



Scottish
Commission
on Social
Security

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Scrutiny report on draft regulations:

The Scottish Child Payment Amendment Regulations 2021

**Submitted to the Scottish Government and the Scottish
Parliament's Social Security Committee on 20 November 2020.**

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Summary of recommendations

Recommendation 1 – We recommend that accessible guidance for decision makers and SCP applicants should provide full detail on complex situations where an award is continuing at a nil rate rather than simply ending.

Recommendation 2 – We recommend that processes and guidance are clear about whether an overpayment of SCP that arises because of a retrospective nil award of tax credits would be recoverable in law or in practice.

Recommendation 3 – We recommend that the draft regulations be amended, in line with the Scottish Government’s policy intention, to ensure that the first payment for a new claim is paid for a full week or full weeks.

Recommendation 4 – We recommend that the term ‘sanction’ be defined in the draft regulations, and that the Scottish Government should seek to align the meaning of this term across all relevant types of assistance.

Recommendation 5 – We recommend that the Scottish Government explore the case for building-in testing at a much earlier stage, to ensure the correct alignment between policy intent and the wording of draft regulations, and build in a consistency check in the drafting of future regulations for SCP and other types of assistance.

1. Introduction

This report provides the views of the Scottish Commission on Social Security (SCoSS) on the Scottish Child Payment Amendment Regulations 2021 ('the amending regulations'). These seek to amend the [Scottish Child Payment Regulations 2020](#).¹ SCoSS has already reported twice on draft Scottish Child Payment (SCP) regulations and this further report builds on that scrutiny.²

In accordance with its statutory function, SCoSS's consideration of the amending regulations took account of the Scottish social security principles and relevant provisions of human rights law.³ Our scrutiny was also informed by a briefing that Scottish Government officials provided at our board meeting in October 2020.

In referring the amending regulations to SCoSS for scrutiny⁴, the Cabinet Secretary for Social Security and Older People stated that they were designed to clarify the Scottish Government's policy and delivery intent on two issues: nil awards and payment cycles. These issues are considered in turn below. We then consider how the process by which the Scottish Government develops regulations could be improved.

2. Nil awards

The original draft regulations submitted to SCoSS for scrutiny contained provisions on 'nil awards': a person would have a live claim for a qualifying benefit even if their award were reduced to zero as a result of

¹ <https://www.legislation.gov.uk/ssi/2020/351/made>

² SCoSS [initially reported](#) on draft SCP Regulations in January 2020. We then produced a [supplementary report](#), in February 2020, on additional and revised provisions of the draft SCP Regulations.

³ Sections 22 and 97 of the Social Security (Scotland) Act 2018 describe the Commission's pre-legislative scrutiny function. Section 97 also requires SCoSS to carry out this role with regard to the Scottish social security principles and any relevant provisions of human rights law.

⁴ <https://www.gov.scot/publications/scottish-commission-on-social-security-letters-scottish-child-payment-2019/>

sanction.⁵ [Our report](#)⁶ on these draft regulations noted that the relevant provisions did not specify whether someone with a nil award for another reason, but who technically had an open claim for a qualifying benefit, would be treated similarly, or whether a decision to retrospectively reduce an award of tax credits to zero would result in SCP received during the same period being treated as an overpayment. The report recommended that the Scottish Government should clarify the circumstances in which a nil award of a qualifying benefit could confer entitlement to the SCP, ideally in the Regulations but, failing that, in Decision Maker Guidance.

The Scottish Government's [response](#) to this recommendation stated: "The draft Regulations set out that a nil award of a qualifying benefit as a result of sanctions can confer entitlement to the SCP (regulation 15(2) of the draft Regulations)."⁷ This response went some way towards addressing the recommendation.

The Scottish Government has subsequently clarified that the policy intent of the amending regulations is to ensure that only people who have a nil award of a qualifying benefit as a result of sanctions **or** as a result of deductions for liabilities will be eligible for the Scottish Child Payment. This approach is intended to ensure consistency with other low income benefits being delivered by Social Security Scotland, for example, best start grants. It means that a person would not be eligible for the Scottish Child Payment if they received a nil award of a qualifying benefit for any reasons other than sanctions or deductions for liabilities.

SCoSS welcomes this amendment. Better consistency across types of assistance is in line with the Charter commitment to make processes and systems as simple and clear as possible. The desirability of not increasing the complexity of the social security system without good

⁵<https://www.gov.scot/binaries/content/documents/govscot/publications/correspondence/2019/12/scottish-commission-on-social-security-letters-scottish-child-payment-2019/documents/revised-scottish-child-payment-draft-regulations-2020---december-2019/revised-scottish-child-payment-draft-regulations-2020---december-2019/govscot%3Adocument/Draft%2BTop-up%2BRegs%2B%2528002%2529%2Bsubmitted%2Bto%2BSCoSS%2B%2528002%2529.pdf>

⁶ <https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2020/01/the-scottish-child-payment-regulations-2020-scrutiny-report-on-draft-regulations/documents/the-scottish-child-payment-regulations-2020-scrutiny-report-on-draft-regulations/the-scottish-child-payment-regulations-2020-scrutiny-report-on-draft-regulations/govscot%3Adocument/The%2BScottish%2BChild%2BPayment%2BRegulations%2B2020-%2Bscrutiny%2Breport%2Bon%2Bdraft%2Bregulations.pdf>

⁷ <https://www.gov.scot/publications/scottish-child-payment-regulations-our-response/>

justification also features in our [scrutiny framework](#).⁸ However, it is inherently complex to distinguish between an award that has simply ended and one that continues at a nil rate, and to distinguish the cause. It is a challenge to keep forms and communications simple and clear while still properly informing people of their entitlements and duties in more complex situations⁹, and unnecessary barriers to applying must be avoided.

Recommendation 1 – We recommend that accessible guidance for decision makers and SCP applicants should provide full detail on complex situations where an award is continuing at a nil rate rather than simply ending.

In practice, it may be fairly uncommon for a sanction or deduction to reduce an SCP applicant's qualifying benefit award to nil. More often people will be left with some amount of benefit in payment.

More common (until tax credits are replaced by universal credit) is the situation where a tax credits award is retrospectively reduced to zero. The draft regulations make it clear that there is no entitlement to SCP in this situation, which means there is the potential for overpayments of SCP. We understand that processes for dealing with overpayments are still in development.

Recommendation 2 – We recommend that processes and guidance are clear about whether an overpayment of SCP that arises because of a retrospective nil award of tax credits would be recoverable in law or in practice.

2.1 Payment cycles

The second issue addressed by the amending regulations concerns payment cycles.

Scottish Government officials provided SCoSS with a brief note (reproduced in Annex A) that explains the policy intent in more detail, and why legal correction is necessary. In essence, the Regulations as currently drafted mean that a payment for an additional child would be

⁸ <https://www.gov.scot/publications/scottish-commission-on-social-security-draft-scrutiny-framework/>

⁹ For example, the [Scottish Government](#) tells SCP applicants with a sanction or deduction that they need to send in evidence, but does not say only to do this if the payment is reduced to zero. This unnecessary evidence requirement could put people off applying.

made on a recurring four-weekly cycle that may not align with the four-weekly payment cycle for the existing claim. However, existing systems are designed so that payments to a client for all their children are made on the same date every four weeks. The amending regulations therefore provide that new and existing claims will be paid on the same recurring date. This will apply regardless of the number of additional eligible children that the client may have. Again, the Scottish Government has explained that this approach is consistent with the functionality for best start payments, and is also consistent with user feedback that it has received.

The amending regulations provide for a short first payment period for a new claim that could be anything from one day to 27 days. We understand that the Scottish Government's policy intention is for the first payment to be treated as a full week (or the full 2, 3 or 4 weeks as the case may be) even where the claim is effectively only for a part of a week. However, as the draft regulations currently stand, this is not clearly provided for. There is no specific provision for the initial payment to be made for a full week or full weeks; payment starts from whichever day the individual tells Social Security Scotland that they have another child.

We support the Scottish Government's policy intention that initial Scottish Child Payments, in the situation described above, would be for full weeks rather than for a smaller number of days. We consider that such an approach:

- would provide simplicity, by avoiding the need for complex provisions on calculating daily rates;
- would align provisions for the start of awards with provisions relating to when awards end; in such cases there is always a whole week's payment, never a part week;
- may achieve value for money, in line with social security principle 1(h), should the cost of transferring a payment to someone's bank account be greater than the value of, for example, one day's payment (which would equate to £1.43).

Recommendation 3 – We recommend that the draft regulations be amended, in line with the Scottish Government's policy intention, to ensure that the first payment for a new claim is paid for a full week or full weeks.

Scottish Government officials have stated that the proposed amendments on the payment cycle and on nil awards will not affect any other provisions in the SCP Regulations. However, we highlight one further issue that may also help to achieve better alignment across different types of assistance, which was one of the Scottish Government's reasons for preparing these amending regulations. Specifically, we suggest that the draft regulations be amended to provide a definition of the term 'sanctions'. While neither the current SCP or best start grants regulations define 'sanctions', we think it is preferable for a definition to be provided given that there are different kinds of sanctions. Usually, the term means a failure to comply with work-related requirements¹⁰, however, a person may also be sanctioned for a benefit offence which can result in a reduced or nil rate of benefit.¹¹

Recommendation 4 – We recommend that the term ‘sanction’ be defined in the draft regulations, and that the Scottish Government should seek to align the meaning of this term across all relevant types of assistance.

3. The process of developing regulations

While we understand that the Scottish Government has been working under exceptional pressures, learning from the way the SCP draft regulations have evolved, resulting in three separate referrals to us, may suggest scope to improve processes in the way regulations are developed and in quality assurance.

We welcome the improved consistency on nil awards across benefits. Ideally this would have been achieved in time to include in the SCP regulations laid recently. This points to an opportunity to improve efficiency by building in a consistency check in the drafting of future regulations for SCP and other types of assistance.

It appears that the discrepancy these amending regulations are designed to address only came to light during what the Scottish

¹⁰ For example, under ss6J, 6K, 19 and 19A of the Jobseekers Act 1995 and ss26 to 28 of the Welfare Reform Act 2012.

¹¹ Sanctions for benefit offences are under the Social Security Fraud Act 2001 and The Social Security (Loss of Benefit) Regulations 2001.

Government describes as “the process for ensuring operational readiness”.

Recommendation 5: We recommend that the Scottish Government explore the case for building-in testing at a much earlier stage, to ensure the correct alignment between policy intent and the wording of draft regulations, and build in a consistency check in the drafting of future regulations for SCP and other types of assistance.

Annex A – Scottish Government briefing on determination without application for additional children joining an existing claim.

- The Scottish Child Payment regulations are drafted on the basis that a determination relates to the client's entitlement to assistance in respect of a single child.
- A client can have any number of children on a claim – in circumstances where an award ends/changes for one child that does not necessitate a determination of entitlement for the other children.
- In the case of an additional children joining an existing claim, this will be done through a determination without application.
- Legislative provision for this is set out at Part one of the Schedule, paragraph 5 –*Multiple determinations involving the same child*.
- Under the Regulations as currently drafted, a determination without application is made for an additional child with a payment due 4 weeks after the application date (or the date on which the application is treated as made) and on a recurring four-weekly cycle thereafter.
- As part of the process for ensuring operational readiness, we have reviewed how the system processes the date of payment for additional children that join an existing claim. We have concluded that we need to make an amendment to the Regulations to reflect the fact that the existing system makes payments to a client for all children in their household on the same date every four weeks.
- As such the amending Regulations make a provision that for additional children joining an existing claim the payment date will be aligned with existing dates. This approach is in line with existing approach for Best Start Foods and supports findings from user research where client valued simplicity and clarity in terms of payment dates.
- When an existing Scottish Child Payment client becomes responsible for an additional child they will be able to contact Social Security Scotland and have the additional child added to their claim without the need to complete a full new application. This is a simpler and faster client journey.
- The client will receive payment for the additional child on their next Scottish Child Payment payday. Depending on which week the additional child was added to the claim the client could receive either one, two, three or four weeks payment for the additional child on their next payday. On the following payday they will receive four weeks payment for all eligible children. The majority of Scottish Child Payment clients will receive payment for additional children more quickly by aligning to the existing payday.