

Scottish Commission on Social Security consultation – The Disability Assistance for Children and Young People (Scotland) Regulations 2020

Response from Citizens Advice Scotland

January 2020

Summary

Citizens Advice Scotland recommends the draft regulations are amended to change or clarify a number of areas to improve the social security support provided to disabled children and young people. In particular, we recommend:

- The statutory timescale for Social Security Scotland to make a re-determination should be reduced to no longer than 42 days.
- Existing case law from Disability Living Allowance should be incorporated in the regulations, to ensure no gaps in the law are created.
- The past presence requirements should be removed.
- The requirement for the needs of a child to be 'substantially in excess' of what is normally required of a child of the same age should be clarified further.
- Amendments should be made to ensure that children and young people who face barriers as a result of a mental health condition can qualify for disability assistance on a fair basis.
- If a person's claim is stopped due to entering a care home, provision should be made for their payment to be quickly restarted when they leave, rather than them having to re-apply.

Introduction to Citizens Advice Scotland and context of response

Scotland's Citizens Advice Network empowers people in every corner of Scotland through our local bureaux and national services by providing free, confidential, and independent advice. We use people's real life experiences to influence policy and drive positive change. We are on the side of people in Scotland who need help, and we change lives for the better.

Citizens Advice Scotland (CAS) welcomes the opportunity to provide comments on the draft regulations to the Commission. Advice on disability benefits are among the most common areas

of advice provided by Scotland's citizens advice bureau (CAB) network. In 2018-19, Scottish CAB provided advice to clients on 6,065 issues related to the care component and 5,050 to the mobility component of Disability Living Allowance (DLA), which this new payment will replace for disabled people under the age of 18.

Many of the proposals in the draft regulations represent welcome improvements to Disability Living Allowance for children and young people, in particular in a number of changes to administer the benefit that treat people with dignity and respect.

The eligibility criteria in the draft regulations are largely copied verbatim from the existing legislation for Disability Living Allowance¹. CAS recognises the need for a 'safe and secure transition' from existing disability benefits to a new devolved system of assistance, and it is crucial that people do not experience a stoppage or delay to their payments as a result of the devolution process.

However, CAS also believes that a safe and secure transition should not be a barrier to more substantial improvements to disability benefits in the longer term. We encourage the Scottish Government to continue to develop proposals for longer-term changes to Disability Assistance alongside proposals for initial transition.²

In addition, we are concerned at the suggestion in the Scottish Government's response to the Disability Assistance consultation that "there is a risk that, should eligibility rules diverge significantly from current DWP rules, Disability Assistance may not continue to be recognised as 'like for like' for passporting purposes."³ If eligibility criteria for devolved disability assistance must be the same as their reserved counterparts, it could severely restrict the Scottish Government's ability to improve weaknesses in the current rules, and design a suite of social security payments that enhance the rights of disabled people in Scotland. CAS would welcome clarification from the Scottish Government and DWP as to what extent policy variation is possible within these parameters.

Our comments below are structured under the headings in the draft regulations, in the order that they appear.

Interpretation

Names of benefits

The draft regulations refer to the payment throughout as 'Disability Assistance for Children and Young People' (aside from a provision in regulation 3 allowing it to have a different public-facing name, and to the benefit to replace PIP as 'DAWAP' (Disability Assistance for Working

¹ Social Security Contributions and Benefits Act 1992 and The Social Security (Disability Living Allowance) Regulations 1991, as amended

² Pages 54 – 55, Citizens Advice Scotland response to Consultation on Disability Assistance in Scotland, May 2019 <https://www.cas.org.uk/publications/cas-response-consultation-disability-assistance-scotland>

³ Page 28, A Consultation on Disability Assistance in Scotland – Scottish Government response, October 2019 <https://www.gov.scot/publications/consultation-disability-assistance-scotland-scottish-government-response/pages/1/>

Age People). However, it is our understanding that, based on responses to the May 2019 consultation on Disability Assistance, that these names may be changed to more accessible names.

Whilst it is possible for benefits in the new Scottish social security system to have different public-facing names to their names in law (for instance Best Start Grant is referred to in law as Early Years Assistance), CAS would recommend that the public-facing names are used in the regulations to avoid confusion being caused.

Incorporation of case law

It is also unclear to what extent existing case law from Disability Living Allowance will be able to apply to disability assistance for children and young people. Many of the terms in the eligibility criteria and existing regulations have been given meaning by judgments of the Upper Tribunal and High Court.

For instance, case law has established that if a child's walking is impaired caused by anorexia nervosa, the cause is physical; that a child's discomfort from chronic diarrhoea might make them virtually unable to walk; and that the industrial injury provisions should be used to determine the degree of impairment for loss of vision or hearing.⁴

It is important that as part of a transition from the existing disability benefits to the Scottish system that individual rights are maintained and no unintentional gaps in the law are created. CAS would echo the Child Poverty Action Group in Scotland's recommendation that a comprehensive review of existing regulations, guidance and caselaw is undertaken to ensure that important detail and rights are not lost upon transition.⁵

This may require detail from existing case law to be written into the regulations, either as amendments to the eligibility criteria, as additions to the interpretations, or to specify that judgments of the Upper Tribunal and courts relating to the interpretation of DLA should be taken to apply to Disability Assistance for Children and Young People.

Residence and presence conditions

Past presence test

Whilst CAS is broadly content with the proposed approach to residency, we would recommend that the past presence test (regulation 4 (2)(c)) is removed, as it is an unnecessary barrier to people receiving social security support.

The past presence test requires a person to have been present in Great Britain for two out of the last three years to be eligible to claim PIP, DLA or Attendance Allowance, and is proposed

⁴ Pages 599 – 637, Welfare Benefits and Tax Credits Handbook 2019/20 - Child Poverty Action Group

⁵ Disability Assistance consultation briefing – Child Poverty Action Group in Scotland, May 2019
<https://cpag.org.uk/sites/default/files/files/policypost/CPAG-Scot-Briefing-Disability-Regulations.pdf>

to be replicated in the new system. However, CAS recommends that the requirement is removed.

The past presence condition is not currently included in any of the other benefits due to be devolved (with the exception of Carer's Allowance) and has not been proposed to be included in any of the Scottish social security payments introduced so far.

The condition can mean that disabled people who are in need of social security support, and who would otherwise be entitled to disability assistance would miss out. For instance, if a family living abroad had a child who became disabled in an accident and moved home to Scotland to be closer to extended family for support, they would not become eligible for Disability Assistance for Children and Young People until two years later.

The past presence condition does not seem to serve a reasonable purpose other than to reduce the number of people who are eligible to claim. This seems somewhat at odds with the Scottish Government's welcome ambitions for the new system, as is penalising people who have recently moved to or returned to Scotland at odds with the Government's ambition to use inward migration as a mechanism to drive economic growth and counter-act demographic decline.⁶ There is also a duty placed on Ministers to promote take-up.⁷ CAS would recommend the past presence condition is removed to ensure that people who would be otherwise eligible to receive Disability Assistance for Children and Young People are allowed to claim it.

In addition to our comments above about the importance of retaining case law, a considerable body case law exists relating to the application of the existing Habitual Residence Test. Consideration should be given to what extent this can be incorporated into the devolved system.

Effect of UK exit from the European Union

It is unclear to what extent the UK's impending exit from the European Union will have on retained EU regulations. It may be possible that regulation 4 (7-10) may need to be revised to take account of any changes in UK immigration legislation as a result.

Care component criteria

Use of language

As the regulations setting out the criteria are largely copied from existing legislation, some of the phrasing appears somewhat outdated and arcane, and does not reflect the social model of disability (e.g. "so severely disabled physically or mentally as to require in connection with his or her bodily functions attention from another person for a significant portion of the day"). Whilst this may be a consequence of the desire to maintain parity with the existing regulations,

⁶ Scotland's Population Needs and Migration Policy: Discussion Paper on Evidence Policy and Powers for the Scottish Parliament – Scottish Government, February 2018
<https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2018/02/scotlands-population-needs-migration-policy/documents/00531087-pdf/00531087-pdf/govscot%3Adocument/00531087.pdf>

⁷ Part 1, Section 3 – Social Security (Scotland) Act 2018
<http://www.legislation.gov.uk/asp/2018/9/section/3/enacted>

CAS would recommend the Scottish Government review the language in the draft regulations with a view to better reflecting the social model of disability.

'Substantially in excess', 'significant', and mental health conditions

As part of a survey of CAB advisers in April 2019 to inform CAS' response to the consultation on Disability Assistance, the advisers who participated suggested a number of areas where the current eligibility rules for DLA for children could be improved upon. A number commented that the current definition of the needs of the child being 'substantially in excess' of what is normally required by a child of the same age could be clarified further, as it can be difficult to judge, given differences in children's development.

"I think basically the idea that this child needs more help /supervision than another child of the same age is correct - but hard to judge. Needs for toddlers and teenagers with the same condition are different. Not sure how to address this. Currently young people frequently reach 16 and expect to migrate to PIP. In fact some have learnt to manage their conditions before this age (e.g. diabetes) and many no longer need the support they needed as children. There is scope for managing expectations." CAB adviser.

A number of advisers also felt that the current rules made it difficult for children with mental health conditions to qualify, in particular children and young people on the autistic spectrum, or with ADHD (Attention deficit hyperactivity disorder). This was in part due to difficulties in being able to provide suitable evidence from schools and CAMHS (Child and Adult Mental Health Services), in part due to long waiting lists for provision of additional support.

As detailed in our comments on the 'Interpretation' section of the regulations, a number of terms are given meaning by case law. In particular, there is no definition in the regulations of what 'significant', 'severely' or 'substantial' means, which could cause difficulties for interpretation if existing case law is not to be incorporated.

Consistency with terminal illness rules

Regulation 5 (3)(b)(ii) refers to an individual not being entitled to the care component if they are terminally ill, unless death is expected within a period of 6 months. This appears to be contradictory to the approach taken in the Social Security (Scotland) Act which removes any specific timescale for people who are terminally ill from qualifying for disability assistance through special rules. CAS would recommend this regulation is reviewed to ensure it is consistent with the welcome changes to terminal illness rules.

Mobility requirements

A number of the respondents to CAS survey of CAB advisers commented that they felt that the criteria for the higher rates of DLA – particularly the mobility component – were set at too high a level, and a number of children with substantial support needs were assessed at the lower or middle rate as a result.

In addition, the regulations could be amended to provide clarity that children who have a mobility impairment due to a mental health issue can qualify for disability assistance, distinct

from a learning disability ('severe mental impairment') or physical condition. This could be achieved by adding 'psychological distress' to the conditions at regulation 7 (2).⁸

The draft regulations also make a holding provision at regulation 10 for 'other exclusions' to the mobility conditions. It is unclear what this relates to, so additional clarity would be welcome.

Entitlement under special rules for terminal illness

CAS warmly welcomes the proposals for special rules for terminal illness, which no longer require someone to have a prognosis of six months or less to live to qualify for disability assistance without further assessment or evidence. We also welcome the decision to extend the ability to complete the verification form to registered nurses as well as registered medical practitioners, as often specialist nurses will be better placed to do so.

Effect of time spent in care homes, residential educational establishments, hospitals and in legal detention

The Policy Note accompanying the draft regulations proposes that the care component will be suspended after a child or young person has spent 28 days in a care home, residential educational establishment or legal custody. However, as drafted, the regulations appear to remove entitlement in these situations, rather than suspending it, and do not specify a process for restarting the payment when a person leaves care or custody.

CAS believes that it is important that the payment should be suspended rather than stopped, and should be resumed promptly and smoothly, as opposed to the individual having to re-apply and be assessed for the benefit again. We would recommend the regulations are amended to make provision for a suspension and resumption of the care component, rather than removing entitlement.

Despite the mention in the section heading of 'Effect of time spent in...hospitals', the regulations themselves make no mention of any effect. To avoid confusion being caused, CAS would recommend either that 'hospitals' is removed from the section heading, or a regulation is added, similar to draft regulation 18, specifying that a stay in hospital has no effect on a person's entitlement to disability assistance.

Additionally, whilst CAS considers the proposals for disability assistance for children and young people to be reasonable, we would recommend the Scottish Government consider them in developing regulations for other forms of social security assistance.

In particular, CAS would recommend that people in receipt of carer's benefit should continue to receive it whilst the person they care for is in hospital, rather than losing entitlement due to a

⁸ SAMH response to Consultation on Disability Assistance in Scotland, May 2019 https://consult.gov.scot/social-security/improving-disability-assistance/consultation/view_respondent?show_all_questions=0&sort=submitted&order=ascending&q_text=samh&uuld=663967701

stoppage of the disability benefit of the person they care for, which currently frequently causes problems for CAB clients.⁹

We would also recommend the rules for stoppages in hospital, care homes and custody are harmonised for the three disability benefits, as opposed to current proposals which stipulate different sets of rules for each.¹⁰

Payment towards winter heating costs

CAS agrees with the proposal to extend eligibility for Winter Heating Assistance to families with a disabled child. This is in keeping with our position on the Fuel Poverty Bill where we have called for more vulnerable people (including households with a disabled member of the family) to be defined as requiring an 'enhanced heating regime' and thus qualify for enhanced support to tackle fuel poverty¹¹. This is in recognition of the increased heating costs faced by families with a disabled child who are likely to be spending more time at home.

Regulation 19 (2) refers to a payment being made "to help meet the costs of heating during winter months". However, this phrase is legally unnecessary as in practice people are able to spend their Winter Fuel Payment on anything they choose rather than being restricted. This phrase could be removed as there is no need for that caveat and it may lead to misconceptions or unnecessary restrictions in practice.

The draft regulations do not prescribe when a Winter Heating Assistance payment should be made – they simply say that a payment should be made without application if the claimant is eligible. To avoid any excessive delays in receiving the payment, the regulations could also stipulate that the payment must be made within a given period of the qualifying date or the first date on which the individual becomes eligible.

In addition, the regulations require the person to be in receipt of Disability Assistance to receive the payment of Winter Heating Assistance, rather than just entitled to it. If payment was disrupted, or the person was awaiting the outcome of a re-determination or appeal, it may lead to them not receiving Winter Heating Assistance or facing a delay in receiving payment at a time when their income is already reduced. CAS recommends extending eligibility to people who are in receipt of Short Term Assistance to avoid people who are challenging a decision to reduce or remove their entitlement to Disability Assistance missing out on a Winter Heating Assistance payment.

The draft regulations set the qualifying week as being the week commencing the third Monday of September, which is the same as the current eligibility period for reserved Winter Fuel Payment. However, it may be more straightforward for people to establish if they are entitled to

⁹ Pages 24 – 25, Citizens Advice Scotland response to Consultation on Disability Assistance in Scotland, May 2019
<https://www.cas.org.uk/publications/cas-response-consultation-disability-assistance-scotland>

¹⁰ Ibid.

¹¹ Speaking up: Understanding Fuel Poverty Support Needs – Citizens Advice Scotland, June 2018
https://www.cas.org.uk/system/files/publications/2018-06-12_speaking_up_-_understanding_fuel_poverty_support_needs.pdf

receive it or not if a set date was used that was more closely associated with the winter months – for instance if the qualifying period was the week containing 1 October. This would also more closely associate the payment with winter.

Entitlement to short-term assistance

CAS warmly welcomes the introduction of Short Term Assistance, which we called on the Scottish Government to introduce, based on evidence of CAB clients being left in hardship due to a decision to reduce or remove their disability benefit on reassessment, even if they are appealing the decision. The creation of Short-Term Assistance fills this gap, by ensuring that people's payments continue until the appeal process is concluded.

As drafted, the regulation 20 (2)(a) appears to exclude people whose payments are stopped because they are suspected of fraud from receiving Short Term Assistance. CAS believes this should be amended to make Short Term Assistance available to people who are appealing a decision that their benefit claim was fraudulent.

Regulation 20 (2)(c) appears to be in draft form, but would appear to be intended to apply to people whose benefit has been stopped or suspended as a result of being admitted to a care home or who are in legal custody. We would recommend that an exception to this is made for people who are challenging a decision to stop their benefit for these reasons (for instance, because they have not in fact been in a care home for more than 28 days).

Age criteria

The draft regulations make provision for an award of disability assistance for children and young people to continue past the age of 18 if a person has applied for disability assistance for working age people but has not yet received a determination. Regulation 23 (2)(b) however makes the caveat that the payment would stop once they turned 19, even if no decision had been made on their application for DAWAP.

This risks creating a 'cliff edge' in the scenario that a decision was substantially delayed, a delay in notifying a person that they should make an application for the working age benefit, or because their application was delayed for a reason. CAS would recommend removing the caveat that the benefit would when a person turns 19, if they have applied for DAWAP, but no determination has been made on their application.

Making payments

The draft regulations make provision for a payment of disability assistance to be paid to 'another person', other than the person specified on the application, if the claim is for a person over the age of 16 (regulation 24 (2)), or where the Scottish Government considers it inappropriate to be paid to the specified person (regulation 24 (3)). It is unclear whether these relate to appointees, to suspected financial abuse, or to give people responsibility for receiving their own payment upon turning 16. Clarity over how these regulations are intended to be used, and what safeguards will be put in place to prevent their misuse would be welcome.

When an application is to be treated as made and beginning of entitlement to assistance

It is somewhat unclear what situations draft regulations 25 (4) and (5) relate to ('when an application within 6 weeks of the day on which the data required to construct a record in respect of the child or young person is submitted'). We would welcome clarification of what types of situation would be covered by the regulation.

Other situations requiring a determination without an application

In cases of suspected fraud, draft regulations 30 (1)(c) and (d) would appear to allow the Scottish Government to stop a person's benefit payment, prior to an investigation having concluded and for allegations to be proven. In a rights-based system, it is important that this only occurs once it has been proven that fraud has been committed. CAS would recommend that a payment is not stopped unless fraud is proven, or that Short Term Assistance is made available to someone challenging an allegation or decision.

Period for re-determination request

CAS welcomes the Scottish Government's decision to increase the time given to a person to make a re-determination request from 31 days to 42 days (regulation 34 (1)). We would however, recommend that full consideration is also given to decisions of the Upper Tribunal related to late reconsideration requests and individuals' appeal rights in August 2017¹². This case law may inadvertently have the effect of making the Scottish system stricter than the current UK system in terms of the requirement for 'good reason' for re-determinations submitted after the time limit set out in Schedule 41 of the Social Security (Scotland) Act.

We are disappointed that the statutory time limit for Social Security Scotland to respond to a request has been set at 56 days.

Evidence from CAB clients has consistently shown that detriment has been caused due to lengthy waits for a decision to be made on a mandatory reconsideration request, both in terms of hardship and causing stress and worry.¹³ CAS are concerned that setting the time limit at 56 days (8 weeks) is too long, given that a person will have already had to wait for an original determination on their application, and that evidence will already have been gathered in making the original determination, so will not need to be re-sought.

Additionally, the Social Security (Scotland) Act provides an option for the period to be extended with the person's consent, which would cover more complex cases and avoids a requirement for an extended period to be set because of a concern about these cases.

¹² R(CJ) and SG v SSWP (ESA) [2017] UKUT 324 (AAC) <https://www.gov.uk/administrative-appeals-tribunal-decisions/r-cj-and-sg-v-secretary-of-state-for-work-and-pensions-esa-2017-ukut-324-aac>

¹³ Page 20 – 21, Citizens Advice Scotland response to Consultation on Disability Assistance in Scotland, May 2019 <https://www.cas.org.uk/publications/cas-response-consultation-disability-assistance-scotland>



CAS strongly recommends the statutory time limit to respond to a re-determination request is reduced to no more than 42 days, the same time as is given to people to make the request.

Liability for over payment

Part 14 of the regulations, relating to liability for overpayments and deductions appears to still be in development. Citizens Advice Scotland would be interested in the development of the content of this section, due to evidence from CAB clients and advisers that there are problems with the way in which overpayment debt is recovered under the current system, and that there is too little flexibility in the approach that the DWP currently takes.

Key improvements that could be made include action to minimise error, improving communications and information sharing, use of a common financial tool to assess an individual's ability to pay, introducing flexibility in how much is deducted to repay debt, limiting the level of deductions to no more than 10% of a person's total benefit payment, and ensuring that a person always has the ability to challenge a decision regarding overpayment debt.¹⁴

¹⁴ Pages 26 - 29, Citizens Advice Scotland response to Consultation on Disability Assistance in Scotland, May 2019
<https://www.cas.org.uk/publications/cas-response-consultation-disability-assistance-scotland>