



Scottish  
Commission  
on Social  
Security

**Scrutiny report on draft regulations:**

**Disability Assistance for Working  
Age People (Scotland)  
Regulations**

**Submitted to the Scottish Government and the Scottish  
Parliament's Social Justice and Social Security Committee on 1  
October 2021.**

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## **Summary of recommendations and observations**

**Recommendation 1: We invite the Scottish Government to set out the action it has taken and plans to take to ensure as far as possible a seamless system for terminally ill people is created and sustained across UK and Scottish benefits.**

**Recommendation 2: We invite the Scottish Government to set out its plans to identify the different factors that could contribute to lower or higher redetermination and appeal rates and success rates, with a view to analysing whether Short-term Assistance is fulfilling its intended role of incentivising and enabling people to challenge decisions they think are wrong or is resulting in unintended consequences.**

**Recommendation 3: In order to avoid gaps in entitlement, regulations should ensure that Short-term Assistance is available to young people aged 18 or over who were on Child Disability Payment but whose initial determination in respect of ADP is that they have no or a reduced entitlement.**

**Recommendation 4: Social Security Scotland should aim to set up active referral systems with advice agencies trained to help with benefit claims, as well as active referral systems, with client consent, to advocacy and local client support services.**

**Recommendation 5: The Scottish Government ensures that tribunal insights into appeal outcomes for ADP are included in quality assurance measures and continuous improvement of Social Security Scotland decision making.**

**Recommendation 6: The Scottish Government is invited to set out a plan of action that will ensure an early focus on systems to capture learning and support continuous improvement in order to elicit good quality, timely supporting information, and support the effective use of evidence in decision making.**

**Observation 1: By law, requiring a consultation must be a last resort, however, this only applies to face-to-face consultations where the individual and practitioner are 'physically in the same**

place at the same time'. In practice, consultations will be delivered by phone or video call in many cases. There may be a case in due course for updating the Act accordingly.

**Recommendation 7: The Scottish Government ensures that the relevant experience of the practitioner advising decision makers or conducting a consultation is clearly communicated in order to instil confidence and promote transparency.**

**Recommendation 8: The Scottish Government considers further ways to make the expertise of disabled people available to staff, for example, through refresher training or roles within Social Security Scotland for people with lived experience.**

**Recommendation 9: SCoSS refers the Scottish Government to the recommendations made in our scrutiny report on the draft Suspension of Assistance (Disability Assistance for Children and Young People) (Scottish Child Payment) (Scotland) Regulations 2021. The Scottish Government should consider the applicability of these recommendations to draft regulations 38 to 43.**

**Recommendation 10: In preparation for the 2023 independent review of disability assistance, the Scottish Government should begin now to consider options, identify their implications and scope out the parameters and process for the review.**

**Recommendation 11: The Scottish Government considers replacing the phrase 'any journeys at all' with 'any journey' in mobility descriptor 1(e) (Planning and following journeys) and reflecting case law that interprets this phrase in guidance.**

**Recommendation 12: The Scottish Government considers the merits of clarifying an ambiguity in daily living activity 3 (Managing therapy or monitoring a health condition).**

**Recommendation 13: The Scottish Government should clarify how the provision paying the difference owed in ADP for a period that overlaps with an award of another disability benefit is intended to work, and ensure that offsetting and overpayment recovery cannot both take place.**

**Recommendation 14: The Scottish Government should seek further views on the most appropriate term or terms to unambiguously**

**encompass mental health, learning disabilities and cognitive impairments.**

**Recommendation 15: The Scottish Government should keep under review the scope to further reinforce the reliability criteria (safely, to an acceptable standard, repeatedly, within a reasonable time period) in the law and in operational practices.**

**Recommendation 16: The Scottish Government should consider whether condensing the required period condition to one period rather than a separate retrospective and prospective period could lead to uncertainty over whether a person needs to satisfy descriptors over the 13-week and 39-week periods separately, or over a single 52-week period.**

**Recommendation 17: The Scottish Government considers clarifying or simplifying the rule lifting the 13-week required period condition when a new ADP application is made within two years of the end of another ADP, CDP, DLA or PIP award.**

**Recommendation 18: The Scottish Government considers whether the residence and presence conditions accurately reflect the policy intent, specifically:**

- a. Whether the reference to satisfying conditions at ‘the start of their employment’ in draft regulations 17(1)(a) refers to the start of the overseas posting.**
- b. Whether draft regulations 17(2) and 18(1) cover a return to the UK as well as periods overseas.**
- c. Whether the intention and rationale for stopping entitlement of ADP during a temporary absence from the UK/ Common Travel Area, while simply stopping payment of CDP in the same situation is intended and justified.**
- d. Whether a consequential amendment is needed to ensure that exceptions to the immigration conditions apply to ADP (and CDP).**

**Recommendation 19: The Scottish Government considers reducing jargon in the age rules by replacing references to the ‘relevant age’ with ‘pensionable age’.**

**Recommendation 20: The Scottish Government is invited to provide an update on progress to ensure people apply for the right**

**type of disability assistance particularly at age 16 to 18 and pension age.**

**Observation 2: SCoSS notes that the ADP age rules as drafted may not permit transfer to ADP over pension age from PIP or DLA without requiring an application.**

**Recommendation 21: The Scottish Government should clarify how the mobility component restrictions apply to planned reviews over pension age, to changes in an award after pension age under the special rules for terminal illness, and when rates change as people over pension age enter or leave a care home, hospital or legal detention.**

**Recommendation 22: The Scottish Government should set out how changes in circumstances are dealt with while a redetermination or appeal is underway. There should be further consideration given to placing this beyond doubt in legislation.**

**Recommendation 23: Draft regulation 45 should be amended so that people who are late in reporting a change in circumstances or in notifying a material fact relevant to the award are not unnecessarily penalised.**

**Recommendation 24: The Scottish Government should set out how it plans to ensure the smooth transfer from CDP to ADP, and the monitoring it intends to put in place to continually improve the process.**

## 1. Introduction

The Scottish Commission on Social Security (SCoSS) welcomes the opportunity to comment on the draft Disability Assistance for Working Age People (Scotland) Regulations (referred to in this report as ‘the draft Regulations’).

The draft Regulations provide the legislative basis for the introduction of Adult Disability Payment (ADP), a new Scottish benefit which replaces Personal Independence Payment starting from spring 2022. Three disability benefits have been devolved to Scotland: Disability Living Allowance (DLA), Personal Independence Payment (PIP) and Attendance Allowance (AA). These UK benefits are now being replaced by new forms of devolved disability assistance. The first of these, Child Disability Payment (CDP), which replaces DLA for children, is currently being piloted ahead of it being available across Scotland from November 2021. ADP is the second benefit to be introduced and will replace PIP.

There are around 46,000<sup>1</sup> children and young people in Scotland getting DLA from the Department for Work and Pensions who will be transferred to CDP by Social Security Scotland. ADP represents a significant scaling up of delivery for Social Security Scotland, with over 300,000 people expected to be getting PIP when ADP is introduced.<sup>2</sup> Given the step change in numbers, to ensure safe and secure transition, Charter commitments around building a diverse, well-trained workforce, embedding a culture of dignity and respect and designing processes that work assume critical importance.<sup>3</sup> However, the Commission is aware that the equally important Charter commitment to ‘look for ways to make eligibility rules fairer’<sup>4</sup> is still of pressing concern. We comment more on the concerns and potential to improve eligibility rules in this report. We also briefly flag some possible implications for ADP Regulations (and devolved social security more widely) of the DWP (Department for Work and Pensions) Health and Disability Green Paper,<sup>5</sup> published on 20 July 2021, though much of this is necessarily speculative at the time of writing. It will be important to remain alert to the implications of change to UK disability benefits, given the intricate interdependencies between the two systems.

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<sup>1</sup> [Benefits for carers and disability assistance at November 2020: summary statistics](#)

<sup>2</sup> Scottish Government [Adult Disability Payment: consultation](#)

<sup>3</sup> [Social Security Scotland - Our Charter](#)

<sup>4</sup> [Social Security Scotland – Our Charter](#): A better future, commitment 8

<sup>5</sup> [Shaping future support: the health and disability green paper - GOV.UK \(www.gov.uk\)](#)

## 2. Approach to scrutiny

Our report has been completed in accordance with the Commission's pre-legislative scrutiny function, set out in sections 22 and 97 of the Social Security (Scotland) Act 2018.<sup>6</sup> Section 97 states that the Commission must report on draft Regulations proposed to be made under any section in Chapter 2 of Part 2 of the Act. The draft Regulations, as referred to SCoSS, are made under powers conferred within this part of the Act. We hope suggestions and recommendations in the report will help Scottish Ministers further improve draft regulations laid before the Scottish Parliament, and inform the Social Justice and Social Security Committee's scrutiny. Rules about transferring awards of PIP paid to people in Scotland by the Department for Work and Pensions to awards of ADP paid by Social Security Scotland, and consequential amendments, are not in scope for SCoSS's scrutiny and have not been referred, although they are expected to be included in the final version of the regulations laid before the Scottish Parliament.<sup>7</sup>

The draft Regulations were formally submitted on 25 June 2021 by the Minister for Social Security and Local Government, Ben Macpherson MSP.<sup>8</sup> As part of the scrutiny process, we were able to seek further information and clarification from officials on various points, which has helped us prepare our scrutiny report and also, we hope, helped the Scottish Government in its evolving policy and legislation development. An updated version of the draft Regulations was submitted to SCoSS on 6 September 2021 with various revisions and additions, including the addition of regulations on the transfer from CDP to ADP.<sup>9</sup> While we welcome the engagement with the Scottish Government which allowed these updates and additions to be included in our report, they did not form part of SCoSS's consultation with stakeholders. This report is based on the provisions and numbering in the updated version of the draft Regulations.

Finally, an update to the residence and presence conditions relating to people evacuated from Afghanistan was sent to SCoSS on 21 September 2021. While scrutiny of these changes is not included in this report, the Commission plans to consider them alongside its scrutiny of corresponding amendments to other benefits contained in The Social

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<sup>6</sup> [Social Security \(Scotland\) Act 2018](#)

<sup>7</sup> Schedule 2, Part 3 (Transfer to Adult Disability Payment) and Part 4 (Consequential Amendments) were not included in the draft Regulations referred for scrutiny.

<sup>8</sup> [Draft regulations referred to SCoSS on 25 June 2021](#)

<sup>9</sup> [ADP draft Regulations.](#)



## Security (Residence Requirements) (Afghanistan) (Scotland) Regulations 2021.<sup>10</sup>

The scrutiny timeline is summarised in the [Annex](#) to this report.

SCoSS carries out its scrutiny role having regard to the Scottish social security principles,<sup>11</sup> any relevant provisions of human rights law, and with reference to our scrutiny framework.<sup>12</sup>

In carrying out our scrutiny, we drew on analyses of stakeholder responses to the Scottish Government’s consultation exercise on the draft Regulations.<sup>13</sup> We also carried out some limited consultation ourselves to help fill identified gaps in responses from representative bodies and people with lived experience. There had also been some changes between the draft that the Scottish Government had consulted upon and the draft formally referred to us so we wanted to ensure these stakeholders had sight of the latest version. We are very grateful for the timely and informative responses we received. These have informed the following report in a number of key areas and have already prompted improvements to the revised draft Regulations. We are also grateful to the Scottish Fiscal Commission for engaging with SCoSS.

### 3. Rights and principles

Section 1 of the Social Security (Scotland) Act 2018 sets out the principles that are to guide the development of the devolved social security system. Section 97(6) requires SCoSS to have regard to these principles and to relevant international human rights law, including – but not exclusively – the ICESCR<sup>14</sup>, when carrying out pre-legislative scrutiny.<sup>15</sup> Principle (b) itself recognises that social security is a human right and key to the realisation of other rights.

ADP is a contribution towards the additional costs associated with disability, a function it shares with CDP and the UK disability benefits it is replacing. Accordingly, it recognises and responds to the fact that a household including a disabled person will typically require a higher income to achieve an adequate standard of living (article 11 ICESCR;

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<sup>10</sup> [The Social Security \(Residence Requirements\) \(Afghanistan\) \(Scotland\) Regulations 2021](#)

<sup>11</sup> [Social Security \(Scotland\) Act 2018, section 1](#)

<sup>12</sup> [Scottish Commission on Social Security: draft scrutiny framework - gov.scot \(www.gov.scot\)](#)

<sup>13</sup> [Adult Disability Payment: consultation analysis - gov.scot \(www.gov.scot\)](#)

<sup>14</sup> [International Covenant on Economic, Social and Cultural Rights](#)

<sup>15</sup> Relevant human rights law is defined as law contained in human rights treaties ratified by the UK.

article 28 (CRPD<sup>16</sup>), live independently and enjoy inclusion in the community (article 19 CRPD) than a household not including a disabled person. In doing so, it helps disabled people to enjoy their right to social security and other social rights without discrimination (article 2.2 ICESCR), on the basis that discrimination can flow not only from unequal treatment, but from treating people the same when one group's circumstances demand additional support.<sup>17</sup> While this is a common purpose for all disability benefits in the UK, the introduction of the various forms of Scottish disability assistance is an opportunity to develop a set of payments that do so *better* than the benefits they are replacing, in keeping with the obligation to work towards the progressive realisation of human rights (article 2.1 ICESCR) and the statutory commitment to continuous improvement of the social security system (principle (g)).<sup>18</sup>

The fact that ADP will mainly differ from PIP in matters of process rather than eligibility criteria or rates of payment does not preclude such improvements. Furthermore, the prioritisation of a safe and secure transition from PIP to ADP will help minimise the risk of people's social security award (a possession protected by the first protocol to the ECHR<sup>19</sup>) being interrupted due to administrative problems, as well as helping to ensure the process takes place efficiently in accordance with principle (h). However, this focus does mean that the planned review of disability assistance in 2023 will be an important opportunity to consider what further improvements might be desirable or feasible once the initial transition has been completed. Responses to both the Scottish Government consultation on ADP and SCoSS's own call for views on the draft Regulations reveal a number of areas where at least some stakeholders believe there is an opportunity for devolution to result in a better approach. We comment on the scope for improvement and the 2023 review in section 6 below.

In the remainder of this section, we highlight social security principles and human rights obligations to which the introduction of ADP seems likely to be relevant. The policy or operational changes linked to each

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<sup>16</sup> [Convention on the Rights of Persons with Disabilities](#)

<sup>17</sup> This is sometimes known as *Thlimmenos* discrimination, after the case in which the European Court of Human Rights recognised the principle (*Thlimmenos v Greece* (app no 34369/97)) – see also [article 5 CRPD](#)

<sup>18</sup> See [SCoSS scrutiny report on the Disability Assistance for Children and Young People \(Scotland\) Regulations](#)

<sup>19</sup> [European Convention on Human Rights](#)

right or principle will be discussed in greater detail in subsequent sections of the report.

The social security principles are not just about how the devolved social security system should operate, but about the process by which it is designed. According to principle (f), ‘the Scottish social security system is to be designed with the people of Scotland on the basis of evidence’. The people of Scotland have had an opportunity to give their views on the development of ADP and other forms of disability assistance through public consultations on the future of social security in Scotland,<sup>20</sup> disability assistance<sup>21</sup> and ADP specifically.<sup>22</sup> The Scottish Government also works closely with stakeholders with particular expertise on social security when designing policy and processes. Notably, the Disability and Carers Benefits Expert Advisory Group (DACBEAG) has provided extensive advice on the development of the various forms of disability assistance.<sup>23</sup> Experts by experience – individuals who have received a UK benefit in an area of social security coming under devolved control – have been a particularly important voice in the development of devolved social security. Their evidence has been gathered in a focused way through the social security experience panels, a high proportion of whose work has focused on disability assistance specifically or on aspects of social security administration of relevance to the delivery of disability assistance.<sup>24</sup> Not every recommendation about the design of ADP to emerge from these processes is reflected in the draft Regulations or plans for operational delivery, but the Scottish Government’s focus on a safe and secure transition and changes to the application and assessment process reflects the priority given to these matters by many stakeholders. Certain other issues highlighted through public and stakeholder engagement may be more relevant to a future review of ADP.

Principle (e) states that the devolved social security system will contribute to reducing poverty in Scotland. ADP will make only a limited contribution to poverty reduction over and above that made by PIP, due to the similarity of the eligibility criteria and rates of payment. However, a small proportion of people may find they are entitled to a higher award

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<sup>20</sup> Scottish Government [Social Security in Scotland: consultation](#)

<sup>21</sup> Scottish Government [Disability assistance in Scotland: consultation](#)

<sup>22</sup> Scottish Government [Adult disability payment: consultation](#)

<sup>23</sup> [Disability and Carers Benefits Expert Advisory Group](#)

<sup>24</sup> [Social Security Experience Panels: publications](#)

following the introduction of ADP,<sup>25</sup> and changes to application, assessment and review processes could mean more people getting an ADP award than would have received PIP.<sup>26</sup>

Perhaps the highest profile social security principle states that the devolved system should have respect for the dignity of individuals at its heart (principle (d)). Initially at least, the Scottish Government is seeking to realise this commitment through changes to the operational delivery of social security assistance, compared to UK benefits. In the case of ADP, there is a strong focus on the application and determination process, including how applicants are required to demonstrate that they meet the eligibility criteria. We consider the planned approach in detail in section 5 below. For now at least, ADP retains the deficit approach to establishing eligibility that characterises UK disability benefits. While it is possible to question whether this is the ideal model in terms of protecting system users' dignity, this is a possible matter for a future review rather than one that can be addressed in the current, transitional period.

Non-discrimination in the context of disability benefits is not only about the treatment of disabled people in comparison to non-disabled people, but the treatment of different groups within the disabled population. Some claimants and advice providers have claimed that PIP operates in a way that unjustly disadvantages certain groups. These include people with a terminal illness who have a life expectancy of more than six months, therefore are unable to claim the benefit under the special rules for terminal illness,<sup>27</sup> people with mental health conditions and people with fluctuating conditions.<sup>28</sup> The extent to which ADP ensures equal access to disability assistance for people in these kind of circumstances, or who are otherwise at a potential disadvantage in their access to public services, will only become clear over time and should be a focus of the future review of ADP (principle (g) seeking opportunities to continuously improve the system in ways which advance equality and non-discrimination).

More broadly, people's enjoyment in practice of their social security rights is a question of procedural justice. The application,

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<sup>25</sup> For example, more people with a terminal illness could be entitled for longer and to a higher amount.

<sup>26</sup> The Scottish Fiscal Commission estimates that by 2026-27, there will be 70,000 more people getting ADP on top of the 400,000 people who would have received PIP in the absence of ADP ([Scotland's Economic and Fiscal Forecasts](#), August 2021, para 5.15)

<sup>27</sup> The High Court in Northern Ireland found this difference of treatment to be unlawful, but this decision was overturned by the Court of Appeal - [Re Cox's application for judicial review \[2021\] NICA judgment, 3 August 2021](#).

<sup>28</sup> [The Second Independent Review of the Personal Independence Payment Assessment](#)

(re)determination and appeal processes must provide a fair opportunity for people to demonstrate their entitlement to an award and challenge decisions with which they disagree. Operational matters discussed in section 5 are relevant here; so is the availability of Short-term Assistance to support redetermination requests and appeals by individuals whose existing award is reduced or terminated. Getting decisions right first time is not just in applicants' interests, but contributes to the efficiency of the system in accordance with principle (h).

A final principle to note is that the Scottish social security system is to be a public service (principle (c)). The ADP Regulations themselves do not make any particular change of relevance to this principle. However, if 'a public service' is interpreted as meaning a service delivered by the public sector,<sup>29</sup> ADP will conform to the description better than PIP due to the prohibition of private sector delivery of any aspect of social security by section 12 of the 2018 Act.

## **4. Policy changes from personal independence payment**

The Scottish Government's ambitions for ADP as it is introduced focus on changes intended to improve the way disabled people experience the system. Some of these changes are operational and administrative and we consider these in section 5 below: application processes, local delivery service, evidence for decision making, rolling awards. Other changes are set out to some extent in the draft Regulations: definition of terminal illness, conditions about residence in the UK, the introduction of Short-term Assistance. We consider these below.

### **4.1 Terminal illness**

Under special rules, people with a terminal illness are entitled to the enhanced rate of both the daily living component and mobility component of ADP (draft regulation 26). Entitlement depends on the clinical judgement of a healthcare professional that the person has a progressive disease that can reasonably be expected to cause their death. Clinical judgement is based on Chief Medical Officer Guidance and notified to Social Security Scotland on a BASRiS form, which stands for Benefits Assessment under Special Rules in Scotland. Entitlement

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<sup>29</sup> This is not inevitably the case – the law recognises that 'functions of a public nature' may be carried out by a wide variety of organisations in different sectors – see [Human Rights Act 1998, section 6\(3\)\(b\)](#)

starts from the date of application for ADP without the usual 13-week qualifying period and can be backdated for up to 26 weeks.

### **Differences in the Scottish approach**

There are differences in ADP compared with PIP: in the definition of terminal illness, in how it is notified, in the amount paid and length of award.<sup>30</sup>

In ADP, people are paid the enhanced rate of both the daily living and mobility components, whereas in PIP just the enhanced rate of daily living component is paid, not the mobility component which people must apply for on the basis of mobility needs. Living with a terminal illness can mean extra costs, for example, for heating, special diets, support to manage health, transport and to spend time with family and friends. Paying maximum entitlement with the minimum of red tape is welcome and in accord with the social security principle of respect for dignity, and with the Charter commitment to make systems simple and clear.<sup>31</sup>

Currently, to qualify for PIP under the special rules, a person must have a progressive disease and be reasonably expected to die within six months.<sup>32</sup> For ADP, there is no time limit on life expectancy. Entitlement depends on a clinical judgement based on guidance that a progressive disease can reasonably be expected to cause death. The intention is that removing the time limit will bring special rules entitlement to those with progressive diseases where the end of life is harder to predict. This is likely to make the system fairer by removing a source of discrimination against terminally ill applicants who fall outside the special rules for PIP. Indeed, since the Scottish Government announced its intention to remove the six-month limit on life expectancy for awards under the special rules, the High Court in Northern Ireland has held that the limit unlawfully discriminates against terminally ill people with a longer life expectancy, contrary to article 14 ECHR.<sup>33</sup> While the Court of Appeal reached the opposite conclusion,<sup>34</sup> in the absence of a Supreme Court judgment it would be unwise to assume that the Scottish Government and Parliament would have had competence to replicate the six-month

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<sup>30</sup> Other differences include making awards life-long with no review for people with awards under the special rules. This is expected to be set out in guidance rather than in regulations.

<sup>31</sup> [Principle \(d\); Social Security Scotland - Our Charter](#) 'Processes that work, commitment 1

<sup>32</sup> The UK Government is planning to legislate to change the six - month limit to 12 months. [Shaping Future Support: The Health and Disability Green Paper](#), para 208.

<sup>33</sup> [Re Cox's application for judicial review \[2020\] NIQB 53](#)

<sup>34</sup> [Re Cox's application for judicial review \[2021\] NICA judgment](#), 3 August 2021

time limit in the draft Regulations, as the Scotland Act prevents them from acting contrary to ECHR.<sup>35</sup>

According to analysis undertaken with health professionals tasked with making these clinical judgements, the change is likely to mean terminally ill people will be on benefit for longer.<sup>36</sup>

There are implications for people in Scotland of there being different rules for UK and Scottish benefits. For DWP benefits, evidence of terminal illness is supplied on a form, DS1500, while for Social Security Scotland benefits such as ADP, it is supplied on a BASRiS form. The Commission believes that administrative requirements must on no account take precedence over the needs of terminally ill people. We commend the approach of the Scottish Government in making it clear in guidance that someone who already has a DS1500 form will not have to supply a BASRiS form too. It is to be hoped that the DWP will similarly accept a BASRiS form as sufficient evidence to decide access to special rules for Universal Credit (UC) and Employment and Support Allowance (ESA).<sup>37</sup> However, there is clearly scope for confusion, amongst clinicians as well as staff in the DWP and Social Security Scotland. Official guidance to clinicians in Scotland in relation to CDP (which has the same terminal illness rule as ADP) is that *during the transition period*, if a clinician sends a form to the wrong department, it will be transferred to the correct department.<sup>38</sup> However, confusion could well outlast the transition period during which disability benefits transfer to Scotland.

**Recommendation 1: We invite the Scottish Government to set out the action it has taken and plans to take to ensure as far as possible a seamless system for terminally ill people is created and sustained across UK and Scottish benefits.**

## 4.2 Residence conditions

The Scottish Government's initial intention is to broadly replicate the residence rules in PIP.<sup>39</sup> Eligibility for PIP depends on having been

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<sup>35</sup> sections 29(2)(d) and 57(2) of the [Scotland Act 1998](#)

<sup>36</sup> [Estimating the impact of the new definition of terminal illness for disability assistance in Scotland: research - gov.scot \(www.gov.scot\)](#)

<sup>37</sup> For UC and ESA, someone whose death can reasonably be expected within six months gets a higher amount of benefit and is not expected to work or prepare for work.

<sup>38</sup> Social Security Scotland [When to complete a BASRiS or a DS1500 form](#)

<sup>39</sup> [A Consultation on Disability Assistance in Scotland, Scottish Government Response, October 2019, paragraph 2.3](#)

present in the UK or Ireland for at least 104 weeks out of the last 156 – called the ‘two-year past presence test’.<sup>40</sup> Following their public consultation on draft ADP regulations in which some stakeholders expressed the view that the two-year past presence test was discriminatory and incompatible with the social security principles of dignity and respect, and of social security being itself a human right, the Scottish Government decided to change the regulations to reduce the past presence test to 26 weeks out of the last 52 weeks. This brings the rules in line with CDP which removes any issues with the interface for young people transferring from CDP to ADP.<sup>41</sup> We welcome this change as one that is likely to advance equality and non-discrimination.

The Commission notes some technical issues with the draft Regulations on residence and presence in section 7.6 below.

### 4.3 Short-term Assistance

Short-term Assistance (STA) is a new type of assistance which is not part of the UK system. It is a form of social security assistance in its own right, but only available to people whose ADP has stopped or reduced who go on to apply for a redetermination or appeal. With STA, people will continue to get the same level of payment as before until the redetermination or appeal is decided (Schedule 2, Part 1). STA is also available with CDP.

The intention is that people are not discouraged from challenging a decision by having to manage on a reduced income.<sup>42</sup> As a payment to help avoid a sudden drop in income when a disabled person may well still have extra costs, it is reasonable to say that STA helps realise the right of disabled people to have decent living conditions, as well as contributing to realising the right to equal access to justice.<sup>43</sup>

STA is not repayable whatever the outcome of the challenge. For people considering challenging a decision, STA is a clear incentive to request a redetermination and appeal. The Scottish Government expects the number of appeals not to change significantly, or even to reduce compared to PIP as a result of better decision making by Social Security Scotland.<sup>44</sup> (As we note below (section 5.2), the new system has

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<sup>40</sup> [PIP handbook - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

<sup>41</sup> The shorter past presence test for children in Disability Living Allowance and now CDP followed a legal challenge on human rights grounds.

<sup>42</sup> [A Consultation on Adult Disability Payment, Scottish Government Response, June 2021, page 49](#)

<sup>43</sup> Articles 13 and 28 of the [Convention on the Rights of Persons with Disabilities](#) (CRPD)

<sup>44</sup> [A Consultation on Adult Disability Payment, Scottish Government Response, June 2021, page 98](#)



potential to get more decisions right first time e.g. through actively seeking information to cover gaps in evidence.) However, the Scottish Fiscal Commission estimates (albeit with caveats on the difficulty of forecasting the consequences of new policies) that people whose award is stopped or reduced will ask for a redetermination in 90 per cent of cases because of the financial incentive of STA.<sup>45</sup> A very high appeal rate is not normally a sign of a smoothly functioning system. STA is intended to help people overcome barriers to challenging decisions so more appeals are to be expected if STA works as intended. However, if as many as nine out of ten people challenge decisions, an unintended consequence may be that STA acts to some extent as giving time to adjust to a reduced income – in effect a ‘run on’. This may be a benign consequence for individuals. In response to the Commission’s report on CDP, the Scottish Government committed to monitoring behavioural impacts of STA and the extent to which it allows people to overcome barriers to challenging decisions.<sup>46</sup> We would reiterate that looking for, and monitoring unintended consequences should also be undertaken.

With appeal numbers being a ‘known unknown’, there needs at least to be the flexibility to manage more redetermination and appeal cases while maintaining timely, high quality decision making. By enabling payment to continue from the point an appeal is lodged until its outcome, it is possible that STA could result in an increase in appeals regardless of the accuracy of initial decision-making. An increased number of appeals where a high proportion are unsuccessful would indicate that initial decision making was in fact accurate. It could just indicate that people are incentivised to appeal irrespective of any realistic chance of success. Thus, evaluating the extent to which STA is meeting the policy objectives is not a straightforward matter of comparing how many people challenge decisions compared with PIP. It is respective success rates, not numbers of appeals, that could provide a comparator on quality of initial decision-making. More broadly, we would encourage the Scottish Government to make sure that the right data is collected to allow a meaningful analysis to ensure that STA is contributing to an efficient system that delivers value for money.

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<sup>45</sup> [Scotland’s Economic and Fiscal Forecasts](#), para A.46

<sup>46</sup> [Scottish Government’s response](#) to SCoSS’s scrutiny report on the Disability Assistance for Children and Young People (Scotland) Regulations 2021

**Recommendation 2: We invite the Scottish Government to set out its plans to identify the different factors that could contribute to lower or higher redetermination and appeal rates and success rates, with a view to analysing whether Short-term Assistance is fulfilling its intended role of incentivising and enabling people to challenge decisions they think are wrong or is resulting in unintended consequences.**

STA is not available to young disabled people who reach the age when they must apply for ADP instead of CDP. There is significant flexibility for young people on CDP to choose when to apply for ADP without the fear of losing CDP if ADP is not awarded (draft regulation 56). However, once passed their 18<sup>th</sup> birthday, there is no provision either to continue to pay CDP until that redetermination or appeal is concluded or pay STA. We considered in our recent report on the draft Disability Assistance for Children and Young People (Amendment) Regulations that young people might well be protected by the non-discrimination provisions of the European Convention on Human Rights (article 14) and other human rights agreements (for example, article 2(2) ICESCR).<sup>47</sup> We noted that 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 STA while the other cannot for no reason other than the requirement to move between forms of disability assistance at a given age. Consequently, we recommended in that report that individuals in this position should be treated as an exception to the general rule that STA is only payable where there is a change to an existing entitlement, not following an initial application/determination. The Scottish Government indicated to the Commission at that point that it shared the view that there should be no immediate loss of entitlement if ADP is not awarded initially. For clarity, we reiterate the recommendation in this report.

**Recommendation 3: In order to avoid gaps in entitlement, regulations should ensure that Short-term Assistance is available to young people aged 18 or over who were on Child Disability Payment but whose initial determination in respect of ADP is that they have no or a reduced entitlement.**

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<sup>47</sup> [SCoSS Scrutiny Report Disability Assistance for Children And Young People \(Scotland\) Amendment Regulations 2021](#), para 3 'Age criteria'

## 5. Operational and administrative processes

Many people with experience of claiming PIP are looking forward to the system in Scotland being fairer and easier to manage, are expecting to be treated with dignity and respect and offered more support, and anticipate decisions being consistent, accurate and right first time. These expectations, and more, are set out in *Our Charter*.<sup>48</sup>

With the introduction of ADP, the Scottish Government is laying down the foundations for a system intended to better meet the needs and aspirations of working-age disabled people. The recent consultation on these draft ADP regulations indicates that people see ADP so far as a significant improvement though there is clearly some frustration that ADP will not include more changes to eligibility conditions from the outset,<sup>49</sup> and expectations that this will be picked up in the proposed 2023 review.

While regulations provide a framework for how ADP is to be delivered, they are not the place for setting out the specifics of processes that will achieve policy intentions and implement Charter commitments. It is the regulations which are the focus of this scrutiny report. However, how well processes are meeting expectations may, in due course, come under the Commission's remit to review in our role to report on the Charter.<sup>50</sup> There should be much to learn from the experiences of disabled people, stakeholders and staff using and delivering the new services.

### 5.1 Applications

People can register their ADP claim simply by giving basic details of name and date of birth, then have 8 weeks to complete the application (draft regulation 35). People will be able to choose to apply online, by post, by phone or through face-to-face contact with staff.

The application form is the starting point for gathering information to enable Social Security Scotland case managers to make the right decision. The form is intended to be as easy to use as possible.<sup>51</sup> This is vital as the form is the primary way to gather the person's own account of their condition and how it impacts their daily living and mobility. The

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<sup>48</sup> [Social Security Scotland - Our Charter](#)

<sup>49</sup> [Adult Disability Payment: consultation analysis - gov.scot \(www.gov.scot\)](#)

<sup>50</sup> This is a statutory function of the Commission under [Section 22\(1\)\(d\)](#) of the Social Security (Scotland) Act 2018

<sup>51</sup> [Social Security policy position paper - disability benefit applications: making applications](#)

person's own account is the richest source of evidence for decision making. We know, however, that it is very difficult for anyone encountering a benefit as complex as ADP, perhaps for the first time, to be able to give a full account that includes being able to explain how they manage activities safely, repeatedly, to an acceptable standard in a reasonable time period, all key issues for eligibility. Ensuring there is help available to complete the form, for anyone needing it, is clearly very important. The new system has help to claim ADP inbuilt, through an Independent Advocacy Service and through Social Security Scotland's network of local client support advisers.<sup>52</sup> This support sits alongside the enormous contribution of the many advice and support services across Scotland.

Supporting people through the application is one of the expectations in *Our Charter*. There is a Charter measurement framework that sets out a range of measures to check how well processes are working. For applications, measures include how many of the people who need extra support are referred to relevant support and how many Social Security Scotland staff know how to refer people to advice and advocacy services. The term 'refer' is often used to mean signposting rather than the more active setting up of appointments through a referral system. People are more likely to get the support they need through active referrals so this is preferable to signposting where it is feasible to set up, and with the individual's permission.

**Recommendation 4: Social Security Scotland should aim to set up active referral systems with advice agencies trained to help with benefit claims, as well as active referral systems, with client consent, to advocacy and local client support services.**

Aiming to get decisions right first time – another Charter expectation – is a challenge given the inherent complexity of ADP (like its predecessor, PIP). Charter measures include research with Social Security Scotland managers of examples of reasons for appeal outcomes.<sup>53</sup> We would suggest that added to that is research with the Scottish Courts and Tribunals Service to learn from the perspective of the tribunals hearing appeals.<sup>54</sup>

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<sup>52</sup> From July 2021, client support advisers were available to people who live within the Child Disability Payment pilot areas – Dundee City, Western Isles and Perth – with the roll out across Scotland due from November 2021. [Local-Delivery-service-factsheet-English.pdf \(socialsecurity.gov.scot\)](#)

<sup>53</sup> [Social Security Charter measurement framework: co-design process](#)

<sup>54</sup> [Equality and Human Rights Commission Research report: Social Security systems based on dignity and respect](#) page 81

**Recommendation 5: The Scottish Government ensures that tribunal insights into appeal outcomes for ADP are included in quality assurance measures and continuous improvement of Social Security Scotland decision making.**

## **5.2 Evidence and consultations**

An application may go through several stages before there is enough information for a case manager at Social Security Scotland to reach a decision on entitlement. Stages involve clarifying information directly with the applicant and working with them to identify sources of supporting information. Supporting information may be formal – e.g. from a community nurse, physiotherapist or support worker – or informal e.g. from family, friends or unpaid carers. Usually one source of formal information will be required. If there is not enough information to make a decision, the case manager can get advice from a Social Security Scotland practitioner – staff with professional experience in health or social care – to clarify questions e.g. about health conditions or how a disability generally affects people, and ultimately about whether a ‘consultation’ is required.<sup>55</sup>

Eliciting timely and detailed supporting information from busy professionals, which is focused on daily living and mobility activities, will be challenging. The evidential value will likely be variable, and Social Security Scotland decision makers will need good skills in weighing evidence to handle this appropriately. How effective formal and informal supporting information is in aiding decision making will be an important area for delivery, learning and improvement. Ahead of ADP being introduced, there is an opportunity to learn from how the system is operating for Child Disability Payment. For example, Social Security Scotland has been working with COSLA and health boards on standard routes to request and give supporting information, from which they have produced guidance for medical professionals, local authorities and health boards.

**Recommendation 6: The Scottish Government is invited to set out a plan of action that will ensure an early focus on systems to capture learning and support continuous improvement in order to elicit good quality, timely supporting information, and support the effective use of evidence in decision making.**

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<sup>55</sup> [Social Security policy position paper - disability benefit applications: how decisions are made](#)

The consultation is intended to be a discussion between the applicant and a practitioner (with an opportunity for third party support for the applicant) to gain information on descriptors that the case manager has said they are not clear about. It will usually be by phone but there is flexibility about finding alternative ways that suit the applicant including meeting in person if requested which could be at their own home.

Practitioners are to take the time they need to fully understand the impacts of a person's condition. Information gathered is to be transparent with reports provided and audio recordings available for appeals.

The redesign of the process away from the functional assessments for PIP that people find so traumatic is one of the most important changes in ADP. The process is not set out in regulations although the Act ensures that requiring someone to take part in a face-to-face consultation is a last resort.<sup>56</sup>

**Observation 1: By law, requiring a consultation must be a last resort, however, this only applies to face-to-face consultations where the individual and practitioner are 'physically in the same place at the same time'. In practice, consultations will be delivered by phone or video call in many cases. There may be a case in due course for updating the Act accordingly.**

In the current system, identifying gaps in evidence or seeking further information often happens only at the appeal stage although recently the DWP has made steps to address this.<sup>57</sup> Undoubtedly the new system in Scotland which actively seeks information to plug gaps in the person's own account is an important step towards getting decisions right first time. To further understand what makes for better decision making, gathering the right data will be important. A recent report from the Northern Ireland Public Services Ombudsman offers useful insights into the importance of further evidence to getting decisions right first time, and also how the manner in which data is gathered and analysed can inhibit or enhance learning and improvement.<sup>58</sup>

The role of the practitioner is a key one. The draft Regulations (regulation 47) sets out the health or social care qualifications and experience that practitioners must have to carry out consultations, called

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<sup>56</sup> [Section 55 Social Security \(Scotland\) Act 2018](#)

<sup>57</sup> [DWP Shaping future support: the health and disability green paper](#) para 192

<sup>58</sup> [Northern Ireland Public Services Ombudsman: PIP and the Value of Further Evidence](#) For example, the report notes that time pressures inhibit further evidence being requested.

‘assessments’ in the regulations. In response to views submitted by stakeholders on the draft ADP regulations, the Scottish Government has strengthened this provision so that the two years’ work experience must be post qualification. This is welcome, however, one stakeholder told SCoSS of their concerns about the level of qualification that social care workers will be required to have. While training for health professionals is often to degree level, the benchmark qualification for registration with the Scottish Social Services Council as a support worker is the significantly lower level SVQ 2 (Social Services and Healthcare).<sup>59</sup> Thus ‘suitably qualified’ in legal terms may be a necessary but not sufficient level of expertise to act as a practitioner.

To consider someone’s mental health condition in a consultation, the practitioner must have worked providing services to people with mental health conditions, and similarly for learning disabilities. We note that the regulation only applies to consultations involving the applicant, not to advice given by a practitioner to a case manager. It will be equally important for practitioners offering direct advice on a case to have the relevant experience. Transparency about the relevant experience of the practitioner offering advice and conducting a consultation should be the norm, both to reassure individuals and also in the interests of public confidence. For example, it may simply be reflected in job titles and appended to decision letters.

**Recommendation 7: The Scottish Government ensures that the relevant experience of the practitioner advising decision makers or conducting a consultation is clearly communicated in order to instil confidence and promote transparency.**

Experience Panels of disabled people and carers advising the Scottish Government have emphasised the need to have staff with extra training and experience on various disability-related issues, beyond the experience brought by health professionals.<sup>60</sup> Social Security Scotland plans to work with organisations who represent those with first-hand experience of disability and health conditions when designing and delivering staff training.<sup>61</sup> Staff with access to insights from disabled people of the impacts of disability on daily life will undoubtedly be better equipped to communicate effectively with applicants. We suggest that

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<sup>59</sup> [Scottish Qualifications Authority: NPA in Social Services and Healthcare](#)

<sup>60</sup> [Social Security Experience Panels: meeting people's needs - visual summary](#)

<sup>61</sup> [Social Security Scotland Corporate Plan 2020 – 2023](#) page 30

this training is continually refreshed, and that more ways to have such insights available to staff are considered.

**Recommendation 8: The Scottish Government considers further ways to make the expertise of disabled people available to staff, for example, through refresher training or roles within Social Security Scotland for people with lived experience.**

### 5.3 Rolling awards

In the current UK system, PIP awards are normally for a fixed period. People have to make a renewal claim to continue to get benefit or have their awards reviewed. The process involves a questionnaire and assessment similar to that involved for new claims. The Scottish Government intends that all ADP awards will be made on a rolling basis. In other words, all ADP awards are to be indefinite but with a date set after which a review will decide continued entitlement (draft regulation 48).

We understand that the Scottish Government wants to implement indefinite awards with no reviews for people whose condition is very unlikely to change over their lifetime, and have consulted DACBEAG<sup>62</sup> on the best way to implement this. Instead of regular reviews, Social Security Scotland would write to people each year with their uprating letter to remind them to get in touch if they think they are entitled to a higher rate of ADP. Of course, in a situation where an individual is already receiving the maximum, that does not apply. There may therefore be an even stronger case for indefinite awards in such circumstances. The Commission agrees that it should be practically possible to judge in individual cases where reviews are unnecessary, and that it is desirable, both from the standpoint of designing simpler processes (a Charter commitment) and likely to deliver a more efficient, value for money service (social security principle (h)). Giving people more certainty over their income will help people make longer term plans e.g. paying for adaptations to a Motability car. It is reasonable to conclude that this approach will help contribute towards realising the right of disabled people to have decent living conditions.<sup>63</sup> In implementing a no-review policy for some people, the Scottish Government will need to exercise care that this is done in an equitable way, e.g. that people with conditions that fluctuate but overall are

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<sup>62</sup> [Disability and Carers Benefits Expert Advisory Group](#)

<sup>63</sup> [Article 28 of the Convention on the Rights of Persons with Disabilities \(CRPD\)](#)



unlikely to change are also considered, which may be the case, for example, with some mental health conditions.

The intention is that people continue to be paid their ADP while the review is underway. However, if people do not respond to requests for information from Social Security Scotland their payments could be suspended (draft regulations 38 to 43). The aim must be to make sure that suspensions are very much the exception.

The draft Regulations provide for a power to suspend in essentially the same circumstances as the draft Suspension of Assistance (Disability Assistance for Children and Young People) (Scottish Child Payment) (Scotland) Regulations 2021, which SCoSS is also currently scrutinising.<sup>64</sup> These in turn reflect the circumstances in which Schedule 11 to the 2018 Act stipulates a power to suspend may exist. That is: when the individual to whom the award is made fails to provide information material to a determination of ongoing entitlement following a request from Social Security Scotland; to protect the individual from financial abuse; when a person who receives payment on behalf of the individual is unwilling or unable to continue to do so; or at the request of the individual.

Some of the issues we are raising in our scrutiny report on provisions to suspend CDP or Scottish Child Payment awards apply equally in the context of ADP. Notably, these are: the need for clarity about the impact on passported entitlements or carer benefits if ADP payments are suspended; the need for independent advocacy and supported decision making to be available when required; and the difficult decision that would face an individual who is considering requesting the waiving of suspension on the grounds of financial hardship.<sup>65</sup> The Commission notes that, in accordance with our recommendation on the draft Suspension of Assistance (Disability Assistance for Children and Young People) (Scottish Child Payment) (Scotland) Regulations 2021, draft regulation 39 requires Scottish Ministers to provide an individual who requests a review of a decision to suspend with a reasoned communication of the outcome.

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<sup>64</sup> [Draft Suspension of Assistance \(Disability Assistance for Children and Young People\) \(Scottish Child Payment\) \(Scotland\) Regulations](#)

<sup>65</sup> The scrutiny report on the Suspension Regulations is yet to be submitted but will be published on gov.scot in due course. In the report, we note that an individual who asks for a suspension to be waived due to present financial hardship might only be storing up greater hardship for the future if it results in overpayments.

**Recommendation 9: SCoSS refers the Scottish Government to the recommendations made in our scrutiny report on the draft Suspension of Assistance (Disability Assistance for Children and Young People) (Scottish Child Payment) (Scotland) Regulations 2021. The Scottish Government should consider the applicability of these recommendations to draft regulations 38 to 43.**

## **6. Eligibility rules**

### **6.1 ADP eligibility issues**

ADP is based on rules as well as processes. Rules are set out in the Act and regulations. The rules set out in detail the conditions a person must satisfy to qualify for benefit. Like PIP, ADP regulations set out a list of activities. Each activity is separated into a range of detailed descriptions of a level of ability e.g. from being able to carry out an activity unaided, to not being able to carry it out at all. These ‘descriptors’ have a points score attached. A person needs a certain number of points to qualify for ADP. There are a series of daily living and mobility activities and descriptors.

While many people hold negative views about how PIP is assessed – i.e. about the processes for delivery – there are also some who feel strongly that change is needed to the eligibility rules themselves – i.e. about what is delivered to whom. There are a range of concerns expressed about the ADP rules, for example: <sup>66</sup>

- The overall approach focuses too much on medical conditions and the treatment and management of medical conditions.
- People must explain what they cannot do rather than what they can do, and often have to give sensitive and potentially intrusive information that is incompatible with dignity and respect.
- There is a suggestion that descriptors do not cater well for some conditions such as multiple sclerosis, epilepsy and other fluctuating conditions, autism, hidden disabilities, some sensory impairments, learning disabilities and mental health conditions.
- The provisions to accommodate fluctuating conditions are too inflexible, requiring that the functional limitation should apply at least 50 per cent of the time.

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<sup>66</sup> Adult Disability Payment (ADP) Regulations: [Analysis of Consultation Responses Final Report June 2021](#), page 42; [Beyond A Safe And Secure Transition, Scottish Campaign on Rights to Social Security](#)

- When DLA was replaced by PIP in 2013 for disabled adults, the requirement to qualify for the higher rate of the mobility component was tightened up, from an unspecified distance in DLA that in practice meant an inability to walk 50 metres, reduced in PIP to a specified distance of 20 metres. As they transferred to PIP, many people lost the higher rate of the mobility component and their passported entitlement to a car through the Motability scheme and, with it, a key part of their independence. The same 20 metre rule applies in ADP.

However, the Scottish Government has said that a safe and secure transition to ADP requires the eligibility rules for ADP to be broadly the same as PIP during the period of transition. ADP marks a step-change in the scale of delivery to be undertaken by Social Security Scotland. The task of setting up the systems needed and transferring a large existing caseload of over 300,000 should not be underestimated. Caseload projections on which the resources for Social Security Scotland to deliver ADP rest, are based on the PIP caseload. The possibility of wider eligibility criteria generating a lot of new claims could render the task overwhelming. Furthermore, it is planned to transfer an estimated 6,000 awards a month from PIP to ADP without reconsidering entitlement in the majority of cases. Having to decide entitlement against new rules could again overwhelm the system.

Regardless of any other factors, these challenges alone simply do not permit going further in changing the rules at this stage. The Commission accepts that this is the reality. The Commission is in no doubt that a stable, well-run system that gives people confidence in the continuity of their payments is absolutely critical. We are persuaded that changing eligibility criteria at this time would risk undermining the delivery of ADP, with extremely detrimental consequences for people who depend on it.

However, delivery challenges are not the only constraints on making more substantial changes. Others include the interdependency with the reserved benefits system and the need to protect the passporting of entitlement to other benefits and services, and cost. We say more on this below, as some may continue to apply to the 2023 review and potentially always, to some degree.

## **6.2 Independent review**

In scrutinising Regulations against principles (d) (dignity and respect), (e) (contribution to poverty) and (h) (efficiency and value for money), as

well as human rights concerning non-discrimination, we felt it important to understand the nature of the constraints that apply regarding scope to make improvements. We also note that *Our Charter* commits the Scottish Government to ‘look for ways to make eligibility rules fairer’.

We are therefore pleased that the Scottish Government plans to set up an independent review in summer 2023, one year after the national launch of ADP. Presumably that review should have principle (g) at its heart: ‘opportunities should be sought to continuously improve the Scottish social security system in ways which (i) put the needs of those who require assistance first and (ii) advance equality and non-discrimination’.

In preparation for the 2023 review, the Scottish Government could usefully make an early start in considering options for change, and to what extent constraints on changing eligibility rules may continue to exist beyond the transition period. It is worth considering how constraints may interconnect, and that the implications could significantly differ in nature and extent, depending on the change in question.

### **Delivery challenges**

Once transition has been completed, it will still be necessary to understand and manage the delivery consequences of any significant changes of approach. Usefully, by 2023, there will have been a chance to learn from the experience of administering the system.

### **Passporting**

Rates of ADP daily living and mobility components act as passports to other forms of assistance, for example, additional amounts in means-tested benefits, Carer’s Allowance, getting a car through the Motability scheme, and reductions and exemptions from Vehicle Excise Duty. Some of these are reserved to the UK and some devolved to the Scottish Government. There are also passports to local authority and other forms of provision, such as council tax exemption, Blue Badge, bus passes, and Disabled Person’s Railcard. For ADP to give people entitlement to UK benefit amounts and support in the same way as PIP, the DWP must accept ADP as a ‘like for like’ system. So far, that agreement has been achieved by keeping the eligibility rules broadly the same. There may come a point where ADP and PIP have diverged to the extent that an alternative to automatic passporting from ADP to UK benefits must be considered. The risk could be that increased disability

benefit could be offset by loss of passported benefits, leaving recipients worse off.

## Changes to the UK benefit system

It is clear that devolved and reserved benefits are closely intertwined. Changes to one system can have consequences for the other.

Entitlement to devolved top-up assistance can be contingent on receipt of specified reserved benefits, while receipt of devolved assistance can act as a passport to reserved provision. There can be implications for people moving from one system to the other. This in turn can bring delivery challenges, the need to share data and IT systems to support it.

In that context, some proposals in the DWP's recently published Health and Disability Green Paper<sup>67</sup> present significant implications for the devolved system. The Green Paper notes that proposals relating to PIP and DLA (devolved) would not apply in Scotland, just those relating to ESA and UC (reserved), however, the proposals may have indirect consequences that *would* apply in Scotland. Some key features of the Green Paper and their implications can be summarised as follows:

- Changing PIP descriptors. Subject to timing of any changes to PIP, there could be implications for the safe and secure transition from PIP to ADP, given the need to maintain eligibility rules like-for-like during this period.
- Changing PIP descriptors would speed the divergence of case law between Scotland and the rest of the UK so that the benefit that case law brings in terms of clarifying rules and challenging unequal treatment, is weakened.
- In the longer term, the Green Paper proposes exploring the scope to combine working-age health and disability benefits (e.g. UC, ESA and PIP) into one benefit. There would be numerous policy and delivery challenges to combining devolved benefits with reserved benefits, and non-means-tested benefits with means-tested benefits.
- Changes could raise questions on passporting arrangements – what would be treated as a passport to what.
- A significant restructuring of UK benefits and changes to passporting may well mean challenges to devolved benefit delivery systems, information exchange and IT systems.

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<sup>67</sup> [Shaping future support: the health and disability green paper - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/shaping-future-support-the-health-and-disability-green-paper)

- There is repeated reference to the need for an ‘affordable’ system. Bigger changes are considered in the context of curtailing rising spending on health and disability benefits. UK benefit policy choices affect how much the UK transfers to the Scottish Government for devolved benefits (the ‘block grant adjustment’). Resources transferred to Scotland for social security may reduce.<sup>68</sup>

## Cost

All of this can bring cost implications. Changes to ADP eligibility rules bring delivery challenges and additional cost implications that extend beyond ADP itself. If they result in increased cost for the UK Government, e.g. in the cost of passported entitlements, those costs would need to be paid by the Scottish Government in accordance with the Fiscal Framework agreed between the two governments. As the Scottish Fiscal Commission has pointed out, new policies are always harder to forecast, and it is inherently difficult to predict how many people will get ADP compared to PIP.<sup>69</sup> Their estimate of spending on ADP assumes an overall increase in successful applications of 21 per cent in the long term.<sup>70</sup> Once the transition to ADP is complete and access to outturn data available, there will be a sounder understanding of the real cost of ADP, and therefore a clearer baseline from which to forecast further changes to the system.

## Miscellaneous

Another factor to consider is the implication of changes to eligibility criteria for existing case law (see 7.1 below by way of illustration). A further key factor will be the learning that will be derived from an active caseload. For example, will the way ADP is delivered generate an increase in successful applications above that which would have been projected had PIP remained in place? Could that alone generate increased expenditure on passported entitlements?

Any one or combination of these factors may constrain change to eligibility rules in different ways. Obviously, some changes will cost more than others but may have a more limited impact on passported entitlements. For example, widening access to enhanced rate mobility

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<sup>68</sup> [Fraser of Allander Institute: The funding of the Scottish Parliament’s new social security responsibilities: how they will work and what are the risks? 21 key questions \(and answers\)](#)

<sup>69</sup> [Scotland’s Economic and Fiscal Forecasts](#), August 2021, para 2.16

<sup>70</sup> [Scotland’s Economic and Fiscal Forecasts](#), August 2021, para A.24

component (e.g. by removing the 20 metre rule) would have very few implications for reserved passporting entitlements. Moreover, the implications of changes to some would be more quantifiable, and hence easier to gauge, than others.

**Recommendation 10: In preparation for the 2023 independent review of disability assistance, the Scottish Government should begin now to consider options, identify their implications and scope out the parameters and process for the review.**

## **7. Regulations - areas for clarification**

### **7.1 Meaning of terms and case law**

Through appeals brought by individual claimants, tribunals and courts interpret social security regulations. These decisions form part of the law, and are referred to as ‘case law’. Decision makers must follow case law as well as the regulations when deciding entitlement in other cases. There are hundreds of PIP cases interpreting the PIP regulations, some setting important principles relating to eligibility criteria. Eligibility criteria are largely replicated in the draft ADP Regulations but despite the similarity, PIP case law does not automatically form part of ADP law. Tribunals and courts in Scotland, who will in time consider individual ADP appeals, will decide to what extent they should follow PIP case law when interpreting ADP regulations. However, the Scottish Government has chosen to incorporate some principles from case law in the draft ADP Regulations. This has the effect of clarifying the law in certain definitions of terms and certain eligibility rules. The intention is to reflect other case law in guidance for Social Security Scotland decision makers. SCoSS believes that this is the right approach. It gives more rights to individuals – if a particular interpretation is in the regulations and the decision maker does not follow the law, an individual can put that right at appeal.

The Scottish Government took advice from DACBEAG to inform their decisions about which case law to include.<sup>71</sup> Even so, incorporating case law principles is not an easy task. There are a number of examples in the draft Regulations, primarily in regulation 2 and Schedule 1, which list definitions of terms. For example in regulation 2 a new definition of ‘needs’ has been added. It clarifies that ‘needs’ relating to an item or

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<sup>71</sup> [Disability and Carers Benefits Expert Advisory Group - PIP Caselaw Integration with DAWAP Regulations: advice](#) ; [Disability and Carers Benefits Expert Advisory Group – PIP Caselaw Integration with DAWAP Regulations: response from ministers](#)

function means they are ‘reasonably required’. Thus it includes needs beyond mere medical necessities and also where something is needed but not actually available. Another amended definition clarifies that an aid or appliance can be an ordinary household item. Both are helpful clarifications and in keeping with Scottish social security principle (d) (respect for the dignity of individuals).

One choice to amend a definition may inadvertently narrow eligibility further than has been established in case law. In Mobility Activity 1, descriptor 1(e), an individual scores points if they ‘cannot undertake any journeys *at all* because it would cause overwhelming psychological distress ...’ whereas the corresponding PIP descriptor simply refers to ‘any journey’. The amended definition may be meant to convey that there is no distinction to be made between familiar and unfamiliar journeys, which is consistent with case law. However, the intention (in PIP) is that an individual would score points under 1(e) if *most days* they cannot manage a single journey.<sup>72</sup> The risk in embedding the words ‘at all’ in the descriptor is that this is interpreted more narrowly as meaning the individual would only score points if they cannot manage a single journey ever. In this case, it may be wiser to clarify the intention in guidance rather than in the regulations.

The opportunity could be taken to clarify an ambiguity in Daily Living Activity 3 (Managing therapy or monitoring a health condition). In descriptors 3(c) to (f), it is not clear whether an individual scores points based on the time taken to assist (e.g. to help attach a TENS machine to relieve pain) or the time taken for the therapy (e.g. however long a TENS machine is in use). Case law has clarified that it is the former.<sup>73</sup>

**Recommendation 11: The Scottish Government considers replacing the phrase ‘any journeys at all’ with ‘any journey’ in mobility descriptor 1(e) (Planning and following journeys) and reflecting case law that interprets this phrase in guidance.**

**Recommendation 12: The Scottish Government considers the merits of clarifying an ambiguity in daily living activity 3 (Managing therapy or monitoring a health condition).**

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<sup>72</sup> [PIP Assessment Guide part 2, para 2.4](#); see also [AA v SSWP \(PIP\) \[2018\] UKUT 339 \(AAC\)](#)

<sup>73</sup> [RH v SSWP \(PIP\) \[2015\] UKUT 281 \(AAC\)](#)



## **7.2 Overlapping entitlement with other benefits**

There is no entitlement to ADP while an individual is entitled to Attendance Allowance (AA), CDP, DLA, PIP or Armed Forces Independence Payment (AFIP). While there can be no overlapping entitlement, it is possible for there to be overlapping payments e.g. where entitlement is removed retrospectively after payment has already been made. To avoid duplication of payment for the same period, where there is ADP entitlement for a period for which a person has already been paid one of the other disability benefits, only the difference will be paid in ADP (draft regulation 4(2)).

Such offsetting can be helpful. Adjusting entitlement avoids the cumbersome alternative of paying money out with the one hand and separately recovering an overpayment with the other hand. However, it is not clear that the provision would necessarily prevent overpayment recovery action from being taken, whether by Social Security Scotland or the DWP, for example, someone having to repay PIP to the DWP, but still getting less ADP. On a further technical point, as drafted, the regulation does not specify that the difference is paid only when the ADP award is higher.

**Recommendation 13: The Scottish Government should clarify how the provision paying the difference owed in ADP for a period that overlaps with an award of another disability benefit is intended to work, and ensure that offsetting and overpayment recovery cannot both take place.**

## **7.3 Daily living and mobility component entitlement**

### **Mental health conditions, learning disabilities and cognitive impairments – terminology**

Draft regulations 5 and 6 set out that an individual is entitled to the daily living or mobility components if their ability to carry out the daily living or mobility activities is limited by their physical or mental health condition or conditions. Draft ADP regulations differ from PIP regulations in that ADP refers to 'mental health condition' whereas PIP refers to 'mental condition'. Mental conditions include learning disabilities and cognitive impairments such as dementia as well as mental health conditions such as depression and anxiety. Elsewhere in the draft ADP regulations, a distinction is made between 'mental health condition' and 'learning

disabilities’ or ‘intellectual or cognitive impairment’.<sup>74</sup> The 2018 Act refers to ‘disability arising from physical or mental impairment’.<sup>75</sup> To avoid ambiguity, there should be more consistency in terminology.

We commend attempts to introduce more positive words to describe people, which is an aim in *Our Charter*.<sup>76</sup> However, using ‘mental health condition’ as a catch-all term risks inadvertently excluding people with learning disabilities and cognitive impairments. There may be no single accepted term that encompasses this range of conditions.<sup>77</sup> SCoSS sought views from stakeholders and is grateful for the feedback received which pointed to other relevant consultations which could inform these regulations.<sup>78</sup>

The Commission considers that further consultation is needed with people with lived experience both to inform the terminology used in the law, and how people are described in forms and communications.

**Recommendation 14: The Scottish Government should seek further views on the most appropriate term or terms to unambiguously encompass mental health, learning disabilities and cognitive impairments.**

## Reliability criteria

Draft regulation 7 provides a way of deciding whether someone can or cannot carry out a points-scoring activity using four measures: being able to do so safely, to an acceptable standard, repeatedly and within a reasonable time period. These are often referred to as ‘reliability criteria’. Regulations further define these terms.

Draft regulation 7(4)(a) adds to the PIP definition of ‘safely’, which refers to a manner ‘unlikely to cause harm’, a further consideration of the likelihood of harm and the severity of the consequences. This change,

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<sup>74</sup> regulation 47, Schedule 1, Part 1, meaning of ‘psychological distress’

<sup>75</sup> [Social Security Scotland Act 2018, section 31](#)

<sup>76</sup> [Our Charter](#), A better future, commitment 7

<sup>77</sup> The term ‘mental disorder’ is used in other legislation, the [Adults with Incapacity \(Scotland\) Act 2000](#), and the [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003](#). [The Mental Welfare Commission for Scotland](#) unpacks this term referring to people with mental illness, learning disabilities, dementia and related conditions. The Scottish Mental Health Law Review recognises that the term ‘mental disorder’ is regarded by many as stigmatising and offensive and plans to engage further with people with lived experience on alternative terminology. [Scottish Mental Health Law Review - Interim Report - July 2021](#)

<sup>78</sup> e.g. [The keys to life Implementation Framework \(2019-2021\)](#)

based on case law, is welcome. Examples in guidance would further bolster this important provision to ensure that risks which are a real possibility albeit relatively unlikely are taken into account if they cannot sensibly be ignored. For example, someone who removes a cochlear implant to shower and so could not hear a fire alarm could score points for needing supervision to bathe.<sup>79</sup>

‘To an acceptable standard’ is not defined in PIP regulations. Draft ADP Regulations insert a new definition in regulation 7(4)(b). This refers to ‘a reasonable standard for the activity, taking account of the impact on the individual’. We understand that the Scottish Government’s intention is that the definition should take account of the impact of such factors as pain and fatigue.<sup>80</sup>

In SCoSS’s view, tightening definitions in the reliability criteria in this way should help Social Security Scotland case managers make fairer and more consistent judgements about whether people can or cannot manage the various activities that make the difference between getting or not getting benefit. Just as important as regulations is how they work in practice. Case managers should be steered by operational practices that give people the opportunity to explain impacts such as pain and fatigue, and that ensure they are taken into account as a matter of course.<sup>81</sup> Because these reliability criteria underpin so much of the decision making, having clear definitions and good operational practices will be an important contribution towards meeting the *Our Charter* intention to ‘make decisions in a way that is consistent and accurate – and aim to get them right first time’.<sup>82</sup> Whether there is scope to further reinforce definitions, and how they are applied in practice, should be kept under review.

**Recommendation 15: The Scottish Government should keep under review the scope to further reinforce the reliability criteria (safely, to an acceptable standard, repeatedly, within a reasonable time period) in the law and in operational practices.**

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<sup>79</sup> This was the case in [SH v SSWP \(PIP\) \[2018\] UKUT 251 \(AAC\)](#)

<sup>80</sup> [Disability and Carers Benefits Expert Advisory Group – PIP Caselaw Integration with DAWAP Regulations: response from ministers](#)

<sup>81</sup> [Paul Gray’s 2014 Independent Review of the PIP Assessment](#) (page 62) recommended that guidance on reliability criteria needed to be reinforced and applied consistently. [Disability and Carers Benefits Expert Advisory Group – PIP Caselaw Integration with DAWAP Regulations: response from ministers](#)

<sup>82</sup> [Our Charter](#), A people’s service, commitment 7

## 7.4 Required period condition

It is a condition of entitlement to ADP that an individual meets the 'required period condition' and also satisfies descriptors over 50 per cent of the days in the 'required period'. In PIP, both are composed of two periods – a 13-week retrospective period and a 39-week prospective period. Each must be satisfied before an award can be made. In draft ADP regulations, while the 'required period' is the same as in PIP – two separate periods – draft ADP regulations 11 and 12, condense the two parts of the required period condition into a single period. These are complex provisions so the consequences of changing the drafting are difficult to foresee. However, the risk is it leads to uncertainty and appeals about whether a person needs to satisfy descriptors over the 13-week and 39-week periods separately, or over a single 52-week period.

**Recommendation 16: The Scottish Government should consider whether condensing the required period condition to one period rather than a separate retrospective and prospective period could lead to uncertainty over whether a person needs to satisfy descriptors over the 13-week and 39-week periods separately, or over a single 52-week period.**

## 7.5 Payment after an interval

Normally to qualify for ADP, a person must be able to satisfy the points-scoring activities from 13 weeks before the date they apply. This is the past period part of the 'required period condition' (there is also a forward period of 39 weeks to satisfy). If they re-apply after a gap in entitlement of up to two years, there is no need to re-satisfy this 13-week condition if the application is based on largely the same health or disability conditions as before (draft regulation 14). The rule links two awards of ADP, but also applies where the person applies for ADP within two years of the end of a CDP, DLA or PIP award.

This is a complex rule. There is a technical drafting issue relating to the linking of previous CDP or DLA awards with a new ADP application. Draft regulation 14(1)(c) requires the CDP or DLA award to have the 'same component' as the ADP award. However, CDP and DLA are structured differently from ADP. It is not clear that having had an award of the CDP or DLA care component would count as the 'same component' as an award of ADP daily living component. Simplifying this

rule would be desirable e.g. by lifting the 13-week past period requirement for any linked awards.

**Recommendation 17: The Scottish Government considers clarifying or simplifying the rule lifting the 13-week required period condition when a new ADP application is made within two years of the end of another ADP, CDP, DLA or PIP award.**

There is a further drafting issue in the rule that links two awards after the person has reached pension age (draft regulation 24(3)). This refers erroneously to subparagraphs (a) and (b) in draft regulations 11 and 12 that do not exist.

## **7.6 Residence and presence conditions**

To be eligible for ADP, people must be ‘ordinarily resident in Scotland’ and ‘habitually resident in the UK, Ireland, Isle of Man or the Channel Islands (the ‘Common Travel Area’). It is not enough to be resident in the country, they must also be actually present in the UK (or Common Travel Area) and have been present for at least 26 weeks in the first 52 weeks (referred to as ‘the past presence test’). There are exceptions to allow for temporary absences, for certain occupations e.g. army personnel outside of the UK, for refugees and for those with a terminal illness and for people covered by social security co-ordination rules e.g. in the EU withdrawal agreement.

Since these draft regulations were referred to SCoSS, emergency regulations have been introduced to allow people evacuated from Afghanistan under the UK Government’s relocation and resettlement schemes to access benefits as soon as they arrive.<sup>83</sup> SCoSS plans to scrutinise these emergency regulations retrospectively. We understand that the version of the ADP regulations laid before the Scottish Parliament will contain corresponding provisions to exempt this group from the habitual residence test and the past presence test. We will consider these ADP provisions in the course of our scrutiny of the emergency regulations.

### **Technical and drafting issues**

Draft regulation 17(2) disapplies the past presence test to serving members of the armed forces and civil servants working abroad on the basis that the Scottish Government considers that the policy intent is

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<sup>83</sup> [The Social Security \(Residence Requirements\) \(Afghanistan\) \(Scotland\) Regulations 2021](#)

served by requiring ordinary residence in Scotland and habitual residence in the Common Travel Area immediately prior to the start of any work-related absence, in addition to the broader fact of the individual's employment in the civil service or in the armed forces.<sup>84</sup>

SCoSS reported on a similar measure in CDP noting that, as drafted, the regulations require the individual to meet the residence and presence conditions 'immediately prior to the start of their employment' – not immediately prior to their posting overseas, which may be a different date.<sup>85</sup>

We are grateful to stakeholders for pointing out that exemption from the past presence test may only be effective while overseas and not on return to the UK, which would mean members of the armed forces, civil servants and their families could lose ADP entitlement on return to the UK. Presence abroad is only clearly treated as satisfying the 'on-the-day' presence condition in draft regulation 15(1)(d) rather than also satisfying the past presence test in regulation 15(1)(e). The same issue could arise for aircraft workers and others treated as meeting presence conditions under draft regulation 18. As drafted, they are treated as meeting those conditions *while* abroad, rather than days abroad counting for the purposes of the past presence test.

Rules permit temporary absence from the UK (or Common Travel Area) for 13 weeks for any reason, or for 26 weeks for medical treatment. After that entitlement to ADP ends. The rationale for entitlement ending is to align with PIP. However, it will not align with CDP under current proposals. SCoSS reported on a measure in CDP that provides that in the same circumstances, CDP entitlement will not stop, there will just be a temporary stop on payments.<sup>86</sup> The rationale for the CPD policy is to minimise the need to re-apply for CDP on return to the UK, reducing stress and anxiety on families and carers. The EQIA (Equality Impact Assessment) notes the bigger impact of loss of entitlement on third country nationals who need to be absent for longer for family reasons.<sup>87</sup>

In addition to these residence and presence rules, there is a requirement that people must not be subject immigration control. This is defined in the Immigration and Asylum Act 1999. For example, this excludes from ADP people whose stay in the UK is subject to the condition that they

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<sup>84</sup> [Child Disability Payment Amendment Regulations: draft equality impact assessment](#)

<sup>85</sup> [SCoSS Scrutiny Report Disability Assistance For Children And Young People \(Scotland\) Amendment Regulations 2021](#), para 3 'Residence and presence'

<sup>86</sup> [SCoSS Scrutiny Report Disability Assistance for Children And Young People \(Scotland\) Amendment Regulations 2021](#), para 3 'Residence and presence'

<sup>87</sup> [Child Disability Payment Amendment Regulations: draft equality impact assessment](#)

have no recourse to public funds. We would welcome clarification about whether an amendment is needed to ensure that the exceptions in The Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000 apply to ADP (and CDP) applicants.

**Recommendation 18: The Scottish Government considers whether the residence and presence conditions accurately reflect the policy intent, specifically:**

- e. Whether the reference to satisfying conditions at ‘the start of their employment’ in draft regulations 17(1)(a) refers to the start of the overseas posting.**
- f. Whether draft regulations 17(2) and 18(1) cover a return to the UK as well as periods overseas.**
- g. Whether the intention and rationale for stopping entitlement of ADP during a temporary absence from the UK/ Common Travel Area, while simply stopping payment of CDP in the same situation is intended and justified.**
- h. Whether a consequential amendment is needed to ensure that exceptions to the immigration conditions apply to ADP (and CDP).**

## **7.7 Age rules**

To qualify for ADP, a person must apply before they reach pension age, currently age 66, but once on ADP, there is no upper age limit to the award continuing (draft regulation 23). People who apply once they reach pension age, currently need to claim Attendance Allowance, or when it is introduced, Pension Age Disability Payment. The most obvious difference between pre- and post-pension age disability benefits is that ADP has a mobility component whereas Attendance Allowance does not. Being able to remain on ADP, therefore, ensures that people do not lose their mobility component as they get older.

### **Simplification**

The ADP pension age rules mirror those for PIP. These are complex and widely misunderstood. For example, some stakeholders responding to the Scottish Government’s consultation on draft ADP Regulations commented that they were difficult to understand and contained too much jargon.<sup>88</sup> With a need to maintain a like-for-like system during the

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<sup>88</sup> [Adult Disability Payment: consultation analysis](#)

transition from PIP to ADP, there may be little scope for simplifying these pension age rules in regulations, but clear guidance with examples will be needed for Social Security Scotland decision makers, as well as clear information and advice for individuals and their advisers.

Where there is an opportunity to use less jargon, this should be taken. For example, all the references to the 'relevant age' could be replaced with 'pensionable age'.

In our previous scrutiny report on CDP, we thought it likely that some people would be confused about which benefit to apply for, particularly at ages of transition between Child Disability Payment and ADP (16 to 18). If anything, there is more scope for confusion at pension age. The Scottish Government responded to our report saying they would 'consider the best way of ensuring that individuals apply for the correct type of assistance, including how best to quickly accept an application made for the wrong type as the correct type in a way that is transparent and fair to clients'. We would welcome an update on progress, and how this will translate to applications from pension age.

**Recommendation 19: The Scottish Government considers reducing jargon in the age rules by replacing references to the 'relevant age' with 'pensionable age'.**

**Recommendation 20: The Scottish Government is invited to provide an update on progress to ensure people apply for the right type of disability assistance particularly at age 16 to 18 and pension age.**

### **Transferring to ADP from PIP or DLA**

Rules about transferring awards of PIP paid to people in Scotland by the Department for Work and Pensions to awards of ADP paid by Social Security Scotland are not in scope for SCoSS's scrutiny and have not been referred, although they are expected to be included in the final version of the regulations laid before the Scottish Parliament. We, therefore, make no comment on this 'case transfer' except to note that the ADP age rules as they stand (draft regulation 23) may not permit someone entitled to PIP or DLA who is now over pension age to be transferred to ADP without having to make an application.



**Observation 2: SCoSS notes that the ADP age rules as drafted may not permit transfer to ADP over pension age from PIP or DLA without requiring an application.**

### **Mobility component restrictions in planned and unplanned reviews**

One source of complexity and confusion is what happens to the rate of the mobility component after pension age, awarded before pension age, when an individual's disability or health condition later deteriorates or improves. The general principle is that changes to disability or health after pension age do not give an individual access to more ADP than they could get in Attendance Allowance (which has no mobility component). Hence, rules provide that a person can stick at the rate of mobility component they are on, or go down from the enhanced to the standard rate, but they cannot go up a rate or stay on the same rate on the basis of a different condition (draft regulation 25).

We would welcome clarity over how the mobility component restrictions apply in some areas in particular: to planned reviews over pension age, to changes in an award after pension age under the special rules for terminal illness, and when rates change as people enter or leave a care home, hospital or legal detention.

- **Planned reviews.** Draft regulation 25, and thus these restrictions to the mobility component, bites if the ADP award is changed in an unplanned review when Social Security Scotland are notified of a change in circumstances that took place after pension age (under draft regulation 49(a)). That seems correct. However, if an ADP award is changed in a planned review under draft regulation 48, it is not clear that the restrictions would apply, as we assume is intended.
- **Special rules.** It is not clear what restrictions would apply to someone with a terminal illness diagnosed after pension age, or where a BASRiS form is received after pension age but dated before pension age. Draft regulation 25(2)(b)(ii) would appear to prevent the enhanced rate of the mobility component being paid in both situations. If draft regulation 25(2)(b)(ii) is intended to apply solely to determinations under the special rules, this should be more clearly stated. If it is intended to apply more broadly, it would appear to be more restrictive than necessary. It seems to result in access to the mobility component for someone whose deterioration in health or disability occurs before pension age depending on

whether the deterioration is evidenced by a healthcare professional after pension age (no entitlement) or evidenced some other way (entitlement).

- Care home, etc. Draft regulation 25 makes no distinction between different kinds of changes of circumstances. If the only reason for determining an award is to change the rate to or from £0 as someone enters or leaves a care home, hospital or legal detention, it would not be fair to question their mobility component entitlement.

**Recommendation 21: The Scottish Government should clarify how the mobility component restrictions apply to planned reviews over pension age, to changes in an award after pension age under the special rules for terminal illness, and when rates change as people over pension age enter or leave a care home, hospital or legal detention.**

## **7.8 Redetermination and appeals**

In our scrutiny reports on the draft Scottish Child Payment regulations and the draft CDP regulations,<sup>89</sup> we drew attention to the need for clarity on how changes of circumstances would be taken into account while a redetermination or appeal was underway, for example, whether an appeal tribunal would decide an award based on circumstances at the day of the hearing or whether a new application would be required. We note that this will also be an issue for ADP where clarity will be needed for individuals, case managers and tribunals. The Scottish Government believes that this is sufficiently addressed in the regulations, and plans to set out further detail in guidance. The Commission notes that there is no guidance on this issue as yet, and would urge that the policy intention is made clear. We remain of the view that clarity would be best achieved in legislation, either in regulations or in the Act, and suggest that this option is reconsidered.

**Recommendation 22: The Scottish Government should set out how changes in circumstances are dealt with while a redetermination or appeal is underway. There should be further consideration given to placing this beyond doubt in legislation.**

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<sup>89</sup> [Scrutiny Report on draft Scottish Child Payment Regulations 2020](#), section 3.3; [Scrutiny Report on draft Disability Assistance for Children and Young People \(Scotland\) Regulations 2020](#), section 6.4

## 7.9 When an increase in level of entitlement takes effect

When an individual reports a change of circumstance that means they are entitled to a higher amount of ADP, when the new entitlement takes effect depends on when they report the change. If it is reported on time (within a month, or within 13 months if there is good reason for the delay), the increased entitlement starts from when conditions for the higher amount are met. However, if they report the change late, the new entitlement starts 'when the Scottish Ministers make the determination' (draft regulation 45). SCoSS reported recently on the same provision in relation to CDP.<sup>90</sup> The report notes that starting entitlement only when the new determination is made, rather than when the change is actually reported, may unnecessarily penalise people for lateness, without adding anything in terms of fairness to those who do report on time, or have good reason for delayed reporting. Not paying from the date the change is reported appears to be punitive and not in keeping with the notion of social security as a human right, as set out in principle (b). The Scottish Government agreed in correspondence to re-examine this provision. The same issue of fairness applies to when increased entitlement starts if an award is increased as a result of Scottish Ministers becoming aware that the original determination was made in ignorance of a material fact (draft regulation 45(b)(ii)).

**Recommendation 23: Draft regulation 45 should be amended so that people who are late in reporting a change in circumstances or in notifying a material fact relevant to the award are not unnecessarily penalised.**

## 7.10 Transfer from Child Disability Payment to Adult Disability Payment

There is a clear age divide between CDP and ADP at the 16<sup>th</sup> birthday. Before the 16<sup>th</sup> birthday, a claim for a disabled child must be to CDP. From the 16<sup>th</sup> birthday, a claim must be to ADP. There is a choice for young people already entitled to CDP when they reach 16. They can either claim ADP when they reach 16, or delay claiming ADP and instead stay on CDP until their 18<sup>th</sup> birthday.

CDP and ADP have different eligibility conditions. There is no guarantee of qualifying for ADP or of getting the same rate. Because of this, it is

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<sup>90</sup> [SCoSS Scrutiny Report Disability Assistance For Children And Young People \(Scotland\) Amendment Regulations 2021](#)

expected that most young people will delay claiming until they reach 18. Only those who think they will be better off on ADP are likely to choose to claim earlier. If they do make the decision to claim ADP but it is not awarded, the Commission understands that their CDP will nonetheless continue as normal until they reach 18. This flexibility is welcome. There is a lot of change as young people finish school and consider options for the future so providing a measure of financial stability during transition planning is helpful.

To transition from payments of CDP to ADP when ADP is awarded, the intention is that the CDP award will end the day before the ADP award begins, which is the date that the ADP award is determined. It could take weeks from application to determination, or longer if there is a further redetermination or appeal. To avoid anyone whose ADP award is higher than their CDP award from missing out during this period, draft regulation 56 backdates any extra entitlement to the date the ADP application was received. In the Commission's view, this backdating provision for CDP to ADP transfer is likely to be regarded as fairer than the provision for people transferring from DLA to PIP where the PIP award cannot be backdated to the date of claim. There may, therefore, be less likelihood of legal challenge on human rights grounds, as has happened in the case of DLA to PIP transfers.<sup>91</sup>

Young people who are terminally ill should see no difference in their award as they transfer from CDP to ADP. Social Security Scotland will transfer them to the maximum rates of the care and mobility components of ADP with no requirement for an application or for any further evidence (draft regulation 57). This seamless transition is welcome, and in line with *Our Charter* expectations of supporting wellbeing and making processes as simple as possible.<sup>92</sup>

However, the transfer process will be much less straightforward for others who will be required to complete an ADP application form. A successful process is likely to be one that communicates clearly and inclusively, actively offers support, and offers multiple chances before withdrawing support. Social Security Scotland communications will need to be tested with the young people and families who will use them.<sup>93</sup> The

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<sup>91</sup> The DLA to PIP transfer provision was the subject of a challenge on the basis of discrimination under the ECHR. In [TW v Secretary of State for Work and Pensions \(PIP\): \[2017\] UKUT 25 \(AAC\); \[2019\] AACR 15](#), the tribunal held that the difference in treatment between new PIP claimants who would be paid from the date of claim and those transferring from DLA who would be paid from a later date was justified.

<sup>92</sup> [Our Charter, Processes that work](#), commitments 1 and 4

<sup>93</sup> [Our Charter, Processes that work](#), commitment 1

number of people who fail to apply for ADP and the reasons why they fail should be monitored with a view to learning and improving the processes to eliminate any drop outs other than through positive choice.

**Recommendation 24: The Scottish Government should set out how it plans to ensure the smooth transfer from CDP to ADP, and the monitoring it intends to put in place to continually improve the process.**

### **7.11 Provision of vehicles**

A person can use their enhanced rate mobility component to lease a powered wheelchair or car adapted for their needs. Motability, the charity which delivers this scheme for DLA and PIP, has been accredited by the Scottish Government to provide the same scheme for ADP (and CDP). This continuity is welcome and important for people in the transfer from PIP to ADP. We also welcome that the draft Regulations explicitly provide for STA to be paid to Motability while a redetermination or appeal is underway, however long the appeal may take (draft Schedule 2, paragraph 2).

## **Annex - Scrutiny timeline**

25 June 2021	Draft Regulations referred to SCoSS by the Minister for Social Security and Local Government.
1 July 2021	SCoSS Board meeting, including a general briefing on the draft Regulations from lead Scottish Government officials responsible for Adult Disability Payment.
9 August 2021	Call for views issued to stakeholders on draft Regulations.
1 September 2021	Meeting with Scottish Government officials to discuss draft Regulations.
6 September 2021	Part 14, regulations 56 and 57 (Transfer from Child Disability to Adult Disability Payment) of the draft Regulations referred to SCoSS.
6 September 2021	Revised draft Disability Assistance for Working Age People (Scotland) Regulations received with several regulations redrafted, and regulations renumbered. The revised version forms the basis for this scrutiny report.
10 September 2021	SCoSS draft recommendations released to Scottish Government officials.
15 September 2021	Call for views issued to stakeholders relating to terminology of mental health.
21 September 2021	Revised draft regulations on residence and presence conditions referred to SCoSS.
29 September 2021	Final Scrutiny report signed off at SCoSS Board meeting.
01 October 2021	SCoSS report published.