



Scottish
Commission
on Social
Security

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Scrutiny report on draft regulations:

Carer's Allowance Supplement (Qualifying Persons) and Young Carer Grant Amendment (Scotland) Regulations 2020

**Submitted to the Scottish Government and the Scottish
Parliament's Social Security Committee on 25 September 2020.**

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Summary of recommendations and observations

Recommendation 1: Periods allowed for determination requests and the making of redeterminations 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.

Recommendation 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.

Recommendation 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.

Recommendation 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.

Recommendation 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.

Recommendation 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.

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 incorrect decisions not covered by the redetermination and appeal provisions in the draft Regulations. The effectiveness of the complaints process should be monitored while CAS remains in place.

Recommendation 7: Reliance on informal complaints procedures, rather than statutory redetermination 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.

Recommendation 8: The Scottish Government should explain why redetermination periods for applications under new Regulation 4(7) of the YCG Regulations are longer than those for other applications.

Recommendation 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).

Recommendation 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.

1. Introduction

The Scottish Commission on Social Security (SCoSS) is pleased to present its report on the draft Carer's Allowance Supplement (Qualifying Individuals) and Young Carer Grant Amendment (Scotland) Regulations ('the draft Regulations'). This report has been completed in accordance with our pre-legislative scrutiny function, as set out in sections 22 and 97 of the Social Security (Scotland) Act 2018.

These draft Regulations are technical in nature. Their primary purpose is to ensure that two forms of social security assistance created under previous legislation¹ comply with the European Union's (EU) social security coordination rules. These are set out in two European Council (EC) Regulations,² which will be collectively referred to in this report as 'the coordination rules'.

As we note below, the timescale for SCoSS to produce this report was very tight. The draft Regulations were referred by the Cabinet Secretary on 31st August 2020, with a requested response date of 18th September for our scrutiny report (in the event, this was extended to 25th September). The Commission received a briefing from Scottish Government officials at its July board meeting and also received responses to its subsequent written questions. Given the short deadline, the Commission invited written views from a limited number of individuals with known expertise in the field. Written answers from the Scottish Government to SCoSS's questions are reproduced in Annex A and our scrutiny timeline is summarised in Annex B. The Commission's webpages provide a link to the draft Regulations that are the subject of this report, other relevant material produced by the Scottish Government and written submissions from stakeholders.³ We thank all those who contributed to our scrutiny.

The report firstly considers the necessity of the draft Regulations in light of the UK's withdrawal from the EU and then summarises the effect of the draft Regulations. Subsequent sections go on to consider whether

¹ Carer's Allowance supplement was established by Social Security (Scotland) Act 2018 s81. The Young Carer Grant was established by the Carer's Assistance (Young Carer Grants) (Scotland) Regulations 2019, made under s28 of the 2018 Act.

² Council Regulation (EC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EC) No 883/2004 of the European Parliament and of the Council on 29 April 2004 on the coordination of social security systems.

³ <https://www.gov.scot/publications/draft-carers-allowance-supplement-qualifying-persons-and-young-carer-grant-amendment-scotland-regulations-2020/>

the draft Regulations achieve their purpose of securing compliance with the coordination rules, before considering issues around redeterminations and appeals and take-up. The report concludes with comments about the process by which the draft Regulations have been brought forward, including the omission of coordination provisions from the legislation that initially created Carer's Allowance Supplement (CAS) and Young Carer Grant (YCG), and the opportunity allowed for pre-legislative scrutiny.

Overall, the draft Regulations referred to the Commission appear likely to achieve their primary purpose of ensuring that CAS and YCG comply with the UK's obligations under the coordination rules. The number of people who will become entitled to payments is currently unknown, meaning the cost to the Scottish budget is also unknown, but will clearly be small – the Scottish Government estimates between 20 and 120 additional people will become entitled to CAS as a result, and a similar number for YCG.⁴ There are likely to be considerable challenges around identifying individuals with a possible entitlement (particularly to YCG) for the purposes of promoting take-up, as Scottish Ministers have a duty to do.⁵

2. The coordination rules and withdrawal from the EU

The key feature of the coordination rules for the purposes of this report is that in certain circumstances they confer eligibility for social security benefits paid by one state upon individuals who reside – temporarily or permanently – in another state. They also determine when a state is obliged to grant resident non-nationals access to social security benefits it provides. The coordination rules cover the European Economic Area (EEA), which consists of the European Union plus Iceland, Liechtenstein and Norway, as well as Switzerland and (for now) the United Kingdom.

Although the UK left the European Union on 31 January 2020, the coordination rules are now 'retained law' with which the social security systems must comply for the time being.⁶ The draft Regulations would be necessary for this reason alone. However, the Scottish Government has advised the Commission that it expects that EEA nationals with settled status in the UK and certain EEA-resident UK nationals will

⁴ Scottish Government's draft outline impact assessments.

⁵ Social Security (Scotland) Act 2018 s3

⁶ European Union (Withdrawal) Act 2018 s3 – this provision incorporates 'direct EU legislation' into UK law. Direct EU legislation includes most Regulations in force on 30 January 2020 (the day before 'exit day')

continue to benefit from the coordination rules for many years to come, even if the coordination rules are superseded in UK law so that they cease to benefit any new individuals.⁷

3. Effect of the draft Regulations

In essence, the draft Regulations will serve to make both YCG and CAS available on the same basis to residents of Scotland and to EEA residents who have a genuine and sufficient link to Scotland and for whom the UK is the competent state for the payment of sickness benefits (these terms will be discussed below).⁸ The main exception to this is that CAS is paid to Scotland-resident claimants of Carer's Allowance without a determination being made by Social Security Scotland, whereas the draft Regulations require a determination (whether with or without application) in respect of EEA residents.

Part 2 of the draft Regulations extends eligibility for CAS to residents of the EEA or Switzerland who are in receipt of Carer's Allowance⁹ and have a genuine and sufficient link to Scotland, and for whom the UK is the competent state for the payment of sickness benefits. It makes provision for determinations of eligibility (with or without application) for CAS and for subsequent redeterminations and appeals. This involves an amendment to s81 of the Social Security (Scotland) Act 2018¹⁰. The Act empowers the Scottish Government to make Regulations amending this section, as long as the purpose of the amendment is to change the definition of a qualifying individual.¹¹ Part 2 of the draft regulations also extends the application of provisions of the Act relating to aspects of the application process – including sections relating to determinations, the duty to inform applicants of any other possible entitlements to devolved social security assistance and provision for appointees to act on behalf of an entitled individual.¹² Retrospective applications and determinations are permitted in respect of any period since the creation of CAS.¹³

⁷ Q&A with Scottish Government officials; briefing note to SCoSS on social security coordination.

⁸ The Administrative Commission for the Coordination of Social Security Systems has determined that both CAS and YCG are sickness benefits within the scope of the coordination rules.

⁹ Carer's Allowance is a UK benefit delivered by the Department for Work and Pensions (DWP). Carer benefits are now a devolved matter in Scotland, where Carer's Allowance will in due course be replaced by the new Carer's Assistance.

¹⁰ Regulation 3 and Schedule.

¹¹ Social Security (Scotland) Act 2018 s81(8).

¹² Regulation 4.

¹³ Regulation 4(2) and 5.

Part 3 extends eligibility for the YCG to young carers resident in the EEA or Switzerland as long as the young carer has a genuine and sufficient link to Scotland and the UK is the competent state for paying sickness benefits to the young carer.¹⁴ The young carer must also meet the standard qualifying conditions of age (16 to 18 years), type (promoting the physical, mental or emotional wellbeing of the cared-for person), duration (13 weeks) and intensity (16 hours per week) of caring commitments. The cared-for person or people must receive a qualifying UK disability benefit.¹⁵ Part 3 of the draft Regulations also allows retrospective applications and awards to cover qualifying periods of care between the commencement date of the YCG Regulations (21 October 2019) and the commencement date for these new provisions (projected to fall in December 2020).¹⁶ Part 3 also clarifies that retrospective applications are possible even if the cared-for person has lost eligibility for the qualifying disability benefit since the end of the 13-week period on which the application is based.¹⁷ An extended period for redetermination requests (42 days) will apply to retrospective applications from EEA residents compared to other YCG applications (31 days) and the period for redeterminations is also longer (56 days as opposed to 16 working days).¹⁸ In previous reports, the Commission has highlighted the desirability of consistency across different forms of social security assistance, where this is possible. There does not appear to be any good reason for the inconsistency with the original YCG Regulations in how the redetermination periods are expressed.

Recommendation 1: Periods allowed for determination requests and the making of redeterminations 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.

¹⁴ Regulation 9(7).

¹⁵ Carer's Assistance (Young Carer Grants) (Scotland) Regulations 2019 Part 2 – further conditions include that an individual can only receive one YCG in a 12-month period and that only one YCG can be paid in respect of a cared-for person in a 12-month period unless the original grant recipient dies, or the original grant is found to have been incorrectly awarded.

¹⁶ Regulation 9(3).

¹⁷ Regulation 9(5).

¹⁸ Regulation 9(8).

4. Genuine and sufficient link to Scotland

It is well established in the case law that a ‘genuine and sufficient link’ to the UK is an appropriate requirement for residents of the EEA or Switzerland seeking to claim a social security benefit on the basis of the coordination rules. Both terms have been the subject of EU case law, whereas the draft Regulations only define ‘sufficient’, but not ‘genuine’, by reference to EU law.¹⁹ Requiring the same kind of connection to Scotland makes good sense, both because the test has been tried and tested legally and because in demonstrating the necessary connection to Scotland the applicant in the process demonstrates the necessary connection to the UK.²⁰ In its policy note, the Scottish Government notes that the genuine and sufficient link test necessarily incorporates a measure of flexibility,²¹ so that it is not possible to include a precise definition in the Regulations. While this is indisputable from a legal point of view, it is also the case that prospective applicants and the advice sector require as much certainty as possible about the sort of circumstances that are likely to fall within or outside the requirements of the test, while decision makers need help to ensure application of the test to similar cases is as consistent as possible. Decision maker guidance for UK benefits outlines some factors that decision makers may take into account,²² but it would be useful if guidance in the Scottish system could be clearer, for example, by giving real-life examples of circumstances that have been found to establish or fall short of a genuine and sufficient link. In response to the Commission’s brief consultation, Dr Charles O’Sullivan suggested that, in compiling such guidance, the Scottish Government should look to examples of best practice from EU member states as well as taking its own overview of relevant case law. Training sessions should ensure the guidance is fully understood, but also that decision makers understand the guidance is only indicative.

¹⁹ Regulation 9(7)(c) and Schedule para 5.

²⁰ The CPAG’s response to the Commission’s brief consultation suggested the Scottish Government might consider going beyond this minimum requirement in its extension of eligibility.

²¹ The judgment in *Kavanagh v Secretary of State for Work and Pensions* [2019] outlines some of the key UK and EU case law – see <https://www.bailii.org/ew/cases/EWCA/Civ/2019/272.html> and <https://cpag.org.uk/welfare-rights/legal-test-cases/disability-living-allowance-and-genuine-and-sufficient-link>

²² See, for example, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/910729/admc2.pdf

Recommendation 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.

Recommendation 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.

5. Competent state

Applicants resident in the EEA or Switzerland will only be awarded YCG or CAS if the UK is the competent state for payment of sickness benefits to the individual. This is because the EU’s Administrative Commission²³ has determined that CAS and YCG are sickness benefits for the purposes of the coordination rules.²⁴ Typically, this would occur if the person is employed in the UK, including as a civil servant or in the armed forces, is a posted worker normally based in the UK or receives UK unemployment or retirement benefits, or is a family member of a person in one of these categories. As with the ‘genuine and sufficient link’ test, no definition of the ‘competent state’ is set out in the draft Regulations and this should be taken into account in the drafting of guidance. ‘Competent state’ provisions in the draft Regulations apply to both CAS and YCG, although given that CAS can only be paid to someone already receiving Carer’s Allowance, an EEA-resident claimant of Carer’s Allowance would already have passed the ‘competent state’ test before being in a position to apply for CAS.

Recommendation 4: The Scottish Government should publish the clearest possible guidance on circumstances within which

²³ The Administrative Commission for the Coordination of Social Security Systems is an EU Committee with representatives of each Member State which meets at least four times each year to facilitate dialogue between Member States and promote the proper functioning of the EU rules. Its role includes determining which cash transfers it classes as ‘social security’, requiring exportability to EEA states and accessibility to qualifying UK-resident EEA nationals in order to comply with the coordination rules

²⁴ Personal independence payment (daily living component), disability living allowance (care component), attendance allowance and carer’s allowance are also treated as sickness benefits for the purposes of the coordination rules. The other categories of social security benefit are: maternity and paternity benefits; benefits in respect of occupational accidents and diseases; death grants; invalidity benefits; old age and survivors’ pensions; unemployment benefits; pre-retirement benefits; and family benefits.

applicants are likely to pass the ‘competent state’ test and update this as significant developments occur.

6. Application and determination

The draft Regulations empower the Scottish Government to make a determination of an EEA resident’s entitlement to CAS with or without application.²⁵ In practice it does not seem very likely that many initial determinations will be made without application, at least in the first round of applications. What was not initially clear to the Commission from either the draft Regulations or the accompanying policy note was whether a fresh determination would be required in respect of each 26-week period for which a CAS payment is made, or whether there would effectively be a single, ongoing award with payments made on a twice-yearly basis. The Scottish Government has now advised that a fresh determination will be made for each 26-week period. It seems much more likely that at least some of these repeat awards will be made without application. It was not necessary to clarify this issue when CAS was introduced due to the automatic nature of payments to Scotland-resident recipients, but clarity is more important now that entitlement is to extend to qualifying residents of the EEA and Switzerland. The provision allowing determinations without application will also enable Social Security Scotland to rectify an initial, incorrect determination without requiring a further application.²⁶

Recommendation 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.

Making provision for retrospective applications for each form of assistance seems fair, and probably legally necessary, given that there will be individuals who ought to have had an entitlement to either CAS or YCG since the introduction of the payment, but did not because the legislation did not comply with the coordination rules.

One provision of concern here is Regulation 9(6)(f), which states that someone who has previously received a YCG is not entitled to make a retrospective application unless this covers a period of 13 weeks ending at least one year after the qualifying period for the previous application.

²⁵ Regulation 4(1) and 6.

²⁶ Regulation 7 and 8.

The effect of this subparagraph appears to be that applications for YCG must be made sequentially in the same order as the period covered by each claim – that is, a young carer who has been awarded YCG could not apply for a second grant in respect of an earlier missed payment period. If this is the case, it could result in a young carer missing out on a grant to which he or she would have been entitled had these provisions been in place from October 2019, when YCG was launched. For example, a 17-or 18-year old carer who applies for the YCG in December 2020 or January 2021 (shortly after these Regulations are due to take effect) might be barred from subsequently applying for a further YCG in respect of a qualifying period ending between October and December 2019, even if he or she met all the conditions in that period other than the then-applicable residence condition. If this was the policy intent, it seems to clash with the general intent of the Social Security Charter that processes and systems should be “as clear as possible.”²⁷ If it was not the policy intent, then the Regulation should be amended to make clear that current and retrospective applications can be made in any order.

Recommendation 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.

7. Redeterminations and appeals

Part 1 of the draft Regulations creates an apparent incongruity in that Scotland-resident claimants have no appeal rights in respect of CAS, whereas EEA-resident applicants do. The Scottish Government has explained that this is because CAS is paid automatically to Scotland-resident recipients of Carer’s Allowance, without any need for a determination, therefore there is no decision to appeal. A complaints process exists, which the Scottish Government states can be used to challenge any erroneous non-payment of CAS, and has resulted in the identification and remediation of “a few” erroneous non-payments.²⁸ Presumably if any appeal were necessary, it would be against the DWP’s determination of a Carer’s Allowance application. The Commission is satisfied to note that when the current UK Carer’s Allowance and CAS are replaced by the new Scottish Carer’s

²⁷ ‘Processes that work’, commitment 1.

²⁸ Reply to question from SCoSS, 15/09/20.

Assistance this will be subject to the full suite of redetermination and appeal rights conferred by the 2018 Act. On balance, it would probably be disproportionate to make similar provision in respect of CAS at this point given that it is in effect an interim measure. However, as a matter of general principle the Commission would stress the preferability of a rights-based redetermination and appeal process to a complaints process that is likely to allow greater discretion around the redress available following an error. As the Child Poverty Action Group in Scotland (CPAG) pointed out in its submission to the Commission, clarity is needed on whether the complaints process is capable of rectifying incorrect decisions resulting from official error, the receipt of incorrect information from DWP or ambiguity as to residence in Scotland.

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 incorrect decisions not covered by the redetermination and appeal provisions in the draft Regulations. The effectiveness of the complaints process should be monitored while CAS remains in place.

Recommendation 7: Reliance on informal complaints procedures, rather than statutory redetermination 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.

CPAG's submission also noted that there is no clear reason why the time limit for redetermination requests and the period in which Social Security Scotland is required to make a redetermination are longer in respect of EEA residents submitting retrospective applications for periods between October 2019 and December 2020 compared to YCG applications from Scotland-resident applicants in this period, or from any applicant after December 2020.

Recommendation 8: The Scottish Government should explain why redetermination periods for applications under new Regulation 4(7) of the YCG Regulations are longer than those for other applications.

8. Take-up

The Scottish Ministers are subject to a duty to promote take-up of devolved social security assistance, which in practice is a duty to “keep under consideration what steps they *could* take” (emphasis added) to ensure people receive their social security entitlements.²⁹ At least some individuals who gain entitlement to CAS or YCG as a result of these draft Regulations are likely to be relatively difficult to target as part of any take-up campaign. It would presumably be possible to communicate the existence of CAS to all EEA-resident Carer’s Allowance claimants, inviting applications from those who consider themselves to have a genuine and sufficient link to Scotland. However, this would presumably depend on DWP contacting its claimants, and would require claimants to have sufficient information or knowledge to assess whether they might have the required link to Scotland. Furthermore, it is likely that only a minority would in fact be entitled to CAS, risking disappointment to applicants and wasted time for both applicants and Social Security Scotland. To identify and directly target EEA-resident young carers would appear challenging but it may be feasible. One approach – again dependent on DWP – might be to contact EEA-resident claimants of UK disability benefits at the appropriate rate advising them of the availability of YCG if they have a young carer who provides the necessary kind and duration of care and has a genuine and sufficient link to Scotland. This process has even more stages than that for CAS and would likely involve an even higher proportion of claimants being contacted who have no eligible carer. The Commission has no firm view on what kind of take-up strategy would be appropriate, but notes that in the case of YCG in particular there may be tension between the duty to promote take-up and the principle that the Scottish social security system should be efficient and delivery value for money.³⁰ Resources expended to promote take-up should be in proportion to the anticipated number of beneficiaries. While the Commission understands that – appropriately – discussions with stakeholders on a communications strategy are ongoing,³¹ it might be helpful to the Social Security Committee if any thinking to date on promoting take-up could be shared before it considers the draft Regulations.

For the most part, identifying people who should have had a past entitlement will be subject to the same challenges, but it seems likely that some of those who make successful applications will have met the

²⁹ Social Security (Scotland) Act 2018 s3.

³⁰ Social Security (Scotland) Act 2018 s1(h).

³¹ Communication from Scottish Government.

necessary conditions at some point during the period for which retrospective applications are allowed. Subject to the point above (and recommendation five) on the sequencing of applications, the Scottish Government might consider contacting those who make a successful application after the new Regulations come into force advising them to consider whether they might have grounds for a retrospective application, unless this would obviously not be the case (for example, a YCG applicant who has just turned 16).

Recommendation 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).

9. Process

The report concludes with some points about the process by which the draft Regulations have been put together and referred to the Commission for scrutiny. Members have become accustomed to working to tight reporting deadlines and the deadline for these Regulations was the tightest to date. The Scottish Government has explained that this was due to a combination of the delay to its legislative timetable caused by the COVID-19 pandemic and the need to have these Regulations in place before the end of the transitional period for leaving the EU.³² In this case, the limited time available, while far from ideal, did not make the task impossible as the focus of scrutiny was narrower than usual. The Scottish Government has stated that any significant delay to the making of the Regulations would have required primary legislation, a more time-consuming process that would have been in the interests of neither EEA residents with an entitlement nor Social Security Scotland.

We note that the Scottish Government has not involved service users in the development of these draft Regulations, due to the small size of the potential client base (and, presumably, the difficulty involved in identifying its members).³³ While social security principle (f) says that the Scottish social security system is to be designed with the people of Scotland, the difficulty in identifying the likely users as well as the technical nature and narrow scope of the Regulations mean not doing so in this case is both defensible and understandable. The Commission

³² Communication from Scottish Government.

³³ Draft outline impact assessments.

welcomes the brief update received on Social Security Scotland's ongoing work to improve its knowledge of its service users, including their protected characteristics, and their experience of devolved social security including CAS and YCG.³⁴

The Commission asked whether it would have been possible or preferable to include the provisions that appear in these draft Regulations in the original legislation establishing the two forms of assistance. Doing so may have saved time and resources, and avoided the need, for example, to establish provisions on retrospective claims.³⁵ In response to questions from the Commission, Scottish Government officials explained that it was considered necessary to await a view from the Administrative Commission on the applicability of the coordination rules before legislating.

The Commission considers this approach to be appropriate in the case of YCG. In the absence of any analogous UK benefit, it would have been impossible for the Scottish Government to be certain about the necessity of the provisions under scrutiny when the Carer's Assistance (Young Carer Grants) (Scotland) Regulations 2019 were drafted – although the Scottish Government has acknowledged it always considered the YCG “likely” to be deemed exportable.³⁶ CAS differs in that it is a top-up payment to a UK benefit that was already known to fall within the scope of the coordination rules. Consequently, the reason for doubting whether the coordination rules would apply is less clear. Communication from the Scottish Government confirms that s81(8) was included in the Social Security (Scotland) Act 2018 precisely because it was anticipated that CAS might be exportable.³⁷ There might therefore have been an opportunity to make the necessary provisions in the original 2019 Regulations, avoiding the need to reopen the issue at a later date. It is reassuring that provision has been made to backdate payments to the introduction of CAS or the date at which the individual's entitlement should have begun, so that people should not lose money.³⁸ However, it would have been better if people in receipt of Carer's Allowance and with a genuine and sufficient link to Scotland had been able to avail of their entitlement from the point at which CAS was introduced or (if later) their Carer's Allowance claim began, and would have avoided the need for Social Security Scotland to administer back payments.

³⁴ Draft outline impact assessments.

³⁵ Regulation 883/2004 article 71-72.

³⁶ Communication from Scottish Government.

³⁷ Communication from Scottish Government.

³⁸ Regulation 5.

While there will sometimes be doubt as to the applicability of the coordination rules to a new social security payment, the Scottish Government has told the Commission which forms of social security assistance it anticipates will be classified as ‘social security’ for the purposes of the coordination rules, and which it does not.³⁹ It follows that where there can be little doubt over its applicability, it may not be necessary to await an opinion from the Administrative Commission before making the necessary provisions for exportability and for extending entitlement to resident EEA nationals.

Recommendation 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.

³⁹ Scottish Government briefing note to SCoSS on social security coordination.

Annex A - Carer's Allowance Supplement (Qualifying Persons) and Young Carer Grant Amendment (Scotland) Regulations 2020: Draft scrutiny timetable

11 August 2020: SCoSS Board meeting: Briefing from Scottish Government official on policy issues

28 August 2020: Regulations referred to SCoSS by the Cabinet Secretary for Social Security and Older People

31 August 2020: Scottish Government provided draft outline impact assessments

31 August 2020: SCoSS requested written submissions from stakeholders

8 September 2020: Deadline for stakeholder views

Annex B - Q&A with Scottish Government Officials

Could the Scottish Government feasibly have anticipated that these draft regulations would have been classified by the relevant EU body as ‘social security’, and therefore be exportable, when drafting the original legislation?

Reaching a view on the classification of these forms of assistance was complicated by the fact that neither payment has a direct equivalent in the existing Department for Work and Pensions system, and detailed discussions were therefore required with the UK Government (UKG) and the relevant EU bodies.

In relation to Carer’s Allowance Supplement (CAS), it was known at the time the Social Security (Scotland) Bill was going through Parliament that CAS may be exportable in terms of the EU rules. It was for this reason that the provision was included in section 81(8) of the now Social Security (Scotland) Act 2018 to expand the definition of qualifying individual. It would not have been practicable to discuss with the relevant EU bodies, as the Bill was going through, what the classification of CAS may be, given the possibility that the CAS provision would be amended.

The Scottish Government’s view in drafting the Young Carer Grant (YCG) regulations was that this assistance was likely to be classified as exportable by relevant EU authorities, and as such there is already provision for some export of YCG, in regulation 8(3) of the YCG regulations as it currently stands. The Scottish Government’s view, further to subsequent discussions with UKG and the relevant EU bodies, is that this should now be extended to allow export by some claimants who do not fall within the current provision.

Is there any information additional to the Cabinet Secretary’s letter as to exactly why the scrutiny timetable is so tight?

The timetable for these regulations has been affected by the coronavirus impact on the legislative timetable and on the overall social security programme. We can no longer rely on section 2(2) of the European Communities Act 1972 after the end of the transitional period for EU exit. As this is what enables us to make by secondary legislation the full package of changes necessary to export CAS, we would then likely be forced to rely on primary legislation. This would significantly delay the

process of enabling people from outside the UK to claim CAS. In any event, we are keen to have the changes in place to enable payments of CAS to be made to people outside the UK in line with the December payment run in Scotland.

While appreciating that it may be very difficult to do so, has the Scottish Government estimated the potential costs of extending the assistance, including for applications being backdated?

Given the very low numbers eligible to receive both CAS and YCG outside of the UK, the additional expenditure on payments, including those for backdated applications, is not expected to be material. Delivery processes are in development but will use existing systems and resources so delivery costs are also expected to be minimal.

Given the low number of people who may claim the assistance, and that they may be scattered throughout the EEA, is there any more info about the Scottish Government 'communications plan and an application process [...] to ensure all eligible carers can access this support?' The SG has said, 'We will be engaging with stakeholders on the development of the processes and on the communications and engagement needed to ensure eligible carers are aware of and can apply for this support', but there are no further details of how and when it will do so.

We have already invited general views on the approach, and are inviting members of the Carer Benefits Advisory Group to a meeting to take input on processes and engagement. This will feed into development work and we plan to share the subsequent draft processes and communications plans with stakeholders for comment once they are worked up. We are also seeking carers who have experience relevant to exportability to support this work, via carer support organisations.

A complaints process, rather than appeal rights, currently exists to rectify any errors in the payment of CAS. Do you know whether any such cases have occurred?

The latest Social Security Scotland 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. A large proportion of complaints received in relation to CAS have been from people who have been missed from a CAS payment run due to the timing of their Carer's Allowance award, where an award was backdated to include the CAS qualifying date after information had been provided to Social Security Scotland by the Department for Work and Pensions (DWP), or after CAS payments had been made. These clients receive a backdated CAS payment at the next payment run.

In a few cases complaints have identified technical issues which meant carers missed CAS payments to which they were entitled. In these cases Social Security Scotland have been able to work with DWP to confirm eligibility and make payments to carers. As we will not always be able to resolve technical issues which are not in our own systems, we are committed to ensuring that once Social Security Scotland is aware of an issue, this will be flagged for review ahead of future CAS payments. This will ensure processes are in place to prevent eligible carers experiencing problems receiving payments in future.

Scottish Government can make a determination of an EEA resident's entitlement to CAS with or without application. Would a fresh determination be required in respect of each 26-week period for which a CAS payment is made, or would there effectively be a single, ongoing award with payments made on a twice-yearly basis? I.E. does each such payment of CAS represent a separate award, requiring a fresh determination, or do consecutive payments fall within the same award?

A fresh determination would be made in respect of each Carer's Allowance Supplement (CAS) payment so there would be no ongoing award. As we would not be requiring carers to report any change of circumstances to Social Security Scotland (rather they will continue to report changes to the Department for Work and Pensions (DWP) in relation to their Carer's Allowance claim), making a new determination for each payment would ensure that carers are still entitled to CAS before they are paid.

In practice, because we have access to DWP systems for the purposes of CAS, this will not require applications for each payment, instead the intention is that ahead of each CAS payment run, Social Security Scotland staff would review the records of carers outside of the UK who received the previous payment to check if they remain eligible (i.e. that they are still in receipt of Carer's Allowance and resident in the EEA/Switzerland). Where a carer is still eligible a payment would be made and a determination letter issued. Where it appears a carer is no longer eligible, Social Security Scotland would contact them for further information and if it is confirmed that they are no longer entitled, a payment would not be made and a determination letter to this effect would be issued.