



Scottish
Commission
on Social
Security

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Scrutiny report on draft regulations:

The Best Start Grants and Scottish Child Payment (Miscellaneous Amendments) Regulations 2021

**Submitted to the Scottish Government and the Scottish
Parliament's Social Security Committee on 5 November 2021.**

Contents

Summary of recommendations and observations	3
1. Introduction.....	4
2. Approach to Scrutiny.....	4
3. Competing claims in the current Regulations.....	5
4. Amendment prompted by tribunal judgment	8
5. The Draft Regulations.....	9
6. Rights, Principles and Charter Commitments.....	12
7. Interface with UK system.....	14
Annex - Scrutiny timeline.....	16

Summary of recommendations and observations

Observation 1: When scrutinising draft Regulations that are proposed in light of a specific tribunal or court judgment, SCoSS needs to see the text of the judgment at the earliest opportunity in order to take a clear view of whether the draft Regulations represent a satisfactory response.

Recommendation 1: While recognising that an exhaustive list is likely to be impossible, SCoSS asks the Scottish Government to ensure that guidance on how the test envisaged by draft Regulation 6 will work in practice is as comprehensive as possible. Guidance should be clear that the objective is to ensure that the award goes to the person who, in the Scottish Ministers' judgement, has main responsibility for the child.

Recommendation 2: The Scottish Government should consider a further amendment to allow Scottish Ministers to decide who should receive Scottish Child Payment (SCP) or Best Start Grant (BSG) in situations where the hierarchy in paragraph 5 of the schedule to the SCP Regulations (as amended by the draft Regulations) and part 3 of schedule 1 to the BSG Regulations (as inserted by the draft Regulations) might result in an award being made to an individual, other than the person who currently has main responsibility for care of the child.

Recommendation 3: The Scottish Government should consider whether there is a case for deleting paragraph 5(5) from the Schedule to the SCP Regulations, or including an equivalent provision in Regulation 6 of the BSG Regulations, and explain its decision.

Recommendation 4: The Scottish Government should monitor the impact of the draft Regulations to ensure that the additional discretion conferred upon Social Security Scotland is used appropriately to enhance the role of SCP and BSG in reducing child poverty/deprivation.

Recommendation 5: The Scottish Government should ensure that learning arising from the need for these amendments is factored into the future use of top-up powers or passporting entitlement to

Scottish social security assistance based on an award of a DWP benefit in general.

1. Introduction

The Scottish Commission on Social Security is pleased to present its report on the draft Best Start Grants and Scottish Child Payment (Miscellaneous Amendments) Regulations 2021 (hereafter the draft Regulations) to the Scottish Government and Scottish Parliament. This report has been completed in accordance with SCoSS's pre-legislative scrutiny function, conferred by sections 22(1)(a) and 97 of the Social Security (Scotland) Act 2018. The draft Regulations amend the way in which Social Security Scotland should decide between competing claims for Scottish Child Payment (SCP) or Best Start Grant (BSG) in the last resort and the rules that determine when more than one Best Start Grant may be paid in respect of the same child.

2. Approach to Scrutiny

The draft Best Start Grants and Scottish Child Payment (Miscellaneous Amendments) Regulations 2021 regulations were unexpectedly referred to SCoSS on 3 September 2021¹ by the Minister for Social Security and Local Government, Ben Macpherson MSP. This coincided with members having to prioritise the Disability Assistance for Working Age People (Scotland) Regulations² (ADP) in conjunction with scrutiny of additional draft regulations, including Winter Heating Assistance for Children and Young People (Scotland) Amendment Regulations³, the Suspension of Assistance (Disability Assistance for Children and Young People) (Scottish Child Payment) (Scotland) Regulations 2021 and with limited secretariat support in place to assist with report drafting.

In the limited time available – there was some urgency due to the fact that appeals had been held in the tribunals system pending reconsideration of the regulations – we have focused on identifying

¹ [Letter from Minister Ben Macpherson](#)

² [Disability Assistance for Working Age People \(Scotland\) Regulations](#)

³ [Winter Heating Assistance for Children and Young People \(Scotland\) Amendment Regulations: scrutiny report on draft regulations](#)

issues and queries but have not been able to go as far as we usually would to investigate them and take a view.

As usual, as part of the scrutiny process, we sought further information and clarification from officials on various points, to aid us in preparing the scrutiny report. A welcome update was received from David Wallace, Chief Executive of Social Security Scotland, on how the agency has responded to the problem of competing claims in advance of the draft Regulations being laid and how it is preparing to implement the Regulations thereafter.

This is the fourth scrutiny report on SCP that we have produced. Other reports were:

- The Scottish Child Payment Regulations 2020: scrutiny report on draft regulations⁴, published 21 January 2020
- The Scottish Child Payment Regulations 2020: supplementary scrutiny report on draft regulations⁵, published 25 February 2020
- Scottish Child Payment Amendment Regulations 2021: scrutiny report on draft regulations⁶, published 24 November 2020

We have referred to recommendations from these reports where these have relevance to the amendments that are the subject of this report.

3. Competing claims in the current Regulations

The SCP and various forms of BSG are income supplements awarded to families with dependent children and in receipt of a qualifying low-income benefit. BSGs are a form of early years assistance within the scope of section 32 of the Social Security (Scotland) Act 2018. They were established by the Early Years Assistance (Best Start Grants) (Scotland) Regulations 2018 – referred to in this report as the BSG Regulations. These Regulations predate the establishment of SCoSS, but amendments fall within the scope of our pre-legislative scrutiny function. The grants take the form of one-off payments at particular milestones in a child’s life that may result in specific costs – a pregnancy and baby grant, an early learning grant and a school-age grant. SCP is a

⁴ [The Scottish Child Payment regulations 2020: scrutiny report on draft regulations](#)

⁵ [The Scottish Child Payment regulations 2020: supplementary scrutiny report on draft regulations](#)

⁶ [Scottish Child Payment Amendment Regulations 2021: scrutiny report on draft regulations](#)

top-up to several UK benefits within the scope of section 79 of the 2018 Act. It was established by the Scottish Child Payment Regulations 2020 – referred to in this report as the SCP Regulations. These regulations were scrutinised by SCoSS in draft form before being laid before the Scottish Parliament⁷ and SCoSS members gave evidence to the Social Security Committee during its scrutiny.⁸

Both SCP and BSG are passported awards to recipients of child tax credit, income-based jobseeker's allowance, income-related employment and support allowance, income support, state pension credit, universal credit or working tax credit. Housing benefit is a passporting benefit for the purposes of BSG only. To be entitled to an award, an individual must in most cases be in receipt of one of the passporting benefits *and* generally be responsible for a child who is a dependant of the individual or their partner. A child is considered to be a dependant of an individual if the individual has an award of child tax credit, child benefit, state pension credit or universal credit that recognises their responsibility for the child, or if a kinship care arrangement exists, or (for BSG only) another arrangement such as placement for adoption exists.⁹

The SCP Regulations recognise the possibility that competing claims might be made in respect of the same child. In the event that this happens, paragraph 5 of the Schedule stipulates that each potential recipient's entitlement must be determined before a decision is made about which (if any) is to receive the award. Paragraph 5(4) sets out a hierarchy of factors to be considered in order to determine which individual prevails. The hierarchy is:

1. If one individual has been awarded child tax credit, state pension credit or universal credit in respect of the child, that individual has priority.
2. If no-one has been awarded child tax credit, state pension credit or universal credit in respect of the child, but one individual has been awarded child benefit, that individual has priority – unless another individual is a kinship carer for the child, in which case the kinship carer will have priority.

⁷ [The Scottish Child Payment Regulations 2020: scrutiny report on draft regulations](#)

⁸ [Scottish Parliament Social Security Committee, Official Report from Thursday 30 January 2020](#)

⁹ [Regulation 12 The Scottish Child Payment Regulations 2020 No. 351; Regulation 10 The Early Years Assistance \(Best Start Grants\) \(Scotland\) Regulations 2018 No. 370](#)

3. If both individuals are kinship carers for the child but neither has been awarded child tax credit, state pension credit, universal credit or child benefit in respect of the child, then the individual whose entitlement is to be determined first has priority.

In all cases, Social Security Scotland must, at the outset, establish the entitlement of the individual whose entitlement is to be determined first, before moving on to consider any competing claim. Which individual is due the first determination depends on who was first to apply, or was the first individual whom Social Security Scotland became aware of a need to make a determination on without application. The draft Regulations amend the criteria used to prioritise competing claims in paragraph 5 of the Schedule to the SCP Regulations.

The BSG Regulations currently contain no explicit provision about competing claims, but do allow a second individual to become entitled to a grant in respect of a child after a grant has already been made to someone else, if the child's care arrangements should change (Schedule 2, para 1(b) and para 3, and equivalent provisions in Schedules 3 and 4). The draft Regulations insert a new provision (paragraph 6) into Schedule 1 to the BSG Regulations that largely (although not entirely) reflects paragraph 5 of the Schedule to the SCP Regulations, in their amended form.

The rules governing multiple determinations in respect of the same child differed slightly in the draft SCP Regulations referred to SCoSS for pre-legislative scrutiny, compared to the version in the Regulations as ultimately made. In our scrutiny report, SCoSS noted the potential for confusion about who is entitled to an award, particularly in the aftermath of parental separation.¹⁰ Recommendation 11 stated¹¹; 'The Scottish Government should ensure the Regulations and guidance are clear on how competing applications will be resolved, including any right of appeal that the unsuccessful applicant might have, taking into account the fact that one applicant might not be aware of the other application.' The Scottish Government responded¹² that it had established its hierarchy of factors indicative of responsibility for a child to take account of the fact that universal credit child element, child tax credit and pension

¹⁰ The tribunal judgment that prompted the current draft Regulations concerned an appeal by a grandparent who had applied for SCP, rather than a dispute between parents.

¹¹ [Scottish Child payment draft regulations](#)

¹² [Scottish Government response to draft regulations](#)

credit child addition are regarded as ‘a more robust test of responsibility’ than child benefit.

4. Amendment prompted by tribunal judgment

The draft Regulations amending the SCP and BSG Regulations are being made as a result of a first-tier tribunal judgment in a case involving competing claims for SCP. A further seven appeals concerning competing claims for SCP and one concerning competing claims for BSG have since been identified. Scottish Government officials provided SCoSS with some information on the appeals and subsequently with the text of the tribunal judgment. Having the opportunity to read in full the comments from the tribunal that prompted the proposed amendments to the two sets of Regulations was key to our ability to scrutinise the adequacy of that response.

The various cases before the tribunal concern situations in which the Regulations could provide no means of distinguishing between the competing claims other than making the award to the individual who was due the first determination of entitlement. In at least some of these cases the root of the problem was that awards of child tax credit or universal credit had been made to two individuals in respect of the same child. Receipt of child tax credit, universal credit or pension credit in respect of the child is the top-ranking consideration when multiple claims exist and the Regulations provide for no other means of differentiating the two claims. From a strictly legal point of view, the tribunal found in favour of the Scottish Government – applying the Regulations, making the award to the person who was due the first determination was the correct decision. However, the tribunal criticised this approach, stating that the Regulations had been drafted in such a way as to ‘deprive the rightful recipient of this assistance because of a technicality in the legislation’. That is, the wording of the Regulations was not in keeping with the policy intent of targeting support at individuals who receive a low-income benefit and are the primary carer for a child.

The Scottish Government’s response has been two-fold. First, since it is not generally legally possible for two individuals to hold awards of child tax credit, universal credit or pension credit, in respect of the same child, it asked the Department for Work and Pensions (DWP) to review the

competing claims and determine who ought to receive the passporting award. This brought a resolution in three cases. In three other cases, when one individual received universal credit while the other received child tax credit, the dispute is ongoing; a further two cases were still being considered by DWP at the time the draft Regulations were referred to SCoSS for scrutiny. Further, DWP only agreed to undertake such checks at the Scottish Government's request until the end of 2021. Consequently, the decision was taken to amend both the BSG and SCP Regulations to enable Social Security Scotland to deal with competing claims in a way that better matches the policy intent, namely that the SCP or BSG award should go to the person with primary responsibility for care of the child.

Observation 1: When scrutinising draft Regulations that are proposed in light of a specific tribunal or court judgment, SCoSS needs to see the text of the judgment at the earliest opportunity in order to take a clear view of whether the draft Regulations represent a satisfactory response.

5. The Draft Regulations

In one sense the Scottish Government is having to respond to a problem that was not of its making. DWP and HM Revenue and Customs should not be paying two awards of the child element of universal credit or child tax credit in respect of the same child. SCoSS notes that Social Security Scotland continues to work with DWP to attempt to reach a resolution when such cases are identified. That said, the Scottish Government in drafting the SCP Regulations clearly recognised the possibility that there would be occasions when receipt of the passporting benefit would not sufficiently distinguish two competing applicants, since it provided a last-resort means of doing so. It is this backstop that is criticised in the tribunal judgment. Once a clash of claims arose, the only available means of resolving it was an arbitrary one based on which individual applied first rather than whose circumstances best matched the policy intent of the payment.

The draft Regulations seek to remedy this shortcoming by introducing a new criterion for prioritising competing claims for SCP, and by effectively replicating the same set of criteria (as amended) in the BSG

Regulations. The new criterion, which will become paragraph 5(6) of the Schedule to the SCP Regulations, states that, when it is not possible to determine who should receive the award based on receipt of universal credit, child tax credit, pension credit or child benefit or of a kinship care arrangement, Social Security Scotland ‘must determine which of the individuals is entitled to the payment having regard to the circumstances of the child’. The Scottish Government has told SCoSS that ‘this test is likely to take into account the child’s care and living arrangements’, with a view to determining who is the primary carer. We presume that further details will be set out in guidance.

Recommendation 1: While recognising that an exhaustive list is likely to be impossible, SCoSS asks the Scottish Government to ensure that guidance on how the test envisaged by draft Regulation 6 will work in practice is as comprehensive as possible. Guidance should be clear that the objective is to ensure that the award goes to the person who, in the Scottish Ministers’ judgement, has main responsibility for the child.

The amendment will enable Social Security Scotland to distinguish between competing claims when the existing hierarchy is unable to do so. It does nothing to address scenarios when the existing hierarchy may itself give rise to awards to the person who does not currently have main responsibility for the child. For example, paragraph 5(4)(a) indicates that where someone receives universal credit child element, child tax credit or pension credit child addition in respect of a child, this award trumps all other considerations. This means that if a child is living with a kinship carer, who is in receipt of a qualifying low-income benefit, but someone else (for example a parent) continues to receive child tax credit or universal credit child element in respect of the child, the kinship carer would not be entitled to receive SCP. SCoSS notes that, following receipt of our draft recommendations, the Scottish Government plans to make a further amendment in relation to the identification of the individual with primary responsibility for the child.

Recommendation 2: The Scottish Government should consider a further amendment to allow Scottish Ministers to decide who should receive SCP or BSG in situations where the hierarchy in paragraph 5 of the schedule to the SCP Regulations (as amended by the draft Regulations) and part 3 of schedule 1 to the BSG Regulations (as inserted by the draft Regulations) might result in

an award being made to an individual other than the person who currently has main responsibility for care of the child.

More extensive amendment of the BSG Regulations is required to achieve the same objective. The end result is the insertion (as paragraph 6 of schedule 1) of a set of criteria for differentiating multiple claims in respect of the same child. This is essentially a mirror image of the amended version of paragraph 5 of the Schedule to the SCP Regulations, except that sub-paragraph 5(5), which gives priority to the individual who is due the first determination when there is no other means of differentiation, has no equivalent. There is no clear reason for this. If omission from the BSG Regulations confirms that the provision is now redundant, there seems no good reason for its continued inclusion in the SCP Regulations. If it is deemed desirable to retain the provision as a final 'backstop' in the SCP Regulations, it is not clear why the same should not apply to the BSG Regulations. SCoSS has argued in previous reports for consistency across social security Regulations unless there is a reason why they should differ¹³.

Recommendation 3: The Scottish Government should consider whether there is a case for deleting paragraph 5(5) from the Schedule to the SCP Regulations, or including an equivalent provision in Regulation 6 of the BSG Regulations, and explain its decision.

In conversation with Scottish Government officials, SCoSS asked whether consideration had been given to using receipt of child benefit as a means of determining who should receive the SCP or BSG award in situations where there are concurrent awards of the passporting low-income benefit. Officials explained that the transfer of a child benefit award from one individual to another can take time and may lag some way behind a change in care arrangements. Scottish Women's Aid's submission of views to the Scottish Government on the proposed amendment highlights that this process may be deliberately drawn out in cases of domestic abuse. Who receives child benefit might not, therefore, be a reliable guide to who is the primary carer, at least in the short term.

¹³ [Disability Assistance for Children and Young People \(Scotland\) regulations 2020](#) – page 48 section 7 consistency and coherence.

Further amendments to the BSG Regulations have the effect of widening the circumstances in which two grants may be awarded to different individuals in respect of the same child. At present, a second award may only be made if the child's care arrangements change *after* someone else had applied for a grant or received a grant as a result of a determination without application. Following amendment, the BSG Regulations will no longer stipulate when the change of care arrangements must have occurred. The Scottish Government has told SCoSS that the change is necessary because some children's care arrangements have been more fluid than the Regulations anticipated.

6. Rights, Principles and Charter Commitments

Although the tribunal judgment has revealed a shortcoming in the Regulations as made, the Scottish Government's response appears to be in keeping with a number of its commitments under the social security principles, *Our Charter* and human rights law.

Principle (b) recognises that social security is a human right and essential to the realisation of other rights. Some argue there is tension between a rights-based and discretion-based approach to social security.¹⁴ The SCP and BSG Regulations in their current form can be described as rights-based in as much as they provide a transparent means of prioritising competing applications that leaves no room for discretion on the part of the decision maker. However, the criterion used in the last resort to decide which application should succeed when others do not distinguish them is an arbitrary one. The change of approach envisaged by the draft Regulations does introduce a greater degree of discretion. However, if this discretion is appropriately exercised it can help the two forms of social security assistance deliver some of the objectives of human rights law and other principles. Decision makers can be supported to exercise discretion appropriately by ensuring that consideration of the Public Sector Equality Duty is embedded in the process.¹⁵

¹⁴ [C Fitzpatrick, G McKeever and M Simpson, 'Conditionality, discretion and TH Marshall's right to welfare' \(2019\) 41\(4\) Journal of Social Welfare and Family Law 445](#)

¹⁵ [Technical guidance on the Public Sector Equality Duty: Scotland | Equality and Human Rights Commission \(equalityhumanrights.com\)](#)

Notably, principle (e) states that the Scottish social security system is to contribute to reducing poverty. The SCP has been specifically designed to reduce *child* poverty¹⁶ and it can be argued that the BSG is about reducing child material deprivation by providing a one-off income supplement at strategic points in the child's life that are associated with particular costs. In each case the ultimate objective is to help children in households in receipt of low-income benefits enjoy a standard of living adequate for their development, in accordance with article 27, UN Convention on the Rights of the Child (UNCRC). These objectives will only be achieved if the additional income goes to the person who is in fact the primary carer for the child, and who has a low income. The draft Regulations will give Social Security Scotland greater flexibility to ensure this happens in complex cases. If this is achieved in practice, it will represent an improvement of the devolved social security system in a way that puts the needs of those who require assistance first, in accordance with principle (g). By responding to the problem that the various appeals have highlighted, the Scottish Government can credibly claim that it is treating the best interests of the affected children as a primary consideration, in accordance with article 3(1) UNCRC – albeit that (as noted above) there may still be instances when the rules result in an award being made to an individual other than the person who currently has main responsibility for the child.

Recommendation 4: The Scottish Government should monitor the impact of the draft Regulations to ensure that the additional discretion conferred upon Social Security Scotland is used appropriately to enhance the role of SCP and BSG in reducing child poverty/deprivation.

Relaxing the rules that define the circumstances in which two people can receive a BSG in respect of the same child will presumably lead to an increase in duplicate awards. It is possible to argue that making multiple payments in respect of the same child, when the default is only to make one award at each of the relevant milestones, is in tension with principle (g), which states that the social security system should be efficient and deliver value for money. Equally, it could be argued that where a child's care arrangements are fluid, more than one person might have to make major purchases at these milestones and that the payment of more than

¹⁶ [Scottish Government, *Analysis of options for the income supplement* \(Edinburgh: Scottish Government, 2019\)](#)

one grant is therefore justified in pursuit of poverty reduction. Since the 2018 Act sets no hierarchy of principles, which should be prioritised in this instance can only be a political decision.

7. Interface with UK system

As SCoSS has previously remarked the interface between devolved and reserved benefits is complex, both at policy and delivery level. Eligibility for both SCP and BSG are contingent on receipt of reserved benefits, and issues with DWP errors or in accessing DWP data are key drivers of these amendments. Thus changes to DWP benefits, the efficiency of its processes and the availability of DWP data all could have a direct impact on devolved provision and those who rely on it. This means there will always be advantages and disadvantages to weigh up when it comes to using section 79 top-up powers, or relying on reserved provision to serve as a passport to devolved benefits. On the one hand, going down that road can be quicker, less costly and less complex than setting up stand-alone forms of devolved assistance. On the other, it creates more reliance on the stability of DWP policy and the efficiency of its processes.

In SCoSS's first report on SCP regulations, we (and stakeholders) commented on the decision to establish SCP using section 79 top-up powers rather than as a new, stand-alone form of devolved assistance, which was and remains an option. Scottish Government gave pragmatic reasons for this and made a judgement call that the benefits of acting quickly to put assistance in place (without the need for primary legislation) outweighed the potential disadvantages.

The more use is made of top-up or passporting powers, the more learning there will be to inform cost/ benefit analyses. The tribunal ruling reveals, and these amendments respond to, evidence about the nature of some of those potential disadvantages. This will be important learning to take forward when it comes to the future use of top-up powers or passporting arrangements, and any related developments or reviews.

Recommendation 5: The Scottish Government should ensure that learning arising from the need for these amendments is factored into the future use of top-up powers or passporting entitlement to

Scottish social security assistance based on an award of a DWP benefit in general.

We note that the delivery issues that have arisen necessitating these amendments might also raise the question of whether reliance on DWP data and the efficiency of its processes have a bearing on Social Security Charter expectations: “handle... applications and enquiries as quickly as we can”¹⁷ and ultimately “pay [the SCP] on time and in the right amount.”¹⁸ That in turn might have implications for SCoSS in our role to report on it.

¹⁷ [‘Processes that work’ commitment 2: “recognise that your time is precious and handle your application and enquiries as quickly as we can”](#)

¹⁸ [‘A people’s service’ commitment 9: “pay you on time in the right amount”](#).

Annex - Scrutiny timeline

3 September 2021	Draft Regulations referred to SCoSS by the Minister for Social Security and Local Government.
10 September 2021	Questions issued to Scottish Government officials regarding the draft regulations.
28 September 2021	SCoSS Board meeting, including a general briefing on the draft Regulations from lead Scottish Government officials responsible Best Start Grant and Scottish Child payment regulations.
13 October 2021	Questions issued to Scottish Government officials regarding draft regulations.
14 October 2021	SCoSS draft recommendations released to Scottish Government officials.
19 October 2021	Letter received from David Wallace Chief Executive, Social Security Scotland
2 November 2021	Final Scrutiny report signed off at SCoSS Board meeting.
5 November 2021	SCoSS report published.