



Scottish
Commission
on Social
Security

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Scrutiny report on draft regulations:

**The Social Security (Up-rating)
(Miscellaneous Amendments)
(Scotland) Regulations 2021**

**Submitted to the Scottish Government and the Scottish
Parliament's Social Security Committee on 8 February 2021.**

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Summary of recommendations

Recommendation 1: The Scottish Government is asked to clarify its strategic policy approach to uprating assistance, by explaining where, when, why and how flexibility in decision making is desirable and could be used.

Recommendation 2: The Scottish Government is asked to clarify its strategic approach to uprating assistance, distinguishing between the maintenance of value and the increase of value.

Recommendation 3: The Scottish Government is asked to clarify what might constitute an 'exceptional circumstance' that would justify benefits being increased beyond the September rate of CPI.

Recommendation 4: Unless circumstances outwith the control of the Scottish Government preclude it, where there is a policy intent to uprate in a non-routine way, enough time should be factored in for stakeholder engagement.

Recommendation 5: To improve transparency, the Scottish Government is asked to consider whether section 77 reports or information provided to accompany uprating regulations could usefully say more on the economic impact on different groups and the overall costs of uprating decisions.

Recommendation 6: The Scottish Government should prepare equality impact assessments concerning the overall impact of future uprating decisions on equality, where there is a policy intent to uprate in a non-routine way.

Recommendation 7: The Scottish Government should review whether other information could usefully be provided in future section 77 reports in order to improve transparency.

Recommendation 8: Acknowledging there may be good reasons that preclude uprating SCP for 2021-22, the Scottish Government is

asked to clarify the basis for deciding not to update it and any implications for its strategic approach in comparable situations.

1. Introduction

This report provides SCoSS's views on the [Social Security \(Up-rating\) \(Miscellaneous Amendments\) \(Scotland\) Regulations 2021](#)¹. We refer to these as the 'draft regulations' throughout our report. It also builds on SCoSS's previous reports on the Scottish Government's approach to up-rating².

The Scottish Government has previously stated that it would use the September figure of the Consumer Price Index (CPI) as its preferred measure of price-inflation unless and until a superior measurement index emerged, as the way annually to maintain (rather than increase) the value of assistance in accordance with statutory requirements. On this occasion, in response to the impact of the COVID-19 pandemic, Scottish Ministers have proposed to go considerably beyond statutory requirements. While the September CPI rate is 0.5%, they propose instead to apply a rate of 1% to certain forms of devolved assistance, including to some benefits where there is no statutory requirement to uprate at all.

SCoSS welcomes this decision. It reflects information we have sourced on the impact of COVID on some low income households. It maintains and slightly enhances the system's contribution to the realisation of certain human rights and the reduction of poverty. Arguably, the decision can also be seen as an investment in the people of Scotland by helping low income households cope with a period of particular income stress. However, the decision to uprate by more than the September CPI rate of inflation raises questions about the implications for the Scottish Government's intended strategic approach to uprating and the nature of the evidence base on which discretion has been exercised. We explore these below and make recommendations for action that could strengthen the evidence base, improving transparency and thus accountability.

¹ [SI/SR Template \(www.gov.scot\)](#)

² [Scottish Commission on Social Security letters: uprating 2019 - gov.scot \(www.gov.scot\)](#) and [The Social Security Assistance \(Funeral Expense Assistance and Young Carer Grants\) \(Up-rating and Miscellaneous Provisions\) \(Scotland\) Regulations: scrutiny report on draft regulations - gov.scot \(www.gov.scot\)](#)

Scrutiny process

The Cabinet Secretary [referred](#)³ the draft regulations to SCoSS for formal scrutiny on 29 January 2021, the day after the Scottish Government presented its Scottish budget for 2021-22 to the Scottish Parliament.

The draft regulations could not be formally referred before the budget's publication, with the result that we had just a few days within which to submit our report. This compressed timetable is a consequence of the postponement of the UK Government's budget, the consequent delay to the Scottish budget, and the imperative that uprating must come into effect on 1st April. The Scottish Government's report on its approach to uprating, [A report in fulfilment of section 77: Duty to consider effects of inflation](#)⁴, has been published alongside the draft regulations.

Given the very limited time available for scrutiny we were unfortunately unable to consult with stakeholders on the draft regulations, despite the importance we attribute to our scrutiny being informed by the views of stakeholders including people with lived experience. Scottish Government officials helpfully provided a briefing on issues related to the draft regulations at our board meeting of 21 January 2021, and responded to our subsequent written questions. This report reflects information they provided. We have also referred extensively to the 'section 77 report' mentioned above. The information it contains is critically important to our scrutiny of the draft regulations.

As required by the [Social Security \(Scotland\) Act 2018](#), henceforth referred to as 'the Act'⁵, our scrutiny was undertaken with regard to the Scottish social security principles⁶ and relevant provisions of human rights law. The section 77 report highlights as particularly relevant principles (a), (b), (e), and (g). We suggest that principle (f): 'the Scottish social security system is to be designed with the people of Scotland on the basis of evidence', is also highly relevant to consider, particularly in a situation where annual uprating decisions exceed statutory requirements

³ [Cabinet Secretary for Health and Wellbeing dot \(www.gov.scot\)](#)

⁴ [A report in fulfilment of section 77: Duty to consider effects of inflation \(www.gov.scot\)](#)

⁵ [Social Security \(Scotland\) Act 2018 \(legislation.gov.uk\)](#)

⁶ Social Security (Scotland) Act 2018 asp 9 s1.

or represent a departure from the Scottish Government’s previously stated strategic approach to uprating. We accept that timelines for producing uprating draft regulations may unavoidably not allow for the gathering of evidence via stakeholder engagement. Nonetheless, it remains of critical importance that the Scottish social security system be designed ‘on the basis of evidence’, particularly where uprating is non-routine. Among other things, such evidence should also shed light on value for money, as per principle (h)⁷.

Principle (b) states that “social security is itself a human right and essential to the realisation of other human rights.” Previous SCoSS reports have noted the potential contribution of devolved social security assistance to the realisation of certain rights⁸. Uprating is important to the maintenance of this contribution. If a particular benefit intended to contribute to the realisation of a particular right were not uprated for an ongoing period then, over time, it would make less and less of a contribution to that right. By extension the contribution to the right to social security⁹ might arguably dwindle. This should be relevant to consider over the longer term.

A non-routine uprating

While it may be reasonable to expect that annual uprating decisions should usually be routine, and while clearly constraints do apply, the Scottish Government has considerable scope to exercise discretion (this is explored in more detail in Annex A below). In keeping with the current exceptional circumstances, the action taken on this occasion clearly is non-routine. In response to the impact of COVID, decisions go beyond statutory requirements and do not reflect the Scottish Government’s previously stated strategic approach to uprating.

The uprating provisions set out in the draft regulations can be summarised as follows:

- The CPI rate in September has been agreed as the measure of price-inflation). The rate was 0.5%. However, the Scottish Government has

⁷ The Scottish social security system is to be efficient and deliver value for money.

⁸ For example, this might concern the human right to an adequate standard of living (art 11 ICESCR), or to respect for family life (art 8 ECHR), or to independent living and social inclusion (art 19 CRPD)

⁹ Art 9 ICESCR.

used a rate of 1% to uprate certain benefits, which, on that basis, represents an increase in their value rather than the maintenance of their value in light of price inflation.

- In addition to Funeral Support Payment¹⁰ and Young Carer Grant, which it is required to uprate (if deemed materially below the inflation-adjusted level), the Scottish Government has exercised discretion also to increase by 1% the level of the three Best Start Grants¹¹; Child Winter Heating Assistance; and Job Start Payment.
- It has not exercised discretion to uprate or increase the value of Best Start Foods¹². This benefit is not covered by the Act. However, the level of Job Start Payment, similarly not covered by the Act, is increased by 1%.
- The duty to report on and uprate Scottish Child Payment does not come into effect until the end of the current financial year¹³. However, it is less clear that this precludes the use of discretion to uprate it on this occasion.

The regulations also include some minor technical amendments to other regulations. We have no comment on these¹⁴.

The fact that this is not a routine set of uprating regulations, while entirely understandable in the current exceptional circumstances, nonetheless has some important implications. We explore these below.

¹⁰ There are three different kinds of possible payment.

¹¹ The pregnancy and baby grant, the early learning grant, and the school age grant.

¹² The amount of Best Start Foods means that a 0.5% increase would be rounded down to the current amount. A 1% increase would be rounded up to 5 pence.

¹³ This duty was created by the Social Security Administration and Tribunal Membership (Scotland) Act 2020.

¹⁴ It may be worth noting that Carers Allowance Supplement, a short-term measure until Carer's Assistance is established, can only be uprated by 0.5%, due to the constraints of the formula set out in section 81. Legislation is not required to uprate this. The Scottish Government will bring forward separate legislation to uprate carer and disability benefits by 0.5% in April 2021. This means the rates of these benefits will remain in line with that paid by DWP in England and Wales while the DWP continues to deliver them in Scotland under an agency agreement. The overall result is that the levels of some forms of assistance in Scotland will go up by 1%, others by 0.5% and others will stay the same.

2. Implications for strategic policy approach

In addition to the index to be used to measure price inflation, the Scottish Government's [response](#)¹⁵ to our earlier report on uprating clarified a number of elements of its intended strategic approach to uprating, as discussed below.

2.1 Approach to flexibility

Allowing for some flexibility in making annual uprating decisions is desirable. It would be wise to reflect that in the strategic approach. However, beyond a certain point, flexibility amounts to an absence of any clear strategic approach to policy. There could be a risk that it undermines credibility in policy positions that have previously been set out. Particularly in the early stages of a system's development it could inadvertently be taken as setting precedents which may have unforeseen consequences for the future.

As previously stated, we welcome the fact that the Scottish Government has taken action in these uprating regulations to mitigate the impact of COVID on low income households. However, this could raise questions about its previously stated strategic, longer-term approach to uprating policy.

Recommendation 1: The Scottish Government is asked to clarify its strategic policy approach to uprating assistance, by explaining where, when, why and how flexibility in decision making is desirable and could be used.

2.2 Approach to maintaining and increasing value

In responding to a recommendation in our earlier report on its policy approach, the Scottish Government stated:

“Chapter 7 of the 2018 Act provides for uprating for inflation and makes clear that inflation is the change in the general level of relevant prices. Therefore, uprating relates purely to ensuring that the value of assistance keeps up with the change in the general level of prices over time. Increasing the value of assistance, to

¹⁵ [Cabinet Secretary for Health and Wellbeing dot \(www.gov.scot\)](http://www.gov.scot)

make it more generous, is a separate matter to uprating for inflation. If Scottish Ministers wish to increase the value of assistance, this would be done by bringing forward amending regulations which would adjust the rates of assistance. This would be separate to regulations made in fulfilment of the duty under section 78 of the Act.”¹⁶

However, on this occasion, the overall value of assistance has been increased by double the rate of inflation according to the agreed measure, and this increase has been made as part of the uprating regulations, rather than through separate amending regulations. This either constitutes a policy change to the measure used for uprating to maintain value (i.e. the September rate of CPI) or it represents an uplift – an increase in value – above the inflation-adjusted level.

In the context of a catastrophic pandemic, where departure from the norm is clearly justifiable, this may feel like a semantic nicety. But, in view of this departure from the stated strategic approach, it would be helpful for the Scottish Government to confirm its intention concerning the meaning of uprating and its strategic policy approach. This would also improve accountability and transparency.

Recommendation 2: The Scottish Government is asked to clarify its strategic approach to uprating assistance, distinguishing between the maintenance of value and the increase of value.

2.3 Approach to exceptional circumstances

The impact of the arrival of the current pandemic undoubtedly constitutes an exceptional circumstance. But it is currently not possible to say with certainty for how long this ‘exceptional circumstance’ can be expected to continue. Moreover, there have been other seismic shocks to the economy in the past and there could be again.

In our [previous report on uprating](#)¹⁷ SCoSS recommended that it would be helpful for the Scottish Government to “present plans to mitigate the adverse effects of volatile inflation on people receiving devolved

¹⁶ [Cabinet Secretary for Health and Wellbeing dot \(www.gov.scot\)](http://www.gov.scot)

¹⁷ [SCoSS+uprating+report+-+October+2019.pdf \(www.gov.scot\)](http://www.gov.scot), recommendation 4.

benefits, should this occur”. While the Scottish Government could be said to have done so in the section 77 report, it should still be helpful to produce a more strategic and transparent approach to exceptional circumstances. We note that while an increase in the value of benefits may be a clearly justifiable response to a particular crisis (and there may anyway be a case for increasing value), that this higher value then becomes embedded as the value to be maintained for the future.

Recommendation 3: The Scottish Government is asked to clarify what might constitute an ‘exceptional circumstance’ that would justify benefits being increased beyond the September rate of CPI.

3. The evidence base

Ultimately, the best way to take forward intended goals within the constraints that apply will always be a matter of political judgement. However, without a robust evidence base, there may be questions or confusion about how the chosen course of action will achieve policy intent, is strategic and represents value for money. That may particularly be the case where decisions are taken that exceed statutory requirements, or do not align with previous statements on strategic approach or could set precedents for it. There may well be extremely good reasons for doing so. However, in the interests of transparency these require to be supported by good evidence.

3.1 Designing with the people of Scotland

One key form of evidence concerns that provided through engagement with stakeholders, particularly people with lived experience. The [policy note](#)¹⁸ accompanying the draft regulations confirms there is no statutory requirement to consult on this instrument. Certainly, if the draft regulations merely implemented an approach that was previously consulted on and accepted, the case for stakeholder involvement (and likelihood of stakeholder interest) would likely be weaker than if the draft regulations were non-routine. However, the existence of scope for ministerial discretion on uprating decisions, and now evidence of the extent to which that may be used, may have implications for social

¹⁸ [Policy Note Template \(www.gov.scot\)](http://www.gov.scot)

security principle (f) – that “the Scottish social security system is to be designed with the people of Scotland on the basis of evidence”.

Recommendation 4: Unless circumstances outwith the control of the Scottish Government preclude it, where there is a policy intent to uprate in a non-routine way, enough time should be factored in for stakeholder engagement.

3.2 Other forms of evidence

In responding to a recommendation in our report on Funeral Expense Assistance and Young Carer Grants (Uprating) (Miscellaneous) (Scotland) Regulations 2020¹⁹ the Scottish Government undertook that it “will look to develop the content and scope of future [section 77] reports as more types of assistance are delivered”. Below we highlight areas where it should be helpful to provide additional information, particularly when more forms of devolved assistance come on stream, whether in section 77 reports, accompanying policy notes or through other means.

The current section 77 report notes that the decision to increase relevant benefits by 1% “is in recognition of the exceptional circumstances arising through COVID-19 and the impact it has had on low income households”. However, it is not entirely clear whether that decision has been driven by evidence of the impact of COVID on the CPI measurement of inflation and its reliability, or evidence of the economic impact on low income households. The report provides a technical commentary on the impact of COVID-19 on CPI inflation²⁰. However, statistical or other information on the impact on different households or other groups is not provided in the section 77 report or policy note. Yet the impact may vary by type of household and equality group and such data is available²¹.

¹⁹ <https://www.gov.scot/publications/funeral-expense-assistance-and-young-carer-grant-regulations-response-to-report/>

²⁰ The graph on p7 shows that inflation ran at 1% or higher for eight of the 14 months covered, and was only at 0.5% or lower for the final two months of the period.

²¹ See for example: <https://covidrealities.org/learnings/write-ups> - particularly the first briefing paper at <https://media.covidrealities.org/Pandemic-pressures.pdf>; <https://media.covidrealities.org/Pandemic-pressures.pdf>;

There is also no information provided in the section 77 report on the budgetary implications of the actions taken or other possible options available within the confines of the fiscal framework. The Scottish Government has previously stated in a response to SCoSS's earlier uprating report: "any decision to uprate beyond the statutory duties laid out within the Act, will have wider budgetary impacts for the Scottish Government and would require significant consideration and analysis before being implemented".²² However, this analysis is not set out in the section 77 report. From discussions with officials we understand that the Scottish Government, in applying the 1% increase, sought to strike a balance between recognising the social security principles and the increased pressures on the Scottish Budget. The estimated cost of the 1% increase is £300k in 2021-22.

Recommendation 5: To improve transparency, the Scottish Government is asked to consider whether section 77 reports or information provided to accompany uprating regulations could usefully say more on the economic impact on different groups and the overall costs of uprating decisions.

3.3 Equality implications

In our uprating report of 2019 we raised the issue of whether Equality Impact Assessments (EQIAs) should be carried out to inform section 77 reports. The Scottish Government responded that they had been conducted on the Bill that led to the Act and on each set of regulations for particular forms of assistance, so this was unnecessary as the policy had not changed²³. However, the existence of considerable discretion, whether or not it is proposed to make use of it, could strengthen the case for carrying out an EQIA on future uprating regulations, to identify their overall impact on equality, rather than relying on those EQIAs originally undertaken on specific forms of assistance when they were introduced. For example, an EQIA could usefully inform decisions on whether or not to maintain or increase the value of a form of assistance on which a particular equality group is particularly reliant, or whether

²² See response to recommendations 11 and 12.

²³ [Cabinet Secretary for Health and Wellbeing dot \(www.gov.scot\)](http://www.gov.scot). See response to recommendation 13.

there are exceptional circumstances that have a disproportionately detrimental impact on a particular equality group. This is relevant to social security principle (g) concerning the advancement of equality and non-discrimination.

Recommendation 6: The Scottish Government should prepare equality impact assessments concerning the overall impact of future uprating decisions on equality, where there is a policy intent to uprate in a non-routine way.

3.4 Additional information

There may be other information that could usefully be included in future section 77 reports that would improve transparency, for example, replicating a table in [SCoSS's report](#) on the Uprating Policy Paper and Analytical Report²⁴. This showed reporting and up-rating requirements for each form of devolved assistance, including whether they were covered by an agency agreement.

Recommendation 7: The Scottish Government should review whether other information could usefully be provided in future section 77 reports in order to improve transparency.

4. Uprating Scottish Child Payment

Scottish Child Payments are being made from February 2021. However, paragraph 1.6 of the section 77 report notes that the duty to report on and uprate Scottish Child Payment (SCP) under the Social Security (Scotland) Act, as amended²⁵, will not come into force until after the end of the current financial year 2020-21. This means that the section 77 report does not cover SCP for the period 2021-22. However, the Scottish Government has previously [stated its commitment to uprating this](#)

²⁴ [SCoSS's report](#)

²⁵ The Social Security (Scotland) Act is amended by the Social Security Administration and Tribunal Membership (Scotland) Act.

[benefit](#) in future years (the attached letter also provides some relevant legal context)²⁶.

We queried whether, despite the legal position outlined above, the Scottish Government could still have decided to up-rate SCP for 2021-22. The absence of a duty to uprate does not necessarily preclude having discretion to do so. There is strong evidence that Covid has disproportionately adversely impacted low income households with children, even though such evidence was not presented in the section 77 report.

We accept there may be practical difficulties to uprating SCP so soon after payments start to be made, or budgetary constraints that preclude uprating it this time. However, it would be helpful to understand the reasons and we are aware this issue is of interest to stakeholders.

Recommendation 8: Acknowledging there may be good reasons that preclude uprating SCP for 2021-22, the Scottish Government is asked to clarify the basis for deciding not to uprate it and any implications for its strategic approach in comparable situations.

²⁶ https://www.parliament.scot/S5_Social_Security/Cab_Sec_SSOP_to_Social_Security_Committee_-_Scottish_Child_Payment_Regulations_-_8_September_2020_.pdf#:~:text=When%20the%20Scottish%20Child%20Payment%20was%20announced%20in,inflation%20and%20to%20uprate%20the%20Scottish%20Child%20Payment.

Annex A: Overview – constraints and discretion

a) Statutory requirements

The Act requires that the Scottish Ministers annually uprate regulations concerning carer’s assistance, disability assistance, employment-injury assistance and funeral expense assistance where “in their opinion” the existing amount falls “materially” below its inflation-adjusted level^{27,28}. In its response to SCoSS’s earlier report on the approach to uprating, the Scottish Government stated that “uprating relates purely to ensuring that the value of assistance keeps up with the change in the general level of prices over time”²⁹.

The Act does not prescribe a specific measure of inflation. Rather, sections 77(4) and (5) require Ministers to take into account the effects of changes in ‘relevant’ prices, with ‘relevant’ to be defined by themselves.

The forms of assistance currently in place that must be uprated (subject to being deemed materially below inflation-adjusted levels) are Funeral Support Payment and Young Carer Grant. The Scottish Government must also report on the impact of inflation on any form of assistance covered by Part 2 Chapter 2 of the Act. It may exercise discretion to uprate these and other forms of devolved assistance. From the end of the current financial year it will need to report on top-up payments created under section 79 and annually uprate Scottish Child Payment (SCP)³⁰.

The Scottish Government must also publish a report under section 77 of the Act. Its purpose³¹ can be summarised as to provide information on what Scottish Ministers have calculated inflation adjusted levels to be, how they were calculated, what they have done or intend to do in light of that and their reasons.

²⁷ Section 78 of the Social Security (Scotland) Act 2018.

²⁸ The duty to uprate certain benefits is also reflected in the Social Security Charter (A Better Future 10)

²⁹ [Cabinet Secretary for Health and Wellbeing dot \(www.gov.scot\)](http://www.gov.scot)

³⁰ This duty was created by the Social Security Administration and Tribunal Membership (Scotland) Act 2020.

³¹ [Social Security \(Scotland\) Act 2018 \(legislation.gov.uk\)](http://legislation.gov.uk)

b) Scope for use of discretion

The approach taken in these draft regulations demonstrates that the Scottish Ministers have considerable discretion when it comes to uprating. This includes:

- What index/ indices to use as the measure of inflation.
- Not to uprate any forms of assistance unless “in their opinion” it is “materially below its inflation-adjusted figure” (section 78(1)). In our previous report we asked the Scottish Government how it would define ‘materially below’, at which point we were told that policy was still under development.
- Whether ‘uprating’ is taken to mean solely maintaining the value of benefits or whether it can also mean increasing their value ‘in exceptional circumstances’.
- What they regard as ‘exceptional circumstances’ that would justify taking a different approach to the one set out.
- Whether only to report annually on inflation-adjusted figures for assistance covered in Part 2 Chapter 2 of the Act, or to maintain or increase their value.
- Whether just to report on any further top-up benefits created under section 79 or to undertake to uprate their value annually (as will be required for SCP).