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The Information Centre
An t-Ionad Fiosrachaidh

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

28 October 2021

Introduction

This paper suggests themes for discussion on the [Disability Assistance for Children and Young People \(Scotland\) Amendment Regulations 2021](#) (the CDP Amendment regulations) based on issues raised in the [report by the Scottish Commission on Social Security](#) (SCOSS). There are four themes suggested:

- Theme 1: Scrutiny timescale
- Theme 2: Delay to the amendment on temporary absence
- Theme 3: Moving from CDP to ADP
- Theme 4: Care needs at night

Child Disability Payment

Child Disability Payment (CDP) is the Social Security Scotland replacement for child Disability Living Allowance (DLA). It has the same structure and payment rates. It was introduced as a pilot in July and will be available nationally from November. It is expected that all those currently on child DLA will be transferred to CDP by spring 2023.¹

[SFC forecast](#) that by 2023-24 there will be nearly 61,000 children and young people receiving CDP at a cost of £299m. The [policy note](#) to these draft regulations states that the amendments will not change expenditure.

What these regulations do

These regulations make a number of technical changes and clarifications to Child Disability Payment. There are no major policy changes. Changes include the following.

Age Limits

¹ [Letter from Minister SSLG to the Committee, 11 October 2021](#)

- In cases of terminal illness, CDP is extended to babies under three months old and after someone has turned 18 (regulation 4).
- CDP can continue until the age of 19 in some cases – e.g. while waiting for their ADP application to be decided (regulation 4).

Residence and Presence

- Relaxes the past presence requirements for civil servants and members of the armed forces posted overseas. (regulations 5 and 6)

Entitlement to care component

- The higher rate care component is awarded for care needs 'at night' rather than, as currently drafted, care needs 'throughout the night' (regulation 7).
- The care component can be paid while someone who is in legal detention is in a hospital or hospice (regulation 11).

When change of entitlement takes effect

- Clarifies when increases and decreases to CDP will take effect following changes of circumstances and where decisions were made in ignorance of a material fact (regulation 13, 14).

Moving between CDP and DLA

- CDP will stop 13 weeks after Scottish Minister *become aware* that someone has moved from Scotland to another part of the UK. (Current regulations refer to Ministers being *notified* of the move) (regulation 17).

Period for re-determination

- If someone doesn't agree with a decision then they can ask for a redetermination. These requests must be made in the proper form. If, following a challenge, a tribunal decides that a request was in the proper form after all, then the time limit for making the redetermination starts from when a tribunal decides that the request was valid. (regulation 18)

Short Term Assistance

- STA is paid while someone appeals against their benefit being stopped or reduced.
- If a tribunal decision about entitlement to CDP is set aside, then Ministers must make a determination about payment of STA (regulation 19)

Transfer from DLA to CDP

The regulations make a number of clarifications to the arrangements for transferring people from DLA to CDP (regulation 20). The basic rule, already in the current regulations, is that someone will receive the same amount of CDP as DLA. There are exceptions for cases of terminal illness. These regulations ensure that if Ministers become aware that someone would qualify under the

Scottish terminal illness rules but not the DWP rules², they will still get the higher amounts of CDP.

The regulations also include provisions to make sure no-one is disadvantaged because of when they are selected for transfer to CDP. The Policy Note explains:

“These regulations also introduce the ability to backdate CDP entitlement where the award of CDP is higher than the DLAC award at the point of case transfer due to cited differences in DLAC and CDP eligibility rules. Any payment of CDP made for this backdated period will be reduced by the amount of DLAC the individual was entitled to in that same period. This is to ensure that individuals whose awards are selected for transfer later are not disadvantaged when compared to those whose awards are selected for transfer earlier.”

SCOSS report and Scottish Government Response

SCOSS provided their [report to the Committee on 9 August](#) and the Scottish Government published its [response on 10 September](#).

SCOSS made 11 recommendations and the Scottish Government rejected three of them. The rejected recommendations related to:

- Entitlement to short term assistance when someone who gets CDP makes a claim for ADP (SCOSS recommendation 4)
- Exemption to residence and presence tests (SCOSS recommendation 5)
- Transfers from legal detention to hospital or hospice (SCOSS recommendation 6).

The SCOSS report also notes the short timescale available for scrutiny.

The Minister’s letter states that one of their proposed changes – one that had been welcomed by SCOSS – was ‘temporarily delayed’. This would have ensured that, when someone goes abroad for less than a year, CDP is suspended rather than ended, making it easier to restart it when they return.

There are some additional, technical amendments referred to in the Minister’s letter that were not referred to SCOSS. The letter from the Minister states that these:

“further amendments are considered minor and technical in nature and merely give effect to the original policy intent.”

Suggested themes for discussion.

Theme 1: Scrutiny Timescale

² Under DWP rules, a person is regarded as terminally ill if they have a 'progressive disease' and as a result their death 'can reasonably be expected within six months. Under Scottish rules, whether someone has a terminal illness for the purposes of claiming benefits, is a matter of clinical judgement.

The Committee has previously discussed the short timescale available for scrutinising regulations. These regulations are another occasion on which SCOSS had less time to report than it would have wished:

“The Commission has had less than a month in which to draft and agree this report. The very tight timescales, combined with leave arrangements, have had inevitable implications for our approach to scrutiny. Regrettably we did not have time for all members of SCoSS to be involved in drafting this report, including the Chairperson. We have also been unable to engage with people with lived experience and consult stakeholders as we would have wished. As a result, to date, there appears to have been no specific stakeholder engagement on the detail of the draft amended Regulations.”³

A recent letter from SCOSS ([dated 12 October](#)) also refers to the issue of capacity, in relation to the recent high number of regulations, saying:

“SCoSS has continued to deliver its scrutiny work despite pressures on our capacity. We aim to maintain our high standards of providing advice on draft regulations which is timely and of clear and additional benefit. To that end we continue to work with Scottish Government officials to identify and put in place ways to improve support to SCoSS, and I am grateful to them for this.”

The Committee may wish to discuss:

- **What efforts are being made to ensure SCOSS has the resources it needs (in terms of both, time, staff and membership) to scrutinise regulations.**
- **How to ensure adequate stakeholder engagement by the Scottish Government in all changes to Scottish social security**

Theme 2: Delaying amendment to regulation 7

As mentioned above, a proposed change to Regulation 7 would have allowed CDP to be restarted if a child is absent from the common travel area for less than 12 months, thus preventing the need for a new application.

SCOSS had welcomed the change saying:

“This is a welcome measure to reduce the possibility of unnecessary gaps in entitlement or reapplications, with potential to help individuals enjoy their right to social security and to contribute to the aspiration in principle (h) to an efficient social security system.”

However, the Scottish Government’s response to SCOSS explains that this change will be delayed due to system issues:

“Regrettably we have also had to temporarily delay the introduction of the amendment to regulation 7 which would allow the Scottish Ministers to

³ [SCOSS report](#)

temporarily stop payment of CDP rather than end entitlement if the child has a temporary absence of less than 12 months from the Common Travel Area. This is because the system capability to provide this will require more development work than anticipated.”

The Committee may wish to discuss:

- **Further detail about the delay to implementing the amendment to regulation 7.**

Theme 3: Moving from CDP to ADP

Short term assistance (STA) is available if someone who already receives a benefit, such as ADP, has that benefit removed or reduced. STA is a payment made while they appeal. STA is not available if someone is applying as a new claim.

SCOSS recommendation 4 proposed that STA (short term assistance) should be provided where young people who get CDP make an application for ADP. SCOSS said:

“We consider that a claimant moving from one form of disability assistance to another because of the age criteria for each form of assistance is in a different position to a new applicant for social security assistance. Indeed, the CDP claimant who applies for ADP might well be protected by the non-discrimination provision of the European Convention on Human Rights.^[10] The positions of two disability assistance claimants who lose or receive a reduced award are broadly analogous. It could be difficult to justify a policy that allows one to benefit from short-term assistance while the other cannot for no reason other than the requirement to move between forms of disability assistance at a given age.”

The Scottish Government disagrees and rejected this recommendation as it treats CDP clients more favourably than other applicants for ADP.

The Committee may wish to discuss:

Whether a young person moving from CDP to ADP should be treated as a completely new claim for ADP or as a form of transfer from one disability assistance to another. If the latter, should they get STA?

Theme 4: Care needs ‘throughout the night’

When the main CDP regulations were discussed at Committee in March this year, stakeholders queried the requirement to have care needs ‘throughout the night’ as it is different to the DLA regulations which require only care needs ‘at night’. At the time, the then Cabinet Secretary assured the Committee that:

“we have no intention to change the interpretation—the guidance will be clear. [...] I do not think that there will be a change in how the provision is

interpreted, but if there is, we can revisit it.” ([Official Report 4th March 2021, col 7](#))

These new regulations amend the drafting to change the wording to ‘at night’. SCOSS welcome this as:

“It will reduce scope for uncertainty about how much care is required to constitute ‘throughout’ the night and, in doing so, will ensure Scottish applicants are not subject to more stringent criteria than their counterparts elsewhere in the UK.”

The Committee may wish to discuss:

Why the Scottish Government changed its mind about the phrase ‘throughout the night’?

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19 October 2021