

## **Disability and Carers Benefits Expert Advisory Group: PIP Caselaw and DAWAP Working Group**

To: Shirley-Anne Somerville, Cabinet Secretary for Social Security and Older People  
By e-mail

12 March 2020

Dear Ms Somerville,

### **PIP Caselaw Integration with DAWAP Regulations**

#### **Background**

In our letter dated 20 December 2019, which provided advice on Disability Assistance for Working Age People (DAWAP), we made two recommendations that focus on ensuring rights established in caselaw interpreting Personal Independence Payment (PIP) regulations are reflected in the forthcoming DAWAP regulations.

We recommended:

**DAWAP regulations should be drafted to reflect individuals' rights as established in PIP caselaw.**

and

**The Scottish Government should consider the findings of DACBEAG's independent short-life working group of disability benefit experts, which will consider how best to reflect the rights established in PIP caselaw in DAWAP regulations. We welcome the Scottish Government's participation in this group.**

This paper sets out the advice from this short-life working group.

We stress that this advice forms only what we were able to develop in the short timeframe available to us and is therefore not comprehensive. We therefore recommend this advice serves to begin a longer, more comprehensive, look into all the principles developed in PIP caselaw and how they might be integrated into DAWAP regulations.

We recognise that including all principles of PIP caselaw will be overly cumbersome, but believe a balance can be struck that ensures the DAWAP regulations provide clarity and that individuals in Scotland retain the rights they currently have.

We welcome the commitment by the Scottish Government to ensure safe and secure delivery of the newly-devolved benefits, and believe this means that the rights people currently enjoy in the UK system must form a baseline for the rights held by those in the Scottish system.

We understand that our advice may incur risks, implications and challenges for the Scottish Government. These will be made explicit in the current advice note and we aim, where possible, to signpost a proposed solution.

Our advice is based on the best information currently available to us. Should our assumptions prove incorrect, or new information become available, our advice may change.

## **Method**

DACBEAG asked experienced welfare rights advisers to attend three workshops to discuss how the rights established in PIP caselaw might be integrated into DAWAP regulations. We aimed to identify which principles have been clearly established by caselaw. We also identified areas in the regulations which caselaw has highlighted as ambiguous, but has not established a clear principle, that the Scottish Government might clarify. These meetings were attended by Scottish Government officials to answer questions and set out the limitations of what the Scottish Government can do at this point in time. The Group greatly valued this input and wishes to thank those officials for their time and insights.

A list of attendees and agenda for our first meeting is provided in Annex A. Note that not all attendees attended every meeting.

## **Why regulations?**

The group was keen to ensure these rights are established in the regulations for the following reasons.

First, the group understands that there is no legal way to bind the Scottish Tribunals to following caselaw established by UK courts that have interpreted PIP regulations.

Guidance is an important part of the decision making process. It is important that the guidance for case managers should reflect, and cite, caselaw that establishes individuals' rights and provides clarity about eligibility. This will allow case managers to make determinations in line with the rights claimants have in the current system.

However, including reference to current caselaw in the guidance will not be sufficient to establish individuals' rights, as guidance is not binding on Tribunals. As Judge Hemingway succinctly explained, "*...entitlement to PIP is governed by the Welfare Reform Act 2012 and regulations made thereunder as opposed to what is said or what is not said in the assessment guide. It is the legislation, not the guide, which has to be interpreted.*"<sup>1</sup> Therefore, integrating caselaw principles into DAWAP regulations is the only way to ensure these rights are not lost.

The group recognises that if this process is not followed, and PIP regulations are simply copied over to the DAWAP regulations, Scottish Tribunals could interpret the regulations differently to the current caselaw. This would mean individuals in

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<sup>1</sup> *SB v SSWP (PIP)* [2018] UKUT 112 (AAC) at [10.].

Scotland could be treated differently to claimants in the rest of the UK at point of transfer.

Caselaw plays an important role in providing clarity about the rules of entitlement. Failure to reflect this caselaw in the regulations would mean that this clarity would be missing from the Scottish system at the point of transfer. Due to the relatively small caseload, compared to the UK PIP caseload, it may be many years before the caselaw has developed sufficiently in Scotland to provide clarity.

By enshrining these principles in regulations, decision makers and Scottish Tribunals will have a clearer path to follow.

## **Limitations**

We appreciate, due to issues related to passporting, qualifying benefits, and case transfer discussed in our 20 Dec 2019 letter, that there are limitations to how much the DAWAP regulations can vary from those of PIP. However, we understand that some changes can be made, including modifying the “Interpretation” sections of the regulations and small clarifying changes to the regulations apart from those laying out the activities and descriptors.

In our previous advice note, we recommended that there be a statutory review date to re-examine DAWAP and explore what more significant changes should be made after a safe and secure transition. Regardless of whether or not this is the approach taken by the Scottish Government, we believe that it is important for there to be a clear opportunity to review the effectiveness of how caselaw has been incorporated in the disability assistance regulations in Scotland. By ensuring this review is carried out by an independent group, the Scottish Government will receive independent advice on how the integration of caselaw has achieved the aims set out above. It will also provide an opportunity to consider whether PIP caselaw that has been established by UK Courts after DAWAP is rolled out should be integrated into DAWAP.<sup>2</sup> This approach would be consistent with the principles espoused in the Social Security (Scotland) Act 2018, especially the principle “that opportunities are to be sought to continuously improve the Scottish social security system...”.<sup>3</sup>

As such, we recommend:

**Recommendation 1: The Scottish Government should establish an independent group to provide advice on how UK caselaw established after the point of transfer should be incorporated into Scottish regulations.**

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<sup>2</sup> This will be important because the caselaw around PIP is still evolving (see e.g. *LS v SSWP* below) and there are many issues that have yet to be tested by the Courts. Due to the small size of the actual caseload in Scotland relative to that of the rest of the UK, these issues may be tested in UK tribunals but not looked at by Scottish tribunals. Where these issues have been settled in Scottish tribunals, this caselaw would be binding. However, where these issues have been looked at only by UK tribunals, this would not be binding and the same issues as discussed above would arise. Therefore, it may be useful for the Scottish Government to consider, from time to time, whether the regulations need amending to take into account this caselaw. The establishment of an ongoing independent group would be an opportunity for the Scottish Government to get advice on this issue.

<sup>3</sup> Section 1(g) of Social Security (Scotland) Act 2018.

## **Caselaw principles**

The Group limited the scope of the workshops to identifying caselaw principles that focused on how the PIP activities and their descriptors are applied. We did not examine cases that deal with procedural issues, for example application and appeal processes, evidence and how awards can be changed.

We do not suggest any specific wording that should be added to the DAWAP regulations. Instead, we hope to highlight areas of PIP regulations that have required clarification by the UK courts and suggest ways the Scottish Government might clarify the DAWAP regulations in light of these decisions.

We recognise that caselaw is not always settled. In areas that caselaw is ambiguous, or where there is not a consensus, we suggest policy decisions should be made in line with the principles set out in part one, section one of the Social Security (Scotland) Act 2018 (the principles of the Act).

In most cases, we believe words and phrases clarified by caselaw could be succinctly explained in the "Interpretations" section of the regulations. But sometimes, the wording of the regulations themselves may need to be changed.

Our final recommendation on this issue is:

**Recommendation 2: The Scottish Government should consider how the principles discussed below can be integrated into the DAWAP regulations.**

The Group carried out an initial scoping exercise to consider which pieces of PIP caselaw it was most important to reflect in the Scottish system. This identified a number of 'cross cutting' issues that applied to more than one activity or descriptor as well as pieces of caselaw that applied to one activity or descriptor. The group considered how the often complex and nuanced caselaw could be incorporated into regulations.

In some cases the group considered that whilst the caselaw highlighted an area that required further clarity the group did not think the caselaw had yet provided sufficient clarity. These may be areas where the Scottish Government should consider what its policy would be.

There were areas where the group members have differing views of the relevance of a piece of caselaw - the advice below is based on the areas where the group found consensus.

## **Cross cutting principles**

**"needs"**

Several cases establish the principle that “needs” as used in the relevant PIP activities, means “as is reasonably required”.<sup>4</sup> That is, it is not the bare minimum of what someone needs, nor what is medically required.

For example, considerations of putting on clothing should not be limited to clothing that simply provides warmth and decency.

As pointed out by Judge Gray, “*The precursor to this benefit, disability living allowance, had as its purpose enabling those with disabilities to live as far as possible as they would wish to had they not those disabilities, and I have no reason to believe that the philosophy behind PIP is markedly different.*”<sup>5</sup>

This also means that the limitations a claimant’s condition puts on their lifestyle should not be used to conclude they have lesser needs. For example, someone whose condition means they typically avoid noisy environments should not be assessed with the assumption that they will not or should not do so. While claimants cannot artificially create entitlement by unreasonably limiting how they choose to live their lives, their choices should not be unduly restricted when establishing what they reasonably need. These two considerations must be carefully balanced.

A clear statement explaining this principle could be included as the definition of “needs” in the “Interpretation” sections of the regulations.

### **“satisfied” on a “day”**

When considering whether someone with a condition that affects them differently at different times, Regulation 7 of the PIP regulations explains they will score points in a given activity if the “descriptor is satisfied on over 50% of the days of the required period...”.<sup>6</sup>

Caselaw has clarified that if a claimant’s condition causes them to satisfy a descriptor for any part of the day, so long as the period that it is satisfied is more than *de minimus*, or simply a fleeting moment, and has more than a “trifling effect” on their life, it is considered satisfied on that day.<sup>7</sup>

This principle could possibly be explained in the definition of “day” in the “Interpretation” sections of the regulations, or added directly to the wording of the regulation 7 equivalent in the DAWAP regulations.

### **“aid or appliance”**

Most of the daily living activities consider the need of an “aid or appliance”.

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<sup>4</sup> *PE v SSWP (PIP)*, [2015] UKUT 309 (AAC); *EG v SSWP (PIP)*, [2017] UKUT 101 (AAC); *SH v SSWP (PIP)* [2018] UKUT 251 (AAC); see also *Secretary of State v Fairley* [1997] 1 W.L.R. 799, discussing DLA.

<sup>5</sup> *EG v SSWP (PIP)* [2017] UKUT 101 (AAC) at [48.].

<sup>6</sup> Reg. 7(1)(a) of *The Social Security (Personal Independence Payment) Regulations 2013*.

<sup>7</sup> *TR v SSWP* [2015] UKUT 626 AAC; [2016] AACR 23.

Some caselaw suggests that an object is an aid so long as it improves, provides or replaces the claimant's impaired function being considered in the relevant descriptor.<sup>8</sup>

However, another line of cases disagrees with this point.<sup>9</sup> These cases suggest that if people without a disability would normally use an object for the same function, it should not be considered an aid.

This is one area that may require a policy decision from the Scottish Government in line with the principles of the Act, as the second line of cases excludes a significant number of people from assistance.

One principle that is well established is that what must be decided is whether or not the claimant needs to use an aid or appliance. Whether or not they actually use that aid or appliance is irrelevant.<sup>10</sup>

These principles could be clarified in the definition of "aid or appliance" in the "Interpretation" sections of the DAWAP regulations.

### **"safely"**

Caselaw has established that decisions about whether someone can conduct an activity "safely" must consider the likelihood (risk) of harm occurring, the severity of the harm if it were to occur, and the balance between the two. The decision rests on whether or not there is "a real possibility that cannot be ignored of harm occurring".<sup>11</sup>

Also, caselaw clarifies that claimants should not be unduly limited in their actions to keep themselves safe.<sup>12</sup> So, for example, someone who faces a risk of harm while taking a bath should not be expected to take fewer baths to reduce that risk.

Other caselaw explains that when considering the risk of harm, it is a general risk that should be contemplated, as opposed to only looking at the risk of actually attempting to complete the relevant activity.<sup>13</sup> For example, when looking at a descriptor that includes "supervision", the Upper Tribunal explained, "*A risk that gives rise to a need for supervision need not be a risk that is unique to a particular activity or to the activities in Schedule 1 generally. It is sufficient if it is a general risk, even one that applies when the claimant is doing nothing, provided that the requirements of a particular descriptor are satisfied.*"

A general risk can satisfy points under several descriptors. For example, a person's epilepsy is not brought on by cooking but gives rise to the need for supervision when cooking. Similarly, this general risk gives rise to the need for supervision when washing and several other activities.

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<sup>8</sup> *NA v SSWP (PIP)* [2015] UKUT 572 (AAC).

<sup>9</sup> *CW v SSWP (PIP)* [2016] UKUT 197 (AAC), reported as [2016] AACR 44; *DR v SSWP (PIP)* [2018] UKUT 209 (AAC); *AP v SSWP (PIP)* [2016] UKUT 501 (AAC).

<sup>10</sup> *KO v SSWP (PIP)* [2018] UKUT 78 (AAC); Reg 4(2)(b) The Social Security (Personal Independence Payment) Regulations 2013.

<sup>11</sup> *RJ, GMcL and CS v SSWP v RJ (PIP)* [2017] UKUT 105 (AAC), reported as [2017] AACR 32.

<sup>12</sup> *SH v SSWP* [2018] UKUT 251 (AAC).

<sup>13</sup> *IM v SSWP* [2015] UKUT 680 (AAC); *id* at [18.].

This principle could be clarified in the definition of “safely” in the “Interpretation” sections of the DAWAP regulations.

### **“to an acceptable standard”**

“Acceptable standard” has no clear definition in the PIP regulations at present. We considered how “an acceptable standard” might be defined in the regulations and ultimately decided that any attempt to do so should be in line with the principles of the Act.

That said, one principle that has been established in caselaw is that when deciding whether someone is able to complete a task to an acceptable standard, the effects of pain must be considered.<sup>14</sup> This principle could be clarified in the definition of “to an acceptable standard” in the “Interpretation” sections of the DAWAP regulations.

### **Alcohol dependency**

It has been confirmed that alcohol dependency is a mental condition and decisions must consider how this condition affects the claimant’s abilities if relevant.<sup>15</sup>

This principle could be clarified in a definition of “mental condition” in the “Interpretation” sections of the DAWAP regulations.

### **Principles regarding specific activities**

The Group went on to discuss each of the activities set out in Schedule 1 of the PIP regulations, and highlighted issues that have required clarification from the Upper Tribunal.

### **Daily Living Activities**

#### **Activity 1 – Preparing food**

The Upper Tribunal has decided that when considering whether someone can cook a simple meal from fresh ingredients to an acceptable standard, decision makers must include a consideration of whether or not they can prepare a variety of meals.<sup>16</sup>

This is something that might be clarified in a definition of “cook” in the “Interpretation” sections of the DAWAP regulations.

Also, while there is not a lack of clarity in the regulations, the Upper Tribunal has highlighted that decision makers often fail to look at whether or not a claimant can cook a meal from “fresh ingredients”.<sup>17</sup>

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<sup>14</sup> *PS v SSWP (PIP)* [2016] UKUT 326 (AAC).

<sup>15</sup> *SD v SSWP (PIP)* [2017] UKUT 310 (AAC).

<sup>16</sup> *SSWP v DT (PIP)* [2017] UKUT 272 (AAC).

<sup>17</sup> *LC v SSWP (PIP)* [2016] UKUT 150 (AAC).

This might be addressed by being especially clear on this point in training and guidance for decision makers.

### **Activity 2 – Taking nutrition**

Caselaw has established that if you would not eat or drink without prompting, you should score points under this activity.<sup>18</sup>

The “Interpretation” sections could be used to clarify this point.

### **Activity 3 – Managing therapy or monitoring a health condition**

We did not feel there was any caselaw that needed to be highlighted regarding this activity, however we want to point out that the definition of “managing therapy” set out in the “Interpretation” section of the current regulations may not be consistent with the principles of the Act.

As defined at present, “manage therapy’ means undertake therapy, where failure to do so is likely to result in a deterioration in [the claimant’s] health.”<sup>19</sup> This means that where therapy is required to improve a claimant’s health, but would not necessarily result in a deterioration if not undertaken, a claimant does not score points.

We invite the Scottish Government to consider whether such a restrictive definition is consistent with the principles of the Act.

### **Activity 4 – Washing and bathing**

Caselaw has established that when deciding whether a claimant “needs assistance to be able to get in or out of a bath or shower”, as described in descriptor (e) of this activity, decision makers must look at whether the claimant is able to get in or out of an unadapted bath, and whether the claimant is able to get in or out of an unadapted shower. If they are unable to get in or out of either, they should score points. That is, the “or” between bath and shower in this phrase is disjunctive instead of conjunctive.<sup>20</sup>

Also, while not discussed explicitly in caselaw, we suggest the Scottish Government look at descriptor (g.) of this activity. The way this descriptor is worded is problematic because it does not address people who cannot bathe (defined in the regulations as including getting into or out of an unadapted bath or shower) but do not need help washing. This seems to exclude a group who should be covered under the

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<sup>18</sup> *JW v SSWP (PIP)* [2018] UKUT 169 (AAC); The PIP assessors guide suggested that this should only apply if the promoting is related to a condition such as Anorexia or Prader Willi Syndrome. (Page 87, PIP Assessment Guide Part Two - The Assessment Criteria – Sep 2019). However, *TK v SSWP (PIP)* [2020] UKUT 22 (AAC) has established that the scope is wider than this. In this case, someone with Cystic Fibrosis who requires a high calorie and high protein diet and, due to lack of appetite, needs prompting to eat a sufficient quantity of food came under this activity. This case was published only days before we submitted this advice. This highlights the dynamic context PIP caselaw sits in at the moment. It also shows the importance of maintaining a means of continuous review of future UK caselaw and consideration of how it should be used to improve DAWAP.

<sup>19</sup> Par. 1, Schedule 1. of The Social Security (Personal Independence Payment) Regulations 2013.

<sup>20</sup> *SP v SSWP (PIP)* [2016] UKUT 190 (AAC).

regulations. Therefore, we invite the Scottish Government to consider whether this descriptor is consistent with the principles of the Act.

### **Activity 5 – Managing toilet needs or incontinence**

Caselaw has established that if a claimant experiences being “caught short” as a result of mobility difficulties, rather than that they suffer from incontinence that requires management, they should not be awarded points under activity 5 (although it does allow points to be awarded when there is a medical problem in relation to continence which can result in incontinence because of mobility difficulties).<sup>21</sup>

The Group feels this outcome may not be consistent with the principles of the Act, and therefore suggests the Scottish Government consider how this activity might be improved.

Further caselaw has held that using incontinence pads counts as using an aid for this activity.<sup>22</sup> Also, needing to use incontinence pads on a daily basis, even if they are soiled irregularly, can meet the 50% rule set out in regulation 7 of the PIP regulations.<sup>23</sup> Importantly, caselaw has highlighted that the real issue to be decided is whether the claimant *has a need* for incontinence pads, not whether or not they actually wear them.<sup>24</sup>

These clarifications could be made in the “Interpretation” sections of the new regulations.

### **Activity 6 – Dressing and undressing**

Caselaw has clarified that “dress or undress” in this activity means the claimant must be able to both put on and take off their clothes, including both their shoes and socks.<sup>25</sup> Difficulty with either function will suffice.

Caselaw has also clarified that dressing in this activity includes the ability to choose clothing that is to an acceptable standard of cleanliness.<sup>26</sup>

These are principles that could be clarified in the “Interpretation” section of the new regulations.

### **Activity 7**

Caselaw has established that “communicating verbally” regards only communication that is made orally and received aurally.<sup>27</sup> For example, lip-reading or being able to communicate via text messages is not relevant.

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<sup>21</sup> *KW v SSWP (PIP)* [2017] UKUT 54 (AAC).

<sup>22</sup> *BS v SSWP (PIP)* [2016] UKUT 456 (AAC).

<sup>23</sup> *SSWP v NH (PIP)* [2017] UKUT 258 (AAC).

<sup>24</sup> *KO v SSWP (PIP)* [2018] UKUT 78 (AAC).

<sup>25</sup> *JM v SSWP (PIP)* [2016] UKUT 542 (AAC).

<sup>26</sup> *DP v SSWP (PIP)* [2017] UKUT 156 (AAC).

<sup>27</sup> *EG v SSWP (PIP)* [2017] UKUT 101 (AAC); *CC v SSWP (PIP)* [2017] UKUT 429 (AAC); *SB v SSWP (PIP)* [2018] UKUT 112 (AAC); *P v SSWP (PIP)* [2018] UKUT 376 (AAC).

The “Interpretation” sections could be used to clarify this point.

Also, similar to the discussion of Activity 9 below, caselaw has clarified that “communication support”, as defined in the regulations to mean “support from a person trained or experienced in communicating with people with specific communication needs...”, can be provided by someone whose only experience of assisting people in this way is of assisting this particular claimant.<sup>28</sup> This means the claimant’s family and friends could well be considered to meet this definition; it is not limited to professionals.

### **Activity 8 – Reading and understanding signs, symbols and words**

We do not wish to highlight any caselaw regarding this activity.

### **Activity 9 – Engaging with other people face to face**

#### **Engage socially**

The Upper Tribunal has found that though the words “engage socially” do not feature in the wording of the activity’s descriptors, “engage” in this context should be defined to have the same meaning as “engage socially”, which is set out in the “Interpretation” section of the schedule.<sup>29</sup>

This is one instance where the wording of the regulations could be modified to add “socially” to the descriptors themselves.

The phrase “engage socially” was given further clarity by caselaw that suggests it must be “in a contextually and socially appropriate manner”.<sup>30</sup> For example, it may not be enough to be considered able to “engage socially” if the client’s only interaction is with one person and they are not able to “establish relationships with others”. Also, it should not be limited to those whom the claimant knows well.<sup>31</sup>

To “engage socially” means more than “the ability to reciprocate exchanges”. For example, a brief conversation with a stranger about the weather while waiting for a bus does not involve establishing a relationship in the normal sense of the word. Nor does buying a burger or an ice cream, although both involve reciprocating exchanges.<sup>32</sup> Similarly, the claimant must be able to engage with people regardless of gender.

Furthermore, the claimant must be able to engage with people “generally”, and such engagement should not be limited to only engagement that is reasonably necessary.<sup>33</sup> So, the ability to engage with those “with whom [the claimant] needs to engage for a specific and limited purpose (health professionals or the tribunal) is insufficient to engage the baseline (zero scoring) descriptor.”

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<sup>28</sup> *TC v SSWP (PIP)* [2016] UKUT 550 (AAC).

<sup>29</sup> *SF v SSWP (PIP)* [2016] UKUT 543 (AAC); *HA v SSWP (PIP)* [2018] UKUT 56 (AAC).

<sup>30</sup> *HJ v SSWP (PIP)* [2016] UKUT 487 (AAC); *AM v SSWP (PIP)* [2015] UKUT 215 (AAC).

<sup>31</sup> CPIP/2559/2015.

<sup>32</sup> *RC v SSWP (PIP)* [2017] UKUT 352 (AAC).

<sup>33</sup> *PM v SSWP (PIP)* [2017] UKUT 154 (AAC).

The case that holds that a claimant need not be able to establish and maintain friendships in order to be considered able to “engage socially” is currently being appealed.<sup>34</sup>

In addition to including “socially” in the schedule, we suggest reviewing the definition of “engage socially” set out in the “Interpretation” section to ensure this clarity is reflected.

## **Social support**

Caselaw has clarified that “social support”, as defined in the regulations to mean “support from a person trained or experienced in assisting people to engage in social situations”, can be provided by someone whose only experience of assisting people in this way is of assisting this particular claimant.<sup>35</sup> This means the claimant’s family and friends could well be considered to meet this definition; it is not limited to professionals.

Further caselaw has established that the difference between “prompting” and “social support”, is that support counts as “social support” if “the claimant needs it to come from a person so trained or experienced.”<sup>36</sup> That is, someone trained or experienced in assisting people to engage in social situations.

The same caselaw establishes that social support or prompting does not need to be given face to face or contemporaneously with the engagement. Determining whether support counts for purposes of descriptor (c.) will be something that needs to be determined on a case by case basis.

The “Interpretation” sections might reflect these principles by adding to the definitions of “prompting” and “social support”.

## **Overwhelming psychological distress**

Another area that needs further consideration is the interplay between the overwhelming psychological distress and substantial risk of harm described in descriptor (d.) of this activity and the “safely” requirement set out in regulation 4 of the PIP regs. At present, as discussed in caselaw, it is unclear whether Tribunals need to consider both the lower standard of “safely” and the separate finding of “substantial harm”.<sup>37</sup> Moreover, there is ambiguity as to where the regulations leave someone for whom social support will not be sufficient to allow them to engage socially but they do not have overwhelming psychological distress or present a danger to others (e.g. persons suffering from persistent delusion disorders).<sup>38</sup>

On this point, we do not suggest a view one way or the other, but we urge the Scottish Government to examine this lack of clarity and consider how it might be addressed in the DAWAP regulations in line with the principles of the Act. It is

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<sup>34</sup> *LS v SSWP (PIP)* [2016] UKUT 573 (AAC) (currently on appeal to the Court of Appeal).

<sup>35</sup> *PR v SSWP (PIP)* [2015] UKUT 584 (ACC); *SL v SSWP (PIP)* [2016] UKUT 147 (AAC); *SSWP v MM* [2019] UKSC 34.

<sup>36</sup> *SSWP v MM* [2019] UKSC 34.

<sup>37</sup> *SSWP v AM (PIP)* [2015] UKUT 215 (AAC).

<sup>38</sup> *SM v SSWP (PIP)* [2019] UKUT 292 (AAC).

possible the Scottish Government could make a decision and, at least for the time being, make their thinking clear in guidance with a view to make the necessary changes to the regulations at a later date.

## **Activity 10 – Making budgeting decisions**

We do not wish to highlight any caselaw principles regarding this activity.

## **Mobility Activities**

### **Activity 1 – Planning and following journeys**

This activity refers to planning and following journeys. Following a journey means “able to follow a route” as set out in the descriptors.

Caselaw explains that “follow a route” means to actually make one’s way along the route or “go along a route”, which includes but is not limited to the ability to navigate (i.e. finding one’s way).<sup>39</sup> Therefore, all the descriptors in this activity, especially descriptors (d.) and (f.), can be satisfied if the claimant cannot undertake those activities due to overwhelming psychological distress. This case also clarifies that if a claimant must ask for directions, they cannot be found able to follow a route.

Further caselaw has clarified that an overall and holistic assessment is required when looking at descriptors (d.) and (f.) of this activity.<sup>40</sup> This includes considering the claimant’s ability to utilise varying means of transportation, including e.g. on foot, public transportation and car, with neither, of themselves, being determinative.<sup>41</sup>

Moreover, whether the claimant is only capable of following part of a journey via some form of transportation, and how they can follow the remainder of that journey, must also be considered.<sup>42</sup>

Also, caselaw has spelled out the difference between “a journey” and “any journey” as used in the descriptors.<sup>43</sup> Essentially, “any” in this context just means either a familiar or unfamiliar journey. The Judge explains, “The test is general in nature so that it does not contemplate consideration of particular or specific journeys. So, a broad assessment of the ability to undertake familiar journeys is what is required.”

Similarly, when considering whether a claimant can undertake a “journey”, it is important decision makers do not focus solely on a local or short journey.<sup>44</sup>

Also, when outdoors, it is not necessary to prove that that a person accompanying the claimant needs to do anything; if their mere presence prevents overwhelming psychological distress, then that is sufficient to score under descriptors (d.) and (f.).<sup>45</sup>

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<sup>39</sup> *MH v SSWP (PIP)* [2016] UKUT 531 (AAC).

<sup>40</sup> *JC v SSWP (PIP)* [2019] UKUT 181 (AAC).

<sup>41</sup> *JC v SSWP (PIP)* [2019] UKUT 181 (AAC); *SB v SSWP (PIP)* [2019] UKUT 274 (AAC).

<sup>42</sup> *JB v SSWP (PIP)* [2019] UKUT 203 (AAC).

<sup>43</sup> *AA v SSWP (PIP)* [2018] UKUT 339 (AAC).

<sup>44</sup> *SSWP v IV (PIP)* [2016] UKUT 420 (AAC); *SB v SSWP (PIP)* [2019] UKUT 274 (AAC).

<sup>45</sup> *AA v SSWP (PIP)* [2018] UKUT 339 (AAC).

These are clarifications that could be made in the “Interpretations” sections of the regulations.

Finally, it should be noted that we believe the decision to narrowly define “orientation aid” to exclude sat navs may be inconsistent with the principles in the Act.<sup>46</sup> These cases are based on the definition of “orientation aid” currently used in the PIP regs, which, in our view, is inconsistent with the interpretation of aids generally.

We invite the Scottish Government to consider whether this definition should be changed to remain consistent with principles of the Act.

## **Activity 2 – Moving around**

There is some conflicting caselaw that highlights a significant ambiguity in this descriptor which we invite the Scottish Government to consider clarifying.

This conflict concerns descriptor (c.) which describes someone who “can stand and then move unaided more than 20 metres but no more than 50 metres.”

One line of cases interprets this descriptor as applying to someone who can move up to 50 metres unaided but cannot move any further even with an aid.<sup>47</sup>

However, another case understands this to apply to someone who can move up to 50 metres unaided and can only move further with an aid.<sup>48</sup>

We invite the Scottish Government to decide which interpretation is most consistent with the principles of the Act, and clarify this descriptor accordingly.

## **Conclusion**

We would like to reiterate that this advice should not be considered comprehensive. While we have done the best we could with the limited time and resources available to us, the principles we discuss above are some that we thought should be considered when drafting the regulations.

We believe the Scottish Government should use this advice as a starting point to complete a more comprehensive assessment of PIP caselaw. Then, using the principles set out in the Act as a lens, it should decide which caselaw concepts should be integrated into the DAWAP regulations.

**Recommendation 3 : This advice should not be considered comprehensive. We recommend the Scottish Government conduct its own survey of PIP cases to ensure the DAWAP regulations fulfil the commitment of a safe and secure transfer.**

## **Recommendations**

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<sup>46</sup> *RB v SSWP (PIP)* [2016] UKUT 304 (AAC); *CSPIP/299/2015*.

<sup>47</sup> *JP v SSWP (PIP)* [2015] UKUT 529 (AAC); *AP v SSWP (PIP)* [2016] UKUT 501 (AAC).

<sup>48</sup> *KL v SSWP (PIP)* [2015] UKUT 612 (AAC).

Please see below our key recommendations.

**Recommendation 1: The Scottish Government should establish an independent group to provide advice on how UK caselaw established after the point of transfer should be incorporated into Scottish regulations.**

**Recommendation 2: The Scottish Government should consider how the principles discussed below can be integrated into the DAWAP regulations.**

**Recommendation 3 : This advice should not be considered comprehensive. We recommend the Scottish Government conduct its own survey of PIP cases to ensure the DAWAP regulations fulfil the commitment of a safe and secure transfer.**

We are pleased to have had the opportunity to engage with your officials whilst undertaking this piece of work and are happy to have a further discussion if they want clarification of any of the issues raise. I hope this piece of work is helpful and look forward to your response.

**Kind regards,**

**Ed Pybus**

**Working Group Chair**

## **ANNEX A**

### **Disability and Carers Benefits Expert Advisory Group: PIP Caselaw and DAWAP Regulations Working Group**

Ladywell Business Centre, 94 Duke St, Glasgow G4 0UW  
22 February 2020, 10:00 to 16:00

#### **AGENDA**

##### **10:00 – 10:30 - Setting the scene**

Introductions

What are we trying to achieve? (David)

The outcome of today's meeting is to produce advice for the Scottish Government in line with the recommendations of the Disability and Carers Benefit Expert Advisory group:

- DAWAP Regulations should be drafted to reflect individuals rights as established in PIP case law, and
- This working group will consider how best to reflect the rights established in PIP case law in DAWAP Regulations.

What are the boundaries of our discussion? (Nathan)

- Overview of policy context

##### **10:30 – 12:30 - How can we achieve this? (Ed)**

Considering the following questions may help shape our discussion:

- What does the current body of PIP caselaw tell us about where the PIP regulations lack clarity?
- Where does the current body of PIP caselaw give individuals additional rights that aren't clear in the PIP regulations?
- How, if at all, should entitlement to DAWAP be influenced by future PIP caselaw? What are the consequences of any approach taken?
- How could any PIP caselaw be incorporated in the DAWAP regulations?
- How are the Scottish social security principles relevant to our process?

##### **12:30 – 13:00 - Lunch**

##### **13:00 – 14:00 - To the detail (split into two groups)**

- Can we recommend specific areas of the regulations, or specific pieces, of caselaw that should be included in the DAWAP regulations?
- What are the risks if certain pieces of caselaw are not incorporated into the DAWAP regulations?

##### **14:00 – 16:00 - (10 min break at 14:30) Feedback and reflection (All)**

Bringing it all together, what is our advice?

##### **16:00 - Close**

## WORKING GROUP ATTENDEES

<b>Name</b>	<b>Organisation</b>
Ed Pybus	DACBEAG – Working Group Chair
Tressa Burke	DACBEAG
Ruth Matheson	Parkhead Housing Association
Steven McAvoy	Enable Scotland
Steven Craig	Queens Cross Housing Association
Jo McLaughlin	The Action Group
Simon Hodge	Castlemilk Law Centre
Paul McCormack	Govanhill Housing Association
Christopher Keel	South Lanarkshire Council
Claire McDermott	Scottish Government
Nathan Gale	Scottish Government
Jessica Da Costa	Scottish Government
David Hilber	DACBEAG Secretariat
Kirsty Milligan	DACBEAG Secretariat