account of the fact that CDP can now be paid at a nil rate whilst entitlement continues. Reg 32(2) makes provision for payment, and is not made subject to Part 5 of the regulations. Reg 33 only bites on situations in which CDP is 'paid' (see Reg 33(1)) and so children in residential school or a care home whose ordinary residence transfers to England (for example if their parents move from Gretna to Carlisle) appear not to benefit from the provision.

### **Recovery of liability**

If there is a policy intent to limit the rate at which deduction can be made to repay a liability then it would be consistent with the principles of the Act to enshrine this in law. For example, Reg 30(8) could be drafted to limit the rate of deductions. Failure to make such provision will, for example, allow the First-tier Tribunal to determine a deduction at a higher rate than the agency's policy allows for.

### **Relinquishment of awards**

The heading of Reg 22 suggests that this version of the regulation is incomplete, as there is no provision for an individual to request that their CDP entitlement ends. If such provision is made, Part 9 would then benefit from additional provision to clarify that there is a duty to make a determination of entitlement, and the date from which entitlement ends.

## **Inclusion Scotland**

**1 Background:** Inclusion Scotland is a 'Disabled People's Organisation' (DPO) – led by disabled people ourselves. Inclusion Scotland works to achieve positive changes to policy and practice, so that disabled people are fully included throughout all Scottish society as equal citizens.

2 SCoSS states that the Cabinet Secretary is particularly interested in views on three issues and our response deals with each of these in turn. We also have some concerns about residency requirements and deal with these towards the end of our submission.

**i) the provisions relating to the periods for requesting and making re-determinations (Part 9)**

The draft regulations state that a redetermination must be requested within 42 days of the day after the day a determination notice is issued. We agree with the proposed time limit on seeking a redetermination as long as the normal rules for accepting that good cause for late notice of seeking an appeal or redetermination apply.

The draft regulations also state that a redetermination notice should be issued within 56 days of notice to seek redetermination being received. We disagree with this time limit, between 28 and 42 days would be preferable. We believe that all the available information necessary to make a redetermination should be collectable in such a time frame.

**ii) the provisions applicable to the mobility component (regulations 6 to 8)**

In terms of the lower rate of the mobility component (regulation 6) Inclusion Scotland continues to believe that the rules surrounding the Mobility component for children with autism, learning disabilities and/or mental health issues should be revised and the particular needs of the children in these impairment groups addressed. For example, a disabled child with one or more of those impairments might be able to plan and make a journey, on a route they were unfamiliar with, but might be unable to do it safely unless accompanied. We think that the issue of the child or young person's safety should be explicitly addressed in the regulations to remove any ambiguity when interpreting them.

In regards to entitlement to the higher rate mobility component, the disabled people we asked about this thought that in cases of severe impairment the 3-year rule should not apply but that mobility assistance should be available from birth or shortly afterwards.

That is because such children may not be able to travel safely on public transport but instead require transportation to be by car or in specially adapted vehicles (e.g. with space for oxygen tanks). These extra costs must currently be borne by the parents until after the child reaches three years of age.

This is not equitable as these parents do not have the other transport options that the parents of children who are unable to walk but not so severely impaired as to require transportation by car or by specially adapted vehicles have available to them.

**iii) the provisions relating to temporary absences from home, including non-payability of assistance (Part 5).**

In terms of the non-payability of assistance Inclusion Scotland continues to have grave concerns about the impact of loss of eligibility due to a relatively short term residential/in-patient need set against longer term arrangements for care and support packages – e.g. motability, employment of Personal Assistants - which may be being met in part from the disabled child or young person's disability assistance.

This is a particular concern where a child or young person is forced to stay in hospital because a care package is not available when the loss of disability assistance may actually exacerbate this situation.

**iv) Residence and presence conditions**

Part 3 paras 4.2. (a), (b) and (c) address issues related to aggregate time spent in the UK and eligibility. Our concern is that there may be very rare occasions when a child or young person might be prevented from returning to the UK because of their own or a parent's/carer's ill health. In addition, as seen during the current pandemic, there may also be occasions when travel between various countries is restricted or not permitted due to quarantine and/or isolation of carriers of a disease or virus.

In such instances we believe that the “presence” condition should be treated as satisfied if the child or young person would otherwise have returned to their normal place of residence in Scotland/the UK.