



Scottish
Commission
on Social
Security

Scrutiny report on draft Regulations:

**The Disability Assistance for Children
and Young People (Scotland)
Regulations 2021 and the Scottish
Child Payment Regulations 2020
(Miscellaneous Amendments)
Regulations 2022**

**Submitted to the Scottish Government and the Scottish
Parliament's Social Security Committee on 18 November 2021.**

Contents

Summary of recommendations	3
1. Introduction	4
2. Approach to scrutiny	4
3. Habitual residence test for refugees.....	5
4. Re-determination time limits	8
5. Advance claims.....	9
Annex A - Extracts from draft Regulations.....	12
Annex B - Scrutiny timetable.....	14

Summary of recommendations

Recommendation 1: Scottish Government explores the scope to remedy the mismatch in residency tests between Carer's Assistance and Disability Assistance in order to promote disabled people's and carers' human rights.

Recommendation 2: Scottish Government engages with stakeholders and people with lived experience to continuously improve information and ensure its accessibility, to people who will be affected by the transfer of awards to Child Disability Payment and Adult Disability Payment.

1. Introduction

The Scottish Commission on Social Security (SCoSS) is pleased to present its report on provisions to be included in the draft Disability Assistance for Children and Young People (Scotland) Regulations 2021 and the Scottish Child Payment Regulations 2020 (Miscellaneous Amendments) Regulations 2022 – ‘the draft Miscellaneous Amendments Regulations’.

This report has been completed in accordance with SCoSS’s pre-legislative scrutiny function, conferred by sections 22(1)(a) and 97 of the Social Security (Scotland) Act 2018.

The provisions which are the subject of this report were referred to SCoSS on 14 October 2021. The provisions:

- provide an exemption from the habitual residence test for refugees applying for Child Disability Payment (Regulation 2(3) draft Miscellaneous Amendments Regulations)
- add a new situation to the rule that governs when the time limit starts for Social Security Scotland to make a re-determination of Scottish Child Payment (Regulation 3(4) draft Miscellaneous Amendments Regulations);
- remove the advance claim provision where there is no entitlement to Child Disability Payment at the time of claim because of receipt of another disability benefit (Regulation 2(4) draft Miscellaneous Amendments Regulations).

An extract from the draft Regulations setting out these provisions is in Annex A at the end of this report.

2. Approach to scrutiny

These amendments are brought forward as part of the draft Disability Assistance for Children and Young People (Scotland) Regulations 2021 and the Scottish Child Payment Regulations 2020 (Miscellaneous Amendments) Regulations 2022. These draft Regulations also contain provisions for suspending payments of Child Disability Payment and Scottish Child Payment.

The suspending payments provisions were referred to SCoSS separately on 25 June 2021 and only later combined into the draft Miscellaneous Amendments Regulations. They were referred in a draft Scottish statutory instrument provisionally called Suspension of Assistance (Disability Assistance for Children and Young People) (Scottish Child Payment) (Scotland) Regulations. SCoSS is reporting separately on the suspending payments proposals in the form originally referred.

Therefore, there are two scrutiny reports relevant to these draft Miscellaneous Amendments Regulations: one scrutinising the suspending payments provisions and this report scrutinising the three miscellaneous amendments relating to applications made in advance, the time limit to make a re-determination and residency tests for refugees. When the draft Regulations are laid in Parliament, both scrutiny reports will be laid at the same time.

The full draft Miscellaneous Amendments Regulations were not referred to SCoSS. The three proposals referred on 14 October 2021 were in the form of a briefing which contained an early indication of the amendments to regulations. A later draft of the combined draft Miscellaneous Amendments Regulations was shared with SCoSS on 25 October 2021. The revised drafting more accurately reflects the policy intention in relation to the residency tests amendment so it is this version that we scrutinise in this report. The relevant provisions are set out in Annex A.

3. Habitual residence test for refugees

To be eligible for Child Disability Payment, a child or young person must meet residency conditions. They must be present in Scotland, and for at least 26 weeks in the last 52 weeks must have been in the UK¹ (referred to as ‘the past presence test’). They must also be ‘habitually resident’ in the UK.² Being habitually resident depends on being settled in the country e.g. being at school, or being registered with a Doctor, and usually requires a minimum period of residence of typically between one and three months.³

¹ or in the ‘Common Travel Area’ which includes Ireland, the Isle of Man and the Channel Islands

² or the Common Travel Area

³ ‘Habitual residence’ is not defined in Regulations. Case law sets out relevant factors.

There are exemptions for some groups from residency tests. Recently, Regulations were introduced to allow people evacuated from Afghanistan under the UK Government's relocation and re-settlement schemes to access benefits, including Child Disability Payment, as soon as they arrive.⁴ They are exempt from the past presence test and the habitual residence test. SCoSS is scrutinising these emergency regulations retrospectively in a separate report.⁵

Other refugees are also exempt from the 26-week past presence test, but are still required to be habitually resident e.g. to have been settled for a period of months. Responding to a query raised by SCoSS, Scottish Government has told us that the Department for Work and Pensions (DWP) does not in practice apply the habitual residence test to refugees claiming Disability Living Allowance, but has not amended Regulations to align with practice. Regulation 2(3) of the draft Regulations remedies this for Child Disability Payment by exempting those who have been granted refugee status or humanitarian protection and their dependants from the habitual residence test. (This does not apply to asylum seekers waiting for a decision on their application for refugee status, who are not usually entitled to social security benefits but may receive assistance through the separate asylum support system.)

This is a welcome simplification of complex residency rules. If the habitual residence test had been applied, although refugees would generally have been in the UK for long enough to pass the test by the time they are granted refugee status, there may still have been a burden on them and on Social Security Scotland of evidencing habitual residence. The change may be of real assistance in allowing immediate support to dependants joining family in the UK with refugee status. This improvement to the system advances equality and contributes to the principle of social security being a human right.⁶

Carers of disabled children or adults with refugee status

The proposed exemption applies to disabled children and young people claiming Child Disability Payment, and we understand will also apply to disabled adults claiming Adult Disability Payment. However, the situation for carers is different. There is a mismatch in residency rules and exemptions from residency tests between Carer's Allowance and

⁴ [The Social Security \(Residence Requirements\) \(Afghanistan\) \(Scotland\) Regulations 2021](#)

⁵ Scrutiny report on laid Regulations: The Social Security (Residence Requirements) (Afghanistan) (Scotland) Regulations 2021.

⁶ [Principles 1\(b\) and \(g\)](#)

disability assistance – Child Disability Payment and Adult Disability Payment. For example:

- Carer's Allowance has a longer past presence test – it is not paid until someone has been in the UK for 104 weeks out of the last 156 weeks, compared to 26 weeks out of the last 52 weeks for Child Disability Payment and Adult Disability Payment.
- For Carer's Allowance, there is no exemption from the past presence test for someone caring for a disabled refugee as there is for the refugee claiming disability assistance.⁷
- For Carer's Allowance, there is no exemption from the past presence test for someone caring for a terminally ill person as there is for the person who is terminally ill claiming disability assistance.

This mismatch leads to situations where a disabled child or adult can get disability assistance but their carer cannot get Carer's Allowance, and thus cannot get Carer's Allowance Supplement. This is relevant to refugees, but not exclusively so. It can affect anyone coming to, or returning to the UK.

If adequate care could be compromised by lack of benefit entitlement for the carer, that arguably breaches both the human rights of the disabled person and the carer. There is an opportunity to remedy this in due course as the Scottish Government introduces Carer's Assistance, the replacement for Carer's Allowance.⁸

Recommendation 1: Scottish Government explores the scope to remedy the mismatch in residency tests between Carer's Assistance and Disability Assistance in order to promote disabled people's and carers' human rights.

⁷ There is exemption from the past presence test for Carer's Allowance if the carer themselves has refugee status.

⁸ The Scottish Government cannot remedy this in Carer's Allowance. They have agreed with the DWP not to make any changes while the DWP is delivering Carer's Allowance on behalf of the Scottish Government ([Carer's Allowance in Scotland: Agency Agreement](#)).

4. Re-determination time limits

The draft Regulations add a new situation to the rule that governs when the time limit starts for Social Security Scotland to make a re-determination of Scottish Child Payment.

To challenge a determination about a Scottish benefit, an individual must first ask Social Security Scotland to make a re-determination before they can appeal to the First-tier Tribunal for Scotland. Regulations provide a time limit for Social Security Scotland to make the re-determination. If the agency misses the time limit, then the person has the right to appeal without waiting any further.

The Scottish Government has identified a gap in the provision that starts the time limit running for making a re-determination. The usual rule starts the time limit from the day Social Security Scotland receives a request for a re-determination. There is also a provision that deals with late requests. However, if a request is received that is deemed not to have been made in the right way, and is therefore not a 'valid' request, an individual can ask a Tribunal to decide whether it was valid. There is currently no provision to specify a different date for the time limit to start running in such cases other than the default date of the original request.

This gap is remedied for Scottish Child Payment by draft Regulation 3(4). This sensibly starts the time limit running from the day the Tribunal makes the decision that the request was validly made. This gives Social Security Scotland the time they need to make the re-determination. Such cases should be infrequent, but could occur. For example, few people are sufficiently familiar with processes to use the term 're-determination' when asking by phone for a re-determination and are not expected to use formal terms, but this does mean there is potentially scope for Social Security Scotland to misinterpret a request.

The amendment clarifies the policy intention and ensures that processes for re-determination and appeal can be more clearly and consistently applied, in line with expectations in *Our Charter*.⁹

The amendment only relates to Scottish Child Payment (SCP). Child Disability Payment (CDP) Regulations and draft Adult Disability Payment (ADP) Regulations already provide for this situation in setting the time

⁹ E.g. Processes that work, commitment 1: make communications, processes and systems as simple and clear as possible by testing them with the people who will use them.

limit for making a re-determination. We understand that the Scottish Government plans to lay separate amending regulations for other Scottish benefits such as Best Start Grant mirroring the amendment to SCP.¹⁰

5. Advance claims

The draft Regulations remove one of the situations which allows applications for Child Disability Payment up to 13 weeks before the child meets all the qualifying conditions. This rule means that instead of refusing an application and requiring a second claim, Social Security Scotland can make an award starting from the date all the conditions are met. This is most likely to happen when an application is made before a child has reached the qualifying age for the mobility component, or where care or mobility needs have not yet lasted the full 13 weeks required to meet the retrospective test. However, in theory, the advance claim rule could apply whichever of the qualifying conditions is not met at the time of claim. The situation being removed is where there is no entitlement at the time of claim because of an award of another disability benefit which is expected to end within 13 weeks (Regulation 2(4) draft Regulations).

The reason for the change is Scottish Government's concern that this provision is likely to cause significant issues in its implementation which could undermine the processes specifically designed to transfer awards from Disability Living Allowance (DLA) to CDP and could risk continuity of payment for people. The same change is being incorporated into the draft ADP Regulations. There is early evidence from the CDP pilot areas¹¹ that a small number of people have applied for CDP even though their child already gets DLA.

Safe and secure transfer of awards¹² and continuity of payment during the transition from delivery by the Department for Work and Pensions (DWP) to delivery by Social Security Scotland is of paramount concern for Scottish Government and for people with lived experience consulted

¹⁰ These separate regulations will not be subject to scrutiny by SCoSS. They are made under section 43(5) of the Social Security (Scotland) Act 2018. Regulations made under that section are subject to the negative procedure of Parliamentary scrutiny, under section 96(3).

¹¹ The pilot areas are Dundee City, Perth and Kinross and the Western Isles.

¹² [Social security case transfer: policy position paper - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/social-security-case-transfer/policy-position-paper/pages/1-10.aspx)

about disability assistance.¹³ Rules and processes for transferring around 52,000 DLA awards to CDP and over 300,000 Personal Independence Payment (PIP) awards to ADP are being carefully planned and implemented. For an award transferred under this case transfer process, DLA entitlement will end the day before CDP entitlement begins. People will get the same amount, paid to the same account, at the same time as their DLA was paid. In most cases, people will not need to do anything. Crucially, they will not need to apply for CDP. Technically, the transfer is accomplished by way of a 'determination without application'. The same process will apply to transfers from PIP to ADP.

If someone bypasses this process by making an application for CDP (or in future ADP), before being selected for transfer, that leaves Social Security Scotland duty bound to determine entitlement. Normally, the outcome would simply be no entitlement to CDP on the grounds of existing DLA entitlement. The risk for individuals will be if they actively withdraw their DLA claim in order to apply for CDP, which at best would probably leave them with a gap in payments and at worst leave them with less money or no award at all and no access to Short-term Assistance should they challenge the decision. The risk for Social Security Scotland lies primarily in the staff time and resources required to deal with the case and communicate with the individual, which at scale could lead to delays in overall service delivery.

To what extent the advance claim provision which the draft Regulations propose to remove contributes to these risks is unclear to SCoSS. We think that few, if any, individuals would be aware of the advance claim provision and actively seek to invoke it. Although, it would potentially be in play for any application made before the managed case transfer process began if there was evidence of a DLA award about to end. Consequently, it is not clear to what extent removing the provision reduces the risk. It does not remove the choice an individual has to end their DLA in order to apply for CDP but simply puts it beyond doubt that an application made before the DLA ends is bound to fail.

That said, we do believe that it is right that Scottish Government is alert to potential risks to this critical transfer process and seeks to mitigate

¹³ [Adult Disability Payment: consultation response \(incorporating the report on 'A Consultation on Improving Disability Assistance in Scotland', 2019\).](#)

those risks. Clear, accessible communication with claimants and stakeholders will be essential. For stakeholders (advice agencies, frontline services working with families), Social Security Scotland offers online information in a range of community languages and in Easy Read, which services can use to inform their clients. There is scope for making this accessible information more directly available to individuals.

Recommendation 2: Scottish Government engages with stakeholders and people with lived experience to continuously improve information and ensure its accessibility, to people who will be affected by the transfer of awards to Child Disability Payment and Adult Disability Payment.

Annex A - Extracts from draft Regulations

The Disability Assistance for Children and Young People (Scotland) Regulations 2021 and the Scottish Child Payment Regulations 2020 (Miscellaneous Amendments) Regulations 2022.

Amendment of the Disability Assistance for Children and Young People (Scotland) Regulations 2021

2.—(1) The Disability Assistance for Children and Young People (Scotland) Regulations 2021 are amended in accordance with paragraphs (2) to (7).

[paragraph (2)]

(3) In regulation 5 (residence and presence conditions)—

(a) For paragraph (10) substitute—

“(10) The past presence condition in paragraph (1)(e) does not apply where an individual—

(a) has a terminal illness within the meaning of regulation 15, or

(b) is an individual described in paragraph (7).”

(b) in paragraph (10A)—

(i) at the end of sub-paragraph (b) omit “or”,

(ii) after sub-paragraph (c) insert—

“(d) been granted refugee status or humanitarian protection under the immigration rules, or

(e) leave to enter or remain in the United Kingdom as the dependant of a person granted refugee status or humanitarian protection under the immigration rules.”

(c) in paragraph (11) for “paragraphs (10) and (10A)” substitute “paragraph (10A)”.

(4) In regulation 24 (when an application is to be treated as made and beginning of entitlement to assistance) omit paragraph (2)(a)(iii).

Amendment of the Scottish Child Payment Regulations 2020

3. —(1) The Scottish Child Payment Regulations 2020⁽¹⁴⁾ are amended in accordance with paragraphs (2) to (5).

⁽¹⁴⁾ S.S.I. 2020/351, amended by S.S.I. 2021/16.

[paragraphs (2) to (3)]

(4) In paragraph 16(2) of the schedule (duty to re-determine and period allowed)—

(a) at the end of sub-paragraph (a) omit “or”,

(b) at the end of sub-paragraph (b) insert—

“, or

(c) in a case where the Scottish Ministers have informed the individual of their decision that the request for a re-determination was not made in such form as the Scottish Ministers require, the day on which it is subsequently decided by the First-Tier Tribunal for Scotland that the individual in question has made the request in such form as the Scottish Ministers require.”.

Annex B - Scrutiny timeline

14 October 2021

Amended draft Regulations referred to SCoSS by the Minister for Social Security and Local Government. To include scrutiny of; Pre-emptive applications, Habitual Residence Test and Re-determination timer start after First-tier Tribunal decide request validly made.

18 November 2021

Final Scrutiny report signed off at SCoSS and report laid.



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The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-80201-863-9 (web only)

Published by The Scottish Government, January 2022

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS991086 (01/22)

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