

Cabinet Secretary for Social Security and Older People
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Dr Jim McCormick
Chair: Disability and Carers Benefits Expert
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c/o Scottish Government



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Dear Jim,

Thank you for your letter of 12 March 2020 regarding Personal Independence Payment (PIP) caselaw and its inclusion in the Disability Assistance for Working Age People (DAWAP) Regulations. I understand the scale and complexity of this work and greatly appreciate your succinct, constructive advice. Having considered all of your recommendations I am pleased to confirm that I broadly support the majority of them, and have set out my decisions below. It is important to note that my commitments relating to the DAWAP Regulations are made subject to any emerging legal issues which may require an alternative approach to be taken.

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.

I agree with the objective this recommendation aims to achieve. In order to ensure the most efficient and effective means of determining what effect emerging PIP and DAWAP caselaw should have on the Scottish system, I want to give further thought to the process by which this should be carried out. I do note the advantages of an independent group undertaking this role and will factor that in to my consideration.

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

Cross cutting principles: “needs”

I agree that “needs” should be defined within the DAWAP Regulations as “is reasonably required” to ensure the judicial interpretation of the term is reflected. I believe that the more nuanced principle relating to any restrictions self-imposed by clients should be captured by the objective definition and lends itself better to explanation in guidance. Worked examples will be provided to avoid potential confusion for Case Managers, particularly where this principle interacts with other definitions and criteria.

Cross cutting principles: “satisfied” on a “day”

In order to ensure the 50% rule continues to operate as caselaw provides I agree that an additional definition of “satisfied on a day” should be incorporated into the DAWAP Regulations.

Cross cutting principles: “aid or appliance”

I am of the view that the first tranche of cases described in your advice, which focus on the purpose for which the individual uses the item, is most in keeping with the original definition, is person centred and will most fully capture the needs of disabled individuals. To that end “aid or appliance” should be defined as an object which a client reasonably requires and “improves, provides or replaces” their reduced function, and can include an object which an individual without a disability might choose to use for the same function.

Cross cutting principles: “reliability criteria”

Due to the importance of the reliability criteria in applying the descriptors correctly I agree that the definition of “safely” in the DAWAP Regulations should reflect the way in which UK caselaw has developed its interpretation, including a need to consider: the likelihood of harm occurring; the severity of the harm if it were to occur; and the balance between the two.

Similarly, I agree that “to an acceptable standard” should be defined within the Regulations, including taking into account the impact of pain and fatigue. Officials will work to develop a definition of “to an acceptable standard” that reflects the principles of the Act, so far as is possible within the limits of existing judicial interpretation. I do however recognise that there may be decisions made on this matter which are not entirely in keeping with our social security principles, such as caselaw relating to an acceptable standard of nutrition. This is something I am very keen to review following delivery of DAWAP.

Cross cutting principles: alcohol dependency

While I absolutely agree that Case Managers must understand the nature of alcohol dependency and be in no doubt that it is a mental health condition, I have concerns about defining it as such in Regulations. Introducing a statutory definition of a condition seems out of step with the functional nature of the PIP framework and would represent a significant departure from it in the DAWAP Regulations. I am not persuaded that there is a compelling rationale as to why “mental condition” should be the only condition that is defined and am acutely aware that attempts to do so risk inadvertently excluding or including particular individuals or creating scope for ongoing legal challenge as to the nature of the definition itself and how it is interpreted. I will therefore instead commit to providing robust guidance for Case Managers on this matter, providing reference to relevant health and social care sources, including those produced by the third sector.

Principles regarding specific activities: Activity 1 - preparing food

I note that the case you referred to in relation to this recommendation was not viewed by the Judge to set a precedent on the need for a variety of meals to be considered. I am also concerned that attempts to include a variety of meals in the Regulations could lead to a subjective consideration being undertaken by Case Managers or the Tribunal. The best approach therefore, in my view, is to cover both of the points raised relating to this activity in guidance. I understand that following discussions with officials you are satisfied with this approach.

Principles regarding specific activities: Activity 2 – Taking nutrition

As a requirement for prompting is a descriptor within this activity I have concerns about causing confusion by also referring to prompting within the definition of the activity itself. Specifically referring to prompting within this activity alone seems to pose the risk that a tribunal may interpret that to mean prompting should be considered differently under activity 2 than it should be considered in all other activities with prompting descriptors. I therefore think that Case Managers guidance is the appropriate place to fully explain how a requirement for prompting should be considered under this activity.

Principles regarding specific activities: Activity 3 – Managing therapy or monitoring a health condition

I share the concerns set out under this activity and note the same issues arise in relation to the medication descriptors also. Current practice is for assessors to consider whether the therapy or medication the client requires improves their symptoms or capability. Broadening the definition of both “therapy” and “medication” in the Regulations in line with that approach is my preferred way of addressing this recommendation.

Principles regarding specific activities: Activity 4 – washing and bathing

I am of the view that the current definition of “bathing” in conjunction with the instruction in the PIP Assessment Guide that consideration should be given to whether the client reasonably requires assistance with getting in and out of an un-adapted bath or shower or a wet-room, captures the needs of the clients you refer to. However, I will ensure that our decision-making guidance also explicitly covers the point you raise. I understand that after further discussion with officials you were content with this approach.

Principles regarding specific activities: Activity 5 – managing toilet needs or incontinence

I agree that the explicit inclusion of the use of continence pads as an aid within our Regulations would be beneficial. Having agreed to change the definition of “needs” I do not think any further clarification of this activity is necessary. I very much appreciate your concern regarding the impact of mobility difficulties on an individual’s ability to

access a toilet when required. However, I am also mindful of the significant challenge of fully understanding the potential impact of making changes of this nature without access to the comprehensive data that will be available once DAWAP is being delivered. Once sufficient data is available I am committed to reviewing this activity to ensure it does not present any barriers to providing dignity to clients with the needs your advice highlights.

Principles regarding specific activities: Activity 6 – dressing and undressing

This recommendation does not seem to be necessary because the descriptors within the activity already state that difficulty with either dressing or undressing is taken into account and the reliability criterion “to an acceptable standard” should capture difficulty in choosing clean clothes.

Principles regarding specific activities: Activity 7 – Communicating Verbally

It is clear that the definition of this activity has undergone significant judicial interpretation and I agree that the interpretation included in Regulations should reflect current understanding. That means stipulating that “communicating verbally” only includes communication that is made orally and received aurally, and that an individual providing “communication support” need only be trained or experienced in providing support to a particular client, as opposed to people in general.

Principles regarding specific activities: Activity 9 – Engaging with other people face to face

Bringing the wording of the descriptors into line with the interpretation of this activity is clearly desirable and I agree that “engage socially” should be included within the descriptors. In response to your further advice relating to “engaging socially,” the lack of a settled precedent regarding the ability to form and maintain friendships inclines me towards monitoring the ongoing judicial consideration of this activity and considering whether any additional changes are required in future.

I agree with your recommendation to clarify the interpretation of “social support” in the Regulations so they reflect the current understanding that such support needs to be provided by someone trained or experienced in doing so, in order to be differentiated from prompting. In relation to the timing of support or prompting, as there is nothing in the legislation to suggest this has to be contemporaneous with the activity, I am satisfied that guidance can be used to ensure Case Managers understand this principle.

Your recommendation relating to “Overwhelming Psychological Distress” is one I am happy to accept and I will include further consideration in the decision-making guidance. Additionally, should any clear precedent in this area emerge I will give consideration to whether any further measures are necessary.

Principles regarding specific activities: Activity 1 – Planning and following journeys

Given the considerable caselaw relating to this activity I agree the interpretations you have highlighted should be developed in the DAWAP Regulations to ensure the

descriptors are applied as intended. Where the interpretation of orientation aid is concerned, I agree this is narrowly defined, but given the number of points associated with the relevant descriptor it seems intended to apply to clients who require a significant degree of support in order to get around. I think this is in keeping with the requirement for a specialist orientation aid to be required and so I am not minded to change it at this time.

Principles regarding specific activities: Activity 2 moving around

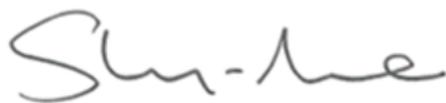
I am of the view that the interpretation of descriptor 2(c) reflecting the approach taken by DWP – applying to someone who can move up to 50 metres unaided but cannot move any further even with an aid – is sufficiently clear. Particularly when considered with reference to the other descriptors within this activity and can therefore be fully explained in guidance.

Recommendation 3: the Scottish Government should conduct its own survey of PIP cases to ensure the DAWAP Regulations fulfil the commitment of a safe and secure transfer

I understand the significant scale of PIP caselaw and can reassure you that throughout the process of drafting Regulations consideration will be given to relevant caselaw, particularly any emerging precedent that needs to be taken into account.

I greatly appreciate your continued commitment to providing advice and support at this extremely difficult time. I sincerely hope that you and every member of the group remain well and continue to be able to focus on your own and your families' health and wellbeing.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Shirley-Anne". The signature is written in a cursive, flowing style.

SHIRLEY-ANNE SOMERVILLE