

Delegated Powers and Law Reform Committee  
Tuesday, 14 May 2024  
16<sup>th</sup> Meeting, 2024 (Session 6)

## Instrument Responses

### Carer's Assistance (Carer Support Payment) (Scotland) Amendment Regulations 2024 (SSI 2024/Draft)

On Thursday 2<sup>nd</sup> May, the Committee asked the Scottish Government:

Regulation 5(2) of the Carer's Assistance (Carer Support Payment) (Scotland) Regulations 2023 ("principal regulations") provides that:

*"an individual shall only be treated as being regularly and substantially engaged in caring for a cared for person on every day in a week if they are, or are likely to be, regularly engaged for at least 35 hours in an award week in caring for that cared for person."*

Regulation 40, which concerns temporary breaks in care, provides that:

- "(1) an award week in respect of an individual who fails to satisfy the requirement of regulation 5(2) is to be treated as an award week in respect of which that individual satisfies that requirement if—*
- (a) that individual has only temporarily ceased to satisfy it, an*
  - (b) that individual has satisfied it for at least 14 weeks in the period of 26 weeks ending with that award week and would have satisfied it for at least 22 weeks in that period but for the fact that—*
    - (i) that individual was undergoing medical or other treatment as an in-patient in a hospital or similar institution, or*
    - (ii) the cared for person was undergoing medical or other treatment as an in-patient in a hospital or similar institution. (2) Regulation 14 (earnings limit) does not apply to an individual in respect of an award week mentioned in paragraph (1)."*

Regulation 2(7) of this instrument amends regulation 40 of the principal regulations by inserting a new sub-paragraph (3) which provides:

- "(3) Paragraph (1) applies to an individual who fails to satisfy the requirement of regulation 5(2) because they are in legal detention, provided the individual satisfies the requirements of this regulation." (emphasis added)*

This appears to have the result that, where an individual is in legal detention for a period, that period only qualifies as a temporary break in care if the circumstances

set out in regulation 40(1)(b) also apply (that is, that the individual or the cared-for person was an in-patient).

Please explain whether you consider that the drafting delivers the policy intention in this regard.

Please confirm whether any corrective action is proposed, and if so, what action and when.

**On Tuesday 7<sup>th</sup> May, the Scottish Government responded:**

Many thanks for the above question – we welcome the views of the DPLRC and the opportunity to discuss these provisions.

New regulation 40(3) of the principal regulations, which is inserted by regulation 2(7) of this instrument, clarifies how regulation 40 operates for individuals (i.e. carers) who are in legal detention. This amendment was included following consultation with the Scottish Commission for Social Security ('SCoSS'), during SCoSS' formal scrutiny of the instrument.<sup>1</sup> SCoSS are an independent statutory body established by the Social Security (Scotland) Act 2018 to provide scrutiny of the Scottish social security system.

In considering the effect of new paragraph (3), I think it will be helpful to first address the background to the construction and effect of regulation 40 of the principal regulations.

**1. Background to the construction of regulation 40**

The drafting construction of regulation 40 of the principal regulations is intended to mirror equivalent provision in the Carer's Allowance legislation, (the DWP administered benefit that Carer Support Payment is replacing in Scotland) – specifically, regulation 40 mirrors regulation 4(2) of the Social Security (Invalid Care Allowance) Regulations 1976/409.

Regulation 40 closely mirrors the drafting of the original Carer's Allowance legislation to ensure continuity in approach and application of the key eligibility criteria for both Carer's Allowance and Carer Support Payment to facilitate the safe and secure transfer of awards<sup>2</sup> from DWP to Social Security Scotland and onto the new Scottish

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<sup>1</sup> Section 97 of the Social Security (Scotland) Act 2018 requires the Scottish Ministers to inform SCoSS of any new benefit regulation, and places an obligation on SCoSS to prepare a report setting out observations and recommendations in relation to the regulations. Scottish Ministers must lay their response to SCoSS's report in Parliament alongside the regulations. See SCoSS' full report on the instrument here: [SCoSS-scrutiny-response-Draft-Carer-Assistance-Carer-Support-Payment-Amendment-Regulations-2024.pdf \(socialsecuritycommission.scot\)](#)

<sup>2</sup> Case transfer is the process of: transferring responsibility for benefits from the DWP to Social Security Scotland; legally changing the benefit awards of existing DWP clients to the new Scottish replacement benefits; and moving existing records from DWP to Social Security Scotland. The process is designed to ensure minimum disruption to clients and that no individual needs to re-apply for existing awards.

replacement benefit. This is reflective of the overall approach that has been taken to the devolution of carer and disability benefits.

The result of this approach, in this instance, has been that the principal Carer Support Payment Regulations have adopted drafting language that was originally constructed in 1976, however we are confident it still achieves the desired policy. It may also be helpful to note that individuals in the sector (i.e. many carers, welfare advisors, carer support organisations etc.) are very familiar with the Carer's Allowance legislation, so mirroring this language in the Carer Support Payment regulations makes it clear to users of the legislation that the effect of these provisions is the same as the equivalent Carer's Allowance legislation. With that context in mind, I have set out below an explanation of the intended reading of regulation 40, which I hope will help to explain how it currently achieves the intended result and in turn, the effect of new paragraph (3).

## 2. Effect of regulation 40 of the principal regulations

Under regulation 40 an individual can satisfy the requirements of the regulation either where they have provided care for 14 of the past 26 weeks and would have satisfied it but for the fact that they or the cared for patient has been an in-patient in a hospital or similar institution OR where they have in fact provided care for 22 of the past 26 weeks.

To illustrate, consider an individual who has provided care for 22 of the past 26 weeks with no hospital visits. In the language of the regulation, we can say that they would have satisfied regulation 5(2) for 22 of the past 26 weeks (i.e. because they have in fact done so) taking into account any hospital visits (of which there are none). The carer will, therefore, satisfy the requirements of regulation 40 and will be entitled to a paid break in care in respect of that week. The "and" in the second line of regulation 40(1)(b) does not require that heads (i) and (ii) be satisfied in order for the regulation to apply. The words "but for the fact that [the carer or cared for person are in hospital]" mean that such stays are disregarded for the purposes of meeting the 22 week test. Where there have been no hospital visits by the carer or cared for person, then heads (i) and (ii) will not apply, and if the carer has in fact provided 22 weeks of care, then they will satisfy the requirements of paragraph (b). The effect of new paragraph (3) therefore is that a period in legal detention will be treated as a temporary break in care where either the carer has been caring for 22 of the past 26 weeks OR the carer has been caring for at least 14 of the past 26 weeks and would have been caring for 22, but for any relevant hospital visits. This is in line with the intended policy and we do not consider that any corrective action is required.