



Child Winter Heating Assistance - written submissions

Submissions have been received from the following organisations:

[Inclusion Scotland](#)

[Child Poverty Action Group](#)

[Citizens Advice Scotland](#)

Submission 1: Inclusion Scotland Submission

1 General View

- 1.1 Inclusion Scotland welcomes the introduction of the Winter Heating Assistance Regulations which will provide much needed additional financial support to families caring for disabled children.
- 1.2 Due to the increased financial hardship resulting from the Covid-19 emergency this support is now needed more than ever. We hope that the DWP will be able to act timeously and provide the necessary data to Scottish Government.
- 1.3 We are pleased to note that several initial concerns with the draft regulations expressed by ourselves and others have now been addressed.

2 Additional Point on the Draft Regulations

- 2.1 The only area of concern that we have about the draft regulations is the potential lack of clarity about the starting date of the claim.
- 2.2 Para 7 of the draft regulations dealing with applications states –

“7. An application is to be treated as made on the day—

(a) it is received by the Scottish Ministers, or
(b) when the Scottish Ministers receive evidence of a genuine and sufficient link to Scotland”.
- 2.3 With respect - how will the Social Security Agency determine which of these two potentially very different dates takes precedence? As far as we can see there seems to be little or no impact on overall entitlement if the later date (of receipt of evidence) is used.
- 2.4 The only potential losers that we can identify are young people who are 17 on the date the application is received but who become 18 and entitled to PIP before the evidence of a genuine link to Scotland is received. We accept such cases will be very rare but are seeking some reassurance that no one will lose out if the later date is used.

Submission 2: Child Poverty Action Group

CPAG in Scotland welcome the opportunity to provide our views on the draft Winter Heating Assistance for Children and Young People (Scotland) Regulations 2020. We are happy for our submission to be published.

We welcome the intention to introduce child winter heating assistance (CWAH) in winter 2020.

Status of the regulations

We note that these regulations have been referred to SCoSS before the policy intention has been completely finalised. For example, the policy note states that 'Officials are considering further the best approach in relation to the average Scottish temperature in Winter and the impact on entitlement for exportable cases' (para 19).

This suggests that there may be further changes made. With previous consultations, SCoSS took the understandable decision not to consult further on updated draft regulations. This issue could be avoided if the Scottish government submitted regulations containing all provisions intended for the eventual benefit. We acknowledge the tension between allowing sufficient time for scrutiny by SCoSS and the Scottish government's desire to introduce devolved benefits as quickly as possible. The advantage of submitting the final draft is that it gives anyone with an interest the opportunity to give their views.

Inconsistencies between different sets of regulations

There are a number of differences in the wording between different sets of Scottish social security regulations, where the policy intent is essentially the same. For example, the 'official error' provisions in Reg 8 differ slightly both from those most recently proposed for the Scottish child payment,¹ and from the regulations currently in force for other one-off payments (best start grant and funeral support payment).² There is no provision at all to award a young carer grant if it was refused due to an official error.

For another inconsistency, see the discussion below of the use of a test of 'resident in Scotland' in Reg 4.

To give a further example, we welcome the extension of the time limit to request a redetermination to that previously proposed for the child disability payment. Those refused CWAH are in practice likely to need advice about how to demonstrate the strength of their link to Scotland. As this may be a complicated question, and individuals may face logistical difficulties in accessing advice, consideration should be given to extending the time limit still further. We note that the extension of the time limit still leaves individuals in Scotland with less time to challenge decisions than they have under DWP administered benefits.

¹ See Sch para 10 of [The Scottish Child Payment Regulations 2020 \(second draft\)](#)

² See Reg 4 of [The Funeral Expense Assistance \(Scotland\) Regulations 2019](#) and Sch 1 para 4 of [The Early Years Assistance \(Best Start Grants\) \(Scotland\) Regulations 2018](#)

This extension leaves a different time limit for those Scottish benefits already introduced. We recommend that consideration is given to also extending the time limit for these benefits. This would make the system easier to navigate for families entitled to more than one benefit, and does not disturb the absolute time limit to request a redetermination (as that is found in the Act).

Whilst there may be sound policy reasons for different rules in relation to different benefits, unless there is such a reason it seems sensible to use identical wording. The current drafting for other Scottish benefits in relation to determinations without an application and residence could be amended, if the change of wording or policy is felt to be a necessary improvement.

In part, this situation arises due to the policy of including all of the rules for each benefit in a single set of regulations, as opposed to the DWP approach of making common provision for claims and decisions in separate sets of regulations that apply to a number of benefits. We acknowledge the potential advantage of the Scottish government's approach, but only as long as all of the regulations are made publicly available in their current form.³

Which children qualify for a payment

The regulations restrict CWA to children receiving a payment of disability living allowance (DLA) highest rate care component during the qualifying week. This is clearly the Scottish government's policy intent. CPAG in Scotland would like to see the eligibility criteria broadened in the following ways. When reviewing the operation of CWA, consideration should also be given to extending eligibility to other vulnerable groups without a disabled child in the household, for example lone parents.

16 and 17 year olds

In the draft child disability payment regulations previously considered by SCoSS, there was a clear intention to introduce difference of treatment for 16 and 17 year-old individuals, depending on the date on which they first claimed a disability benefit. These regulations provide for anyone under 18 and still receiving the correct rate of DLA to get CWA, but not 16 and 17 year-olds who have already transferred to PIP. In our view, this is an arbitrary and unfair distinction – there is no reason that a need for additional heating would be affected by transferring between different disability benefits.

Further, it may act as an incentive to not report an increase in mobility needs to the DWP (as this would trigger the transfer to PIP, and in turn definitely remove eligibility for CWA, whilst not having certainty of being awarded a higher rate of PIP).⁴

³ At the time of writing the best start grant regulations are up to date on legislation.gov.uk, but the funeral support payment and young carer grant regulations are in their original form and so do not include the changes made by [The Funeral Expense Assistance and Young Carer Grants \(Up-rating\) \(Miscellaneous Amendments\) \(Scotland\) Regulations 2020](#)

⁴ At present there is significant uncertainty in relation to what is actually happening in relation to the transfer from DLA to PIP due to the coronavirus outbreak. This concern is based on the wording of the law - in the

People who might gain significantly more than £200 due to increased PIP mobility component entitlement may be dissuaded from transferring to PIP.

Lower rates of disability living allowance

It is of course true that the highest rate care component is paid to the children with the highest level of care needs. But children entitled to the middle rate care component may not be any more able to leave the house, if the only reason that they do not get the highest rate is that they do not need significant care at night. The DLA night-time care condition to qualify for the highest rate includes a carer being awake and watching over a child – and the child may not be awake or out of bed.

Similarly, many children on the higher rate mobility component may have similar needs for additional heating of the home due to their restricted mobility, in spite of not having care needs at night.

One alternative approach would be to extend entitlement to any child or young person in receipt of DLA (or PIP – see above). Research suggests that the extra costs faced by families with disabled children are not adequately met by the rates of disability benefits.⁵ Extending CWA to all disabled children and young people entitled to a disability benefit would be one way to acknowledge and partially address this issue.

Children entitled to disability living allowance but not receiving a payment

CWA should be extended to children who are not receiving payment of DLA but are entitled to the appropriate rate (for example if they are in residential care during the qualifying week). If this change is not made, the Scottish government should publicise the qualifying week well in advance each year, to allow families to schedule a break from residential school during that week, and so benefit from CWA.

Most children will be home from school for periods during the winter, even if the qualifying week falls during term time. As the regulations are drafted, children in hospital are eligible for CWA, whilst children in residential care are not. No explanation is given for this difference in treatment.

Applications

The proposed regulations will only make automatic payments of CWA to disabled children living in Scotland. The extension of eligibility to some children living in other EEA countries is very welcome (in our view this flows directly from EU law, during the transitional period at least). However, it is disappointing that there will be a different process, always requiring an application. If it is not possible to get this data from the DWP, the Scottish government should work with the DWP to promote the possibility of eligibility – perhaps by notifying the appointees of all non-UK resident child DLA claimants in writing that they should apply if they have a link to Scotland.

absence of any published information about the current practice or any agreements between the DWP and the Scottish government about the transfer process.

⁵ See for example Scope's 'Disability price tag research, summarised at [scope.org.uk/campaigns/extra-costs/disability-price-tag](https://www.scope.org.uk/campaigns/extra-costs/disability-price-tag).

We are pleased that an application process is being made available to those living in Scotland who do not automatically receive a payment and think that they should have done. It would be very useful for the Scottish government to clarify, either in the regulations or in guidance, exactly when during the autumn an individual should receive a determination (to avoid premature applications from those who would have been automatically awarded CWA anyway, for example). The current approach leaves uncertain whether an individual who applies for DLA in August and is eventually awarded it in October will be expected to apply for CWA, or will receive it automatically.

The right to a determination

CPAG in Scotland believe that anyone who submits an application for CWA should have the right to receive a determination of their entitlement. The policy note suggests that the process is being put in place to '*enable* Social Security Scotland to make a determination of their entitlement' (para 20, emphasis added). However, we believe that Social Security Scotland should be *required* to determine every application for CWA that is made. If this change is made, and someone does not have additional evidence that is requested, or the decision maker does not think the evidence provided is sufficient to demonstrate entitlement, they will then be able to request a redetermination and ultimately appeal to an independent tribunal.

To achieve this, we believe that Reg 6 should be re-drafted. At present the drafting means that a duty to make a determination on an application only arises if the individual is thought to be entitled to CWA. Unless a determination is made, there is of course no right to request a redetermination, and then appeal. Requiring Social Security Scotland to make a determination for every application would resolve this. Paragraphs (a) and (b) of Reg 6 could be redrafted to include provision clarifying that no additional payment in respect of the same individual and the same qualifying week could be made following an application.

Similarly, Reg 7(b) can be interpreted as preventing the duty to determine entitlement from arising until all evidence required to convince the decision maker that there is a genuine and sufficient link to Scotland has been *provided*. The risk is again that there will be no determination if any evidence provided is not thought sufficient. If Reg 7(b) is only intended to fix the date of an application, it is difficult to see the purpose of it (see below for an explanation).

Deadline to apply

The draft regulations do not set a deadline to apply for CWA. We agree with this approach. It allows those who have wrongly missed out on CWA to receive all of the payments that they were eligible for, whenever they (or Social Security Scotland) discover the mistake.

However, Reg 12 states that only one payment can be made for each determination. This suggests if an individual has missed out on more than 1 payment they would

have to make an new application for each payment they missed out on⁶. It would seem more sensible to allow entitlement for all of the relevant qualifying weeks to be determined following a single application.

Whatever the policy intention is in relation to a deadline to apply, we suggest that the regulations would benefit from redrafting to clarify that intention. It should be noted that imposing a deadline to apply would create a difference in treatment between those who must apply and those who must have their entitlement determined without an application. Given the different treatment arises solely due to an individual living in a different EEA state, this looks like it would be potentially subject to challenge (as it appears discriminatory on the face of it).

Given the policy intention is to only make payments of CWHA from winter 2020 onwards, this could helpfully be clarified by an amendment to the definition of 'qualifying week' in Reg 2. This would place beyond doubt the intention that 2020 is itself a qualifying year. It appears that otherwise the qualifying week in 2020 will have passed before the regulations have come into force – leaving it unclear why previous years are not also included in the definition.

The 'individual' and payments of assistance

The draft child disability payment regulations referred to SCoSS were somewhat confusing in their use of 'applicant', 'individual' and references to someone who received a payment. The change in language to refer only to an 'individual' is welcome, not least as it clarifies that two payments can be made to a lone parent of two disabled children if both get the correct rate of DLA.

Regulation 13 could usefully clarify who should receive payment of CHWA in respect of a child under 16. (Presumably the intention is that it will simply be paid into the same account as DLA, if no application is required.) It is worth noting that unless the provisions for appointees in the current Social Security (Administration and Tribunal Membership) (Scotland) Bill⁷ are in force before these regulations, the Scottish government's justification for introducing that bill suggests that unless the person receiving DLA has parental rights in relation to the individual, CWHA could not automatically be paid to that person. With that in mind, it is unclear why Reg 13 makes provision to pay someone other than the appointee for a young person, but no such provision in relation to a child.

Given CWHA is a one-off payment, and it further appears that there is an intention to only make one payment for each determination (see further discussion above), it is unclear what the intention of reg 13(2) is. In any event the words 'or (2)' appear to relate to a deleted sub-para from an earlier draft and serve no purpose.

Recovery of overpayments

⁶ For example an individual may have been refused DLA but awarded DLA on appeal. This process could have taken more than 12 months so the claimant could have missed two CWHA payments. The current draft regulations would require the claimant to make a separate application for each CWHA payment.

⁷ See section 1 of that bill, which is available here: beta.parliament.scot/bills/social-security-administration-and-tribunal-membership-scotland-bill

Regs 8(1) (b) (ii) and 9 ensure that an individual is always given a determination of entitlement (which they can then challenge) if it appears that they have been incorrectly paid CWA. We welcome this approach, which allows an individual to argue that they were correctly paid CWA.

It is unclear what the practical effect of Reg 9(b) is.

Resident in Scotland and payment for children in other EEA countries

Residence in Scotland and other parts of the UK

The use of 'resident' in Scotland is a different criterion to the other Scottish benefits (which require the individual to be 'ordinarily resident'). Caselaw from other jurisdictions (which will not be binding, but may well prove persuasive) suggests that 'residence' is a lower threshold than 'ordinary residence', and that it is possible to be resident in more than one country.⁸ It is unclear why a different test has been chosen.

There will be a need for detailed guidance for decision makers on how this test is to be interpreted where a child is sometimes resident in different parts of the UK. It is vital that this guidance is made publicly available by the Scottish government, as this will allow relevant evidence to be gathered in support of applications. The guidance should make it clear that the test is residence in Scotland, not necessarily presence in Scotland.

One situation will be where two parents share care of a child and live on different sides of the English border. Even if the English resident parent is the appointee for DLA, the child seems to be clearly resident in both countries. Guidance will also need to address other situations, such as the case of a child receiving specialist hospital treatment in England during the qualifying week, or where a child is in residential accommodation outside Scotland.

Eligibility outside the UK

CPAG in Scotland believe that CWA should be paid to children with a link to Scotland who can continue to be entitled to DLA whilst abroad, no matter where they are living. The current drafting uses the UK government's approach (for winter fuel payments), which adds an additional test comparing the average winter temperatures in different countries. The difficulty with using such a blunt instrument is that parts of inland Spain and France are significantly colder in winter than parts of Scotland, for example. This test is skewed by the inclusion of territories with relatively small populations and very different climates, such as the Canary Islands or Reunion Island.

In our view, the fairest solution is simply to remove this additional barrier to entitlement. This would leave the only question for the decision maker as being the link that the child has to Scotland, as the ability to 'export' entitlement to DLA would

⁸ See for example para 19 of the Social Security Commissioner's decision [R\(IS\)6/96](#)

prevent families outside Europe or covered by the social security system of another EEA state from qualifying.

Submission 3: Citizens Advice Scotland

Summary

Citizens Advice Scotland welcomes the moves to extend Winter Heating Assistance in the challenging context of COVID19 which has resulted in delays to wider measures on disability assistance. We recommend the draft regulations are amended to better meet the policy intention and add clarity in a number of areas. In particular, we recommend:

- Young people in Scotland in receipt of the Enhanced Rate of the Daily Living component of PIP between the ages of 16 and 18 should be considered eligible for CWHA on an equal basis as children and young people in receipt of the High Rate Care component of DLA.
- Making the qualifying period 1 October to 31 March, to align it more closely with regulated gas and electricity supply industry initiatives.
- Making the qualifying week the 7 days beginning 1 October each year.
- Stipulating that the payment must be made within a given period of the qualifying date or the first date on which an individual becomes eligible.
- Clarifying who payments should be made to, and providing a mechanism for resolving disputes over whom they should be made to.

Introduction to Citizens Advice Scotland and context of response

Scotland's Citizens Advice network empowers people in every corner of Scotland through our local bureaux and national services by providing free, confidential, and independent advice. We use people's real life experiences to influence policy and drive positive change. We are on the side of people in Scotland who need help, and we change lives for the better.

Citizens Advice Scotland (CAS) welcomes the opportunity to provide comments on the draft Winter Heating Assistance for Children and Young People (Scotland) Regulations 2020 ("the draft Regulations") to the Commission. Advice on disability benefits is among the most common areas of advice provided by Scotland's Citizens Advice Bureau (CAB) network. In 2018-19, Scottish CAB provided advice to clients on 6,065 issues related to the care component and 5,050 to the mobility component of Disability Living Allowance (DLA), which will act as a qualifying benefit for Winter Heating Assistance for disabled people under the age of 18. In addition, 282 advice issues were provided on the reserved Winter Fuel Payment.

CAS welcomes the proposal to extend eligibility for Winter Heating Assistance (WHA) to households in which a severely disabled child or young person resides. This is in keeping with our position on the Fuel Poverty Bill where we have called for more vulnerable people (including households in which a disabled person resides) to

be defined as requiring an 'enhanced heating regime', either through their need for increased indoor temperatures or through a requirement for enhanced heating hours⁹.

Eligibility for Child Winter Heating Assistance

Citizens Advice Scotland has welcomed both the extension of Winter Heating Assistance to families with severely disabled children, and the extension of Child Disability Payment to young people up to the age of 18. The original policy intention for Child Winter Heating Assistance (CWA) was to provide support for severely disabled children in receipt of the Child Disability Payment, which was to end at the age of 18. Due to the Coronavirus outbreak, this Payment has been understandably delayed, and eligibility criteria must therefore be established in the context of the reserved benefits system if the CWA is to be made available, as planned, this year.

The draft Regulations make provision for a Child Winter Heating Assistance (CWA) payment to be made in respect of children and young people under the age of 18 who receive the highest rate of the care component of Disability Living Allowance (DLA). However, given that new claims for DLA can only be made up to the age of 16, there is a group of young people aged 16 – 18 who instead receive Personal Independence Payment (PIP) and would be ineligible to receive CWA, despite being intended to receive Child Disability Payment when it is introduced. According to the latest official statistics, there are 4,250 people aged 16 to 18 in Scotland who receive the Enhanced Daily Living component of PIP. We would like further consideration to how these young people can benefit from the new payment in the period before the devolved Child Disability Payment is introduced. We have not discussed the practicalities of this with Government, but suggest it could be achieved by making provision for young people under the age of 18 who receive the enhanced rate of the Daily Living component of PIP to receive a CWA payment.

The qualifying week

As has previously been noted by the Commission¹⁰, the choice of qualifying week for Winter Fuel Payment is a practical measure designed to ensure in so far as is possible that the DWP has sufficient time to be able to process all eligible payments before Christmas. However, the draft Regulations do not stipulate when CWA should normally be paid, and so this time period need not necessarily apply.

⁹ https://www.cas.org.uk/system/files/publications/2018-06-12_speaking_up_-_understanding_fuel_poverty_support_needs.pdf

¹⁰ <https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2020/03/the-disability-assistance-for-children-and-young-people-scotland-regulations-2020-scrutiny-report-on-draft-regulations/documents/the-disability-assistance-for-children-and-young-people-scotland-regulations-2020-scrutiny-report-on-draft-regulations/the-disability-assistance-for-children-and-young-people-scotland-regulations-2020-scrutiny-report-on-draft-regulations/govscot%3Adocument/FINAL%2BSCoS%2BReport%2Bon%2Bthe%2Bdraft%2BDACY%2B%2528S%2529%2BRegs%2B2020.pdf>

CAS has previously suggested that it may be more straightforward for people to establish if they are entitled to a WHA payment if a set date (or a series of dates) was used that was more closely associated with the winter months – for example, if the qualifying week was defined as a 7-day period beginning 1 October each year¹¹. While the majority of WHA recipients are likely to receive payment without application, for those who become eligible as a result of the backdating of a qualifying benefit, either in respect of a new claim or through the revision or supersession of an existing claim, clarity of the eligibility criteria and qualifying period for WHA could be important.

The use of the word “Winter” when naming WHA explicitly links it with the period in which the majority of a typical households’ space heating costs are incurred. CAS therefore believes it may be helpful if the Scottish Government were to align the qualifying period more closely with regulated gas and electricity supply industry initiatives with a Winter focus such as the Warm Home Discount Scheme and protections against disconnection for vulnerable consumers, both of which are effective between 1 October and 31 March each year. The qualifying period for Cold Weather Payments could also be extended to match this time period when they are devolved (as Cold Spell Heating Assistance) in 2021.

The qualifying period

CAS is also concerned that the Scottish Government’s decision to determine eligibility for CWAHA on the basis of entitlement to a qualifying disability benefit during a 1-week period in autumn may present an unfairly narrow window of time in which a severely disabled child or young person can be considered eligible for Assistance. By comparison, for the Winter Fuel Payment, a qualifying older person simply has to be present in the UK, or resident in Switzerland or the EEA¹², for 1 day during week beginning with the 3rd Monday in September to meet the qualifying week condition; the date of birth which dictates who counts as a qualifying older person is unrelated to the qualifying week, and varies from year to year.

The draft Regulations conflate the devolved equivalent of the presence requirements of the Winter Fuel Payment qualifying week condition with the other qualifying conditions for CWAHA, which departs from the way in which eligibility for Winter Fuel Payment is established. From an operational perspective this might have merit were no application route for CWAHA to be provided for as an open-ended or long duration data matching exercise with DWP is unlikely to prove sustainable. However, the draft Regulations explicitly provide for eligibility for CWAHA to be determined both with and without an application having been made. This therefore raises the question of

¹¹ https://www.cas.org.uk/system/files/publications/cas_response_-_dacyp_regulations.pdf

¹² Cyprus, France, Gibraltar, Greece, Malta, Portugal and Spain excepted. Those resident in the Switzerland or a relevant EEA country must also be able to demonstrate “a genuine and sufficient link” to the UK.

whether a greater level of fairness could be achieved via the use of an alternative period of entitlement to a qualifying disability benefit (a “qualifying period”)

To align the Scottish social security system’s support for household fuel costs more closely with that provided by regulated gas and electricity suppliers, the adoption of a qualifying period could result in eligibility for CWHA being bestowed upon a severely disabled child or young person who was entitled to a relevant disability benefit on any date between 1 October and 31 March. The week beginning with the 3rd Monday in September (or, as we propose, the 7 days beginning 1 October each year) could then remain as the qualifying week for the purposes of demonstrating a genuine and sufficient link to Scotland, and could also be used as the period in which data matching would afford entitlement without application. Those who become eligible after the qualifying week could then apply for CWHA via the provisions in Regulation 7.

Payment of Child Winter Heating Assistance

The draft Regulations do not prescribe when a CWHA payment should be made and the accompanying Policy Note simply suggests that “The data will be processed by Social Security Scotland and payments made to each of these individuals in the course of the Winter.”¹³

To avoid any excessive delays to the receipt of a CWHA payment and ensure CWHA monies are available when they will be of greatest benefit, the Regulations could stipulate that the payment must be made within a given period of the qualifying date or the first date on which the individual becomes eligible. This would be of particular benefit to consumers whose eligibility for CWHA can be established via data matching without application and who pay in advance for their energy supplies, either through the use of a prepayment meter or because their unregulated heating fuel must be bought in bulk ahead of need.

Making payments

The draft Regulations provide for the Scottish Ministers to make payment to another person to be used for the benefit of the young person; or if they consider for any reason that it is no longer appropriate to pay it to that person, to cease making the payment and pay it to another person instead. No further detail is provided on who the payment is to be made to, or under what circumstances the Scottish Ministers can decide to pay it to someone else.

¹³ Child Winter Heating Assistance Policy Note – Scottish Government

This mirrors a number of issues raised at Stage 1 consideration of the Social Security Administration and Tribunal Membership (Scotland) Bill¹⁴, which was in progress at the time of writing. For clarity, and to protect the rights of people receiving CWA, the Regulations could set out:

- That for children under 16, the payment would normally be made to a person with parental responsibility for them.
- How it could be ensured that the payment goes to the primary carer for the child, or in the case of Child Winter Heating Assistance, to the person who pays the household energy bills.
- That young people aged 16 – 18 could take responsibility for receiving their own CWA payment, and under what circumstances.

Providing for a resolution mechanism for disputes over whom the payment is to be made to, between appointees, or if the relationship between the individual and their appointee breaks down, including a right of independent review.