



T: 0300 244 4000
E: scottish.ministers@gov.scot

Dr Sally Witcher OBE
Scottish Commission on Social Security
c/o Secretariat
Victoria Quay
Edinburgh
EH6 6QQ

info@socialsecuritycommission.scot

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Dear Dr Witcher,

Thank you for your letter of 25 September and accompanying report on the Carer's Allowance Supplement (Qualifying Individuals) and Young Carer Grant Amendment (Scotland) Regulations 2020. To note, these have been renamed for clarity on their purpose and will be brought forward as the Carer's Allowance Supplement and Young Carer Grants (Residence Requirements and Procedural Provisions) (EU Exit) (Scotland) Regulations.

Due to coronavirus and the uncertainties around implications of the UK's exit from the European Union (EU), we have faced greatly reduced timescales for these regulations, and I very much appreciate the work that has gone into considering the regulations and providing these recommendations in a short space of time.

Having considered the recommendations and observations in your report, I have set out a response below as I will shortly be laying the regulations. I welcome the Commission's overall view that the regulations will deliver on the intended purpose of ensuring that provision for both Carer's Allowance Supplement (CAS) and Young Carer Grant (YCG) is in line with the relevant EU rules. I am pleased to confirm that I have accepted the majority of the recommendations in the report and have set out more detail below. A table of responses to each recommendation is included at **Annex A**.

Effect of the draft regulations

The Commission notes the regulations will have the effect of making both CAS and YCG available to qualifying residents of the European Economic Area (EEA) or Switzerland on the same basis as residents of Scotland. The report highlights the Commission's view that there should be consistency across different forms of social security assistance where possible and notes that timescales for carrying out re-determinations in relation to applications for YCG in Scotland are expressed in 'working days' whereas for those outside Scotland timescales are expressed in 'days' only.

Recommendation 1 asks that periods for requesting and making re-determinations are consistently expressed in either calendar or working days, and that this should be done across all forms of assistance, unless there are good, explicit reasons for a different approach.

In response to this recommendation, we have reviewed existing social security legislation and forthcoming regulations and considered how best to express timescales in a way which is consistent and can be clearly understood by all users of Scottish social security. Regulations for all existing forms of devolved assistance use 'days' for timescales which apply to clients, and 'working days' for timescales which relate to work to be carried out by Social Security Scotland. This was considered clearer for clients and agency staff because Social Security Scotland activity will take place only on working days, but client activity can take place outside of this. Providing for 'working days' ensures, too, that bank holidays are discounted.

However, the response to our consultation on the forthcoming disability assistances highlighted a preference for the use of 'days' only in relation to re-determination timescales for both clients and Social Security Scotland. We recognise the importance of both consistency and clarity in Scottish social security in relation to this issue and we are considering further the best approach to take on this for future forms of assistance.

Legislative practice means that we do not specify 'calendar days' in legislation as it is only considered necessary to use anything other than 'days' where we do not mean calendar days. We do appreciate though that 'calendar days' may be considered clearer for clients where it is not specified that we mean 'working days'. As such, we will also be reviewing the guidance available for all existing forms of support to ensure it is clear what is meant by 'days' and 'working days' where these are used and why these are used.

'Genuine and sufficient link' to Scotland

The Commission notes that the 'genuine and sufficient link' test which will be used as part of the approach to exporting CAS and YCG has been tried and tested legally.

Recommendation 2 calls for both 'genuine' and 'sufficient' to be defined with reference to EU law, to ensure the policy intent of compliance with EU law is achieved.

The regulations define 'sufficient' in reference to EU law, so that what is required is that a person has a link to Scotland of such a close nature that if Scottish Ministers were not responsible for paying them the relevant benefit, it would be incompatible with EU law. It is judged according to EU law as it applied at the time the care was provided. This ensures that the policy intent of compliance with EU law is achieved. It is not, therefore, considered necessary to give the word 'genuine' in the regulations anything other than the ordinary dictionary meaning – in other words 'real' or 'true.'

In relation to the 'genuine and sufficient link', the Commission also highlights the importance of potential applicants and decision makers having sufficient advice to ensure consistency in how the test is applied, given the need for flexibility in the test. **Recommendation 3** calls for the publication of the clearest possible guidance on where individuals are likely to have a 'genuine and sufficient link' to Scotland, to be updated in response to significant developments.

Decision-making guidance for Social Security Scotland staff will set out the range of factors which may be taken into account in deciding whether an individual has a 'genuine and sufficient link' to Scotland. Taking into account the recommendations in this report, and feedback from stakeholders, this will also include examples to illustrate situations in which a

person may be considered to have a 'genuine and sufficient link' and where they may not. Decision-making guidance will be published and supporting materials will also be developed for applicants to aid their understanding of the 'genuine and sufficient link' and their eligibility. Processes are also currently being developed to ensure that any developments arising out of future case law are incorporated into all Agency and public-facing guidance.

Competent state

The Commission have highlighted that there is also no definition of 'competent state' in the draft regulations, in relation to an individual's eligibility to apply for CAS or YCG from abroad. **Recommendation 4** asks that the clearest possible guidance is published on situations in which an applicant's competent state is likely to be the UK, and that this is updated in response to significant developments.

As above, we are committed to publishing the decision-making guidance in relation to applications for CAS and YCG from outside the UK, which will include information on decisions regarding an individual's competent state, and to ensuring processes are in place to update all relevant guidance in response to developments in law.

Application and determination

In relation to the provision to make determinations of entitlement to CAS, including determinations without application, the Commission raised the importance of clarity on whether a single determination would be made for an ongoing award of CAS or fresh determinations made for each six monthly payment. **Recommendation 5** suggests that it should be considered whether it could be clearer in the regulations that each payment of CAS represents a separate award, requiring a fresh determination, or if it would be sufficient to include this in guidance.

This recommendation has been considered and it is our view that the regulations as they currently stand do as much as can be done to tie entitlement to CAS to a determination, and that it would not be possible to clarify the need for fresh determinations for each payment within the framework of the Social Security (Scotland) Act 2018 which created CAS. The regulations make clear that CAS may be paid as a result of a determination, and that this may come as a result of (a) an application being made (b) Scottish Ministers deciding, on the strength of information that becomes available to them, without an application, that a person may be entitled, (c) a person receiving a backdated award of Carer's Allowance (CA), after a determination that they are not entitled to CAS, or (d) the fact that the person received CAS on the most recent qualifying date. As such we will ensure that the requirement for a fresh determination to be made for each CAS payment is made clear through guidance.

In relation to applications for past payments of YCG, the Commission highlighted that the provision in the regulations could be read as preventing carers from applying for past payments they are entitled to, if they do not apply for the periods of care in chronological order. **Recommendation 6** calls for Regulation 9(6)(f) to be amended to ensure that individuals don't miss out on any payments of YCG which they are entitled to as a result of the order in which applications are made.

The draft regulations have been amended to ensure it is clear that applications need not be made so that the periods of care are in chronological order, as long as it remains the case that the grant can be paid only once in respect of any 12 month period, in line with the design of YCG.

Re-determinations and appeals

The Commission notes the reasons that a complaints process is used to rectify errors in relation to payments of CAS in Scotland where a re-determination and appeals process will be used for applications from outside the UK, and that it would be likely to be disproportionate to extend the process to CAS as an interim measure. In **Observation 1**, the Commission says they would welcome further information on the use of the CAS complaints process to rectify errors and suggests the effectiveness of this be monitored.

Recommendation 7 also asks that complaints procedures are used in place of re-determination and appeals processes only exceptionally, with criteria published for doing so if this is to be done in future.

The use of a complaints procedure, rather than re-determinations and appeals, is exceptional in the Scottish social security system and exists only for CAS. This is because CAS in Scotland is an automatic payment for which no determination is made by Social Security Scotland, and where no determination is made, re-determination and appeal rights do not exist. As highlighted by the Commission, carers are able to challenge decisions regarding their entitlement to CA with the Department for Work and Pensions (DWP). Additionally, as recognised in the report, CAS is an interim measure ahead of delivery in full of the Scottish replacement for CA.

The complaints procedure for CAS has worked well in allowing carers to question non-payment of CAS, due to technical issues or errors in individual records, and to receive payments to which they are entitled. Where carers contact Social Security Scotland because they feel they have missed a payment of CAS they should have received, client advisors are able to check records on DWP systems to identify why a payment has not been made. Where it has been identified that this is due to an error in DWP records or systems, Social Security Scotland have been able to work with DWP to confirm CAS eligibility and make payments to carers. As errors in systems other than our own cannot always be resolved, issues which have been previously identified are reviewed ahead of future payments to ensure eligible carers do not experience problems receiving payments in future.

When a complaint has been processed by Social Security Scotland, they will also consider any improvements which can be made as a result, and highlight any issues raised by the complaint and improvements that can be made to colleagues across the agency.

Full details of the Social Security Scotland complaints procedure are available on their website¹ and the latest feedback statistics show that 75 complaints were received in relation to Carer's Allowance Supplement between launch in September 2018 and March 2020, during which time 317,055 payments were made to 98,275 carers. The majority of complaints were resolved at Stage 1 with 23% progressing to Stage 2 and none being referred to the Scottish Public Services Ombudsman (SPSO).

Social Security Scotland continue to monitor contact from clients regarding CAS, including any CAS complaints to ensure that any emerging issues can be addressed. Complaints are monitored daily to ensure these meet SPSO timescales and improvements made as a result are shared through monthly reports. Data is also collected from Social Security Scotland's case management system on the feedback received on each benefit and published regularly. To date, as highlighted to the Commission, a majority of complaints relating to CAS are regarding the timing of payments, rather than payments being missed.

The Commission's report also asks why the re-determination timescales set out for applications for YCG from outside of Scotland, in respect of retrospective applications, are

¹ <https://www.socialsecurity.gov.scot/what-we-do/feedback/how-to-complain>

longer than those for applications made within Scotland, and **Recommendation 8** asks that this is explained.

Our intention was for the re-determination and appeal timescales for CAS, and for YCG claims from outside the UK, to be longer than for YCG claims in Scotland to take into account the impact that clients being based abroad may have on the ability of Social Security Scotland to contact clients, and to request and receive any further evidence required. We nevertheless recognise the importance of consistency and following further consideration have amended the timescales so that re-determination timescales for applications for YCG outside of the UK are in line with those in Scotland, and the CAS re-determinations will follow these timescales too. If a client is delayed in making a re-determination request due to being based abroad, a request can be accepted late under existing provisions in the Social Security (Scotland) Act 2018, which apply in relation to the YCG Regulations, and in provision included in schedule 2 of the current draft regulations for claims of CAS from outside the UK. These allow for late re-determination requests where there is a 'good reason' for this. We will also keep the operation of re-determinations for CAS and YCG claims from outside the UK under review to ensure there are no adverse consequences for clients.

Take-up

The Commission have highlighted the duty on Scottish Ministers to promote take-up of devolved social security assistance and the challenges in promoting take-up of both CAS and YCG to those eligible outside of the UK, particularly in doing so in a way which is proportionate and in keeping with the social security principles of efficiency and delivering value for money. **Recommendation 9** asks for details of planning for the promotion of take-up of CAS and YCG among newly eligible groups, including in relation to retrospective applications.

For CAS, our intention had been to use information from the DWP on potential CAS recipients living outside the UK, based on identifying carers who are living abroad, whose last postcode before leaving the UK was in Scotland, and who were in receipt of CA on any of the CAS qualifying dates since launch. However, following detailed consideration, DWP have informed us that it will not be possible to identify the relevant carers, or to contact them, in a way which is proportionate and represents value for money, when the number of carers likely to be eligible is considered. As highlighted in the Commission's report, direct contact with recipients of UK disability benefits abroad would also not be an efficient way of encouraging take-up of YCG outside of the UK, given the potential costs and the very small number of likely recipients.

We are, therefore, planning to promote the changes to CAS and YCG eligibility through engagement and communications with carer support organisations in Scotland, and by reaching out to European carer networks and networks of UK nationals abroad, using online information and social media. Information would be provided on existing channels such as mygov.scot and relevant Scottish Government social media platforms, and we will continue discussions with DWP to identify where UK Government channels may be used to signpost potential applicants to Social Security Scotland. Guidance will also be provided to Social Security Scotland staff to raise awareness of the changes with clients where relevant and we are reviewing existing communications products for both YCG and CAS to consider where these can highlight the changes to carers.

In relation to backdated and retrospective payments, our intention is that the forms for applying for both CAS and YCG will allow for applications to be made for more than one payment at the same time. Processes and guidance for staff will also be designed to ensure

carers are informed of the possibility of applying for retrospective payments to promote uptake of all payments for which carers are eligible. For CAS, client advisors will be able to establish from DWP systems which payments the carers may be eligible for, based on their case history and the information they provide, so that once a carer has applied for CAS, they can receive all past payments they are entitled to.

Process for developing the regulations

The report questions whether it would have been possible or preferable to include the provisions for applications from outside the UK, in the form currently drafted, in the original legislation which established CAS and YCG. **Recommendation 10** asks for a view on whether it is always necessary to await an opinion from the Administrative Commission on whether a new social security benefit falls within the scope of the coordination rules before applying them.

CAS and YCG are brand new forms of support and have no direct comparators in the UK system. In future, the classification of forms of assistance which have yet to be delivered by Social Security Scotland will be more straightforward, as each form of assistance (with the exception of Scottish Child Payment) has a ready comparator in the UK system, and the social security coordination requirements are being taken into account in developing the regulations for these. We will also now be able to draw on comparisons with existing devolved support to come to a view on the exportability of any new forms of assistance to be created in future.

It should be noted that exportability provisions for future benefits, as well as provisions for first or continued applications from abroad, are likely to apply only to the 'protected cohort' covered in the Withdrawal Agreement, or equivalent provisions in the Swiss Citizens' Rights Agreement and EEA EFTA Separation agreement, that is those who move to the EEA or Switzerland by 31 December 2020. There remains a level of uncertainty on if, and how, benefits will be exported to UK citizens who move to countries in the EEA or Switzerland other than Ireland after 31 December 2020, as this is dependent on the outcome of negotiations between the UK and EU. Under the terms of the UK/Ireland Convention on Social Security, the same arrangements for social security coordination that exist at present will be maintained for those moving between the UK and Ireland.

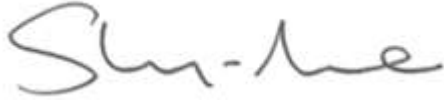
Since the Commission considered the current regulations, they have been amended to refer explicitly to individuals covered by the Withdrawal Agreement and other relevant agreements, in relation to situations where entitlement arises after the end of the EU exit transition period on 31 December 2020.

The First-tier Tribunal for Scotland Social Security Chamber and Upper Tribunal for Scotland (Allocation of Functions, Procedure and Composition) (Miscellaneous Amendments) Regulations

In developing the regulations, it has been determined that a further set of regulations will be needed to give full effect to the provisions for appeals in relation to CAS for those applying from outside the UK. The First-tier Tribunal for Scotland Social Security Chamber and Upper Tribunal for Scotland (Allocation of Functions, Procedure and Composition) (Miscellaneous Amendments) Regulations 2020 will expand the functions of the Social Security Chamber of the First-tier Tribunal for Scotland to include dealing with appeals relating to applications for CAS from outside the UK. The regulations ensure all relevant provisions apply to appeals concerning applications for CAS from outside the UK, in the same way as they do to the other forms of devolved assistance. These regulations will be made under the Tribunals (Scotland) Act 2014 and progressed alongside the main regulations.

Thank you once again for your flexibility in considering these regulations and for all your work to produce these recommendations to a reduced timescale. This is greatly appreciate. Your recommendations and wider feedback have been really valuable in developing the regulations and approach for CAS and YCG exportability, as well as informing wider work to improve consistency across Scottish social security regulations.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Shirley Ann Somerville', written in a cursive style.

SHIRLEY ANN SOMERVILLE

SCoSS recommendation	Accept/Partially accept/Decline	SG response
<p>1. Periods allowed for determination requests and the making of re-determinations should be consistently expressed in either calendar or working days. The Scottish Government should aim to ensure consistency across all forms of devolved social security assistance unless there are good, explicit reasons for taking a different approach.</p>	<p>Partially accept</p>	<p>We have reviewed existing and forthcoming social security legislation. For existing forms of assistance, timescales are expressed consistently in ‘days’ where timescales relate to clients, and ‘working days’ where they relate to action to be taken by Social Security Scotland. This is because Social Security Scotland activity will take place only on working days, but client activity can take place outside of working days.</p> <p>For future forms of assistance we are considering the best approach to take to ensure the system is as consistent as possible while providing clarity for clients and Social Security Scotland staff.</p> <p>It is not considered necessary in legislation to specify ‘calendar days’ rather than ‘days’ but we are reviewing the guidance for all devolved support to ensure it is clear for clients and advisors on where the terms are used and why.</p>
<p>2. The Regulations should define both ‘genuine’ and ‘sufficient’ with reference to EU law in order to ensure the policy intention of ensuring compliance with EU law is achieved.</p>	<p>Decline</p>	<p>The regulations define ‘sufficient’ in reference to EU law, requiring that a person’s link to Scotland is of such a close nature that if Scottish Ministers were not responsible for paying them the relevant benefit, it would be incompatible with EU law. It is judged according to EU law as it applied at the time the care was provided.</p> <p>This ensures that compliance with EU law is achieved so it is not considered necessary to also define ‘genuine’ in this way and genuine retains its ordinary dictionary meaning, of ‘real’ or ‘true’ in relation to a person’s link to Scotland.</p>

<p>3. The Scottish Government should publish the clearest possible guidance on circumstances that are likely to pass the 'genuine and sufficient link' test and update this as significant developments in the case law occur, while being clear that it can never provide an exhaustive list of examples.</p>	<p>Accept</p>	<p>Decision making guidance relating to an individual's 'genuine and sufficient link' will be published and supporting materials will be provided for prospective applicants. Processes are being developed to ensure this guidance is updated in response to developments in case law.</p>
<p>4. The Scottish Government should publish the clearest possible guidance on circumstances within which applicants are likely to pass the 'competent state' test and update this as significant developments occur.</p>	<p>Accept</p>	<p>As above, decision making guidance and information on the 'competent state' test will be published and updated as necessary.</p>
<p>5. The Scottish Government should consider whether it is necessary to amend the draft Regulations to clarify that each payment of CAS represents a separate award, requiring a fresh determination, or whether guidance to this effect will suffice.</p>	<p>Accept</p>	<p>We have considered whether amendments to the regulations are required to clarify this point and concluded this would be more appropriate to set out in guidance.</p>
<p>6. The Scottish Government should amend Regulation 9(6)(f) so that the order in which applications are made does not lead to individuals missing out on any retrospective payments to which they would otherwise have been entitled.</p>	<p>Accept</p>	<p>Regulations have been amended to be clear that applications for past periods can be made for YCG after any 'current' application, and that where two retrospective applications are made, the second may cover an earlier period than the first, provided that in each case there is at least a year between the two periods of care for which the applications are made.</p>
<p>Observation 1. The Commission would welcome any further information on how the complaints process has been and could be used to rectify any errors in the payment of CAS and its ability to rectify any</p>		<p>The CAS complaints process has worked well to rectify errors in CAS payments. Individuals have been able to contact Social Security Scotland where they feel they have missed payments to which they are entitled and Social</p>

<p>incorrect decisions not covered by the re-determination and appeal provisions in the draft Regulations. The effectiveness of the complaints process should be monitored while CAS remains in place.</p>		<p>Security Scotland has been able to work with DWP to confirm eligibility and make payments.</p> <p>We are continuing to monitor CAS contacts and complaints to ensure we can respond to any emerging issues.</p>
<p>7. Reliance on complaints procedures, rather than statutory re-determination and appeals processes, to rectify errors in devolved social security should be very exceptional and clearly justified. If the Scottish Government envisages further use of this model it should publish criteria for doing so.</p>	<p>Accept</p>	<p>Use of a complaints procedure in place of re-determinations and appeals processes is exceptional and exists only for CAS, as this is an automatic payment and interim measure.</p>
<p>8. The Scottish Government should explain why re-determination periods for applications under new Regulation 4(7) of the YCG Regulations are longer than those for other applications</p>	<p>Accept</p>	<p>In response to this recommendation, re-determination timescales for applications for YCG from the EEA and Switzerland have been reconsidered and will now be in line with those for YCG in Scotland. These timescales will also apply to applications for CAS from outside the UK.</p> <p>Where clients may be unable to submit re-determination requests on time as a result of being based abroad, these can be accepted late in line with provisions already in the Social Security (Scotland) Act 2018 which apply to YCG and are being extended to CAS through these regulations.</p>
<p>9. The Scottish Government should provide details of any planning to date on promoting take-up of CAS and YCG among newly-eligible groups, including the promotion of retrospective applications, in a proportionate way in keeping with social security principle (h) [that the Scottish social security system is to be efficient and deliver value for money].</p>	<p>Accept</p>	<p>For CAS, our original intention had been to use data from DWP to identify prospective clients outside of the UK. However, detailed discussions with DWP have not identified a means to do this which is proportionate to the numbers of carers involved. It would also not be feasible or cost-effective to reach prospective YCG applicants outside of Scotland using DWP data or resources.</p>

		<p>In light of this, our take up strategy will focus on communications through carers organisations in Scotland and networks in Europe, using social media and online information, as well as updates to existing communications channels and products.</p>
<p>10. The Scottish Government should outline its view on whether it is always necessary to await an opinion from the Administrative Commission on whether a new social security benefit falls within the scope of the coordination rules before applying them. The Scottish Government may create future top-up payments to reserved benefits within the scope of the coordination rules, or create new forms of assistance directly analogous to reserved benefits within their scope. If feasible, it should include the necessary provisions for compliance in its draft Regulations rather than await an opinion from the Administrative Commission.</p>	<p>Accept</p>	<p>The unique situation of Scottish social security and the fact that there were no direct comparators for CAS or YCG in the UK system meant that discussions were needed with the UK Government and EU groups regarding the exportability of these forms of support.</p> <p>For future benefits, there are existing comparators in the UK system, and exportability provisions are being included in the regulations as needed. For any further new forms of support we will be able to draw on comparisons with existing support to come to a view on exportability at the time of developing regulations.</p>