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6 May 2022

Dear Sally,

Thank you for your scrutiny report of 30 March 2022 on The Disability Assistance for Working Age People (Transitional Provisions and Miscellaneous Amendment) (Scotland) Regulations 2022 (the “Regulations”). I would like to express my sincere gratitude to the Commission for considering these Regulations. I recognise the significant volume of work undertaken by the Commission in their scrutiny of these Regulations, alongside others to challenging timescales.

As you will be aware, our plan is to begin transferring awards from Disability Living Allowance to Adult Disability Payment, where they would otherwise be required to apply for Personal Independence Payment, from 29 August 2022 when Adult Disability Payment is launched nationally. This group of people includes people who report a relevant change of circumstances, who have an award review or award renewal due, or who request to have their benefit transferred.

The substantial analysis undertaken by the Commission on these Regulations has been immensely valuable in ensuring that the case transfer process delivers for disabled people in Scotland. Changes we have made in response to the Commission’s recommendations demonstrate that we are listening and that our decisions are informed by evidence of what is right for clients.

Please find attached a copy of the Scottish Government’s response to the Commission’s recommendations (set out in the accompanying Annex A). The response also details further changes that have been made to the regulations (set out in the accompanying Annex B). These changes include miscellaneous amendments to the Disability Assistance for Children and Young People (Scotland) Regulations 2021, and the Disability Assistance for Working Age People (Scotland) Regulations 2022, which were identified after the Commission had published its report.

As these are to be made using the regulation making powers in section 31(2), 36(2) and 52 of the Social Security (Scotland) 2018 Act (the “2018 Act”), these were referred to the Commission on 12 April 2022.

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Further transitional amendments to the Personal Independence Payment (Transitional Provisions) Regulations 2013, and to provide for the solution for transferring individuals with Working Age Disability Living Allowance and Personal Independence Payment on a 3 weekly in arrears and 1 week in advance payment cycle onto a 4 weekly in arrears payment cycle, have also been added since the Commission published its report. As these provisions are being made under section 95 of the 2018 Act they do not need to be referred to the Commission.

The main purpose of the Regulations is to put in place case transfer processes for those clients on Working Age Disability Living Allowance that wish to transfer or would otherwise have to apply for Personal Independence Payment. These Regulations must be in force by Adult Disability Payment national launch to meet our commitment that, wherever possible, we will transfer clients after the national launch of Adult Disability Payment before they have to undergo a DWP face-to-face assessment. Therefore, we do not wish to delay these regulations beyond 6 May.

I am grateful for the Commission's initial consideration of these additional provisions, your subsequent letter of 4 May 2022 that noted the Commission accept the need to have complete, robust regulations in place before the national roll-out of Adult Disability Payment, and that incorporating these amendments into the original set of regulations is the most time-efficient way to achieve this.

In your letter you also raised a specific technical issue in relation to draft regulation 19(5), which relates to the transfer of people over pensionable age from Disability Living Allowance and onto Adult Disability Payment. You recommended that the Scottish Government confirms it is content that there is a clear legal mechanism to provide for Adult Disability Payment to be awarded, including the mobility component, at review stage for those over the state pension age.

On further consideration, we accept that the drafting could be clarified to ensure the exception added to regulation 24 of the Disability Assistance for Working Age People (Scotland) Regulations 2022 applies consistently to all determinations that clients transferring from Disability Living Allowance will receive, for their entitlement to Adult Disability Payment. The drafting has, therefore, been updated accordingly, so that the exception to the age requirement for transferring individuals will extend to the initial transfer determination under regulation 4, the review determination under regulation 12, and any subsequent determination of Adult Disability Payment the client receives. We also intend to mirror the clarification in the provisions on case transfer for Personal Independence Payment in paragraph 7 of Part 3 of schedule 2 of the Disability Assistance for Working Age People (Scotland) Regulations 2022, to ensure that similarly the age requirement will be consistently disapplied for all transferring individuals moving from Personal Independence Payment to Adult Disability Payment.

The restrictions upon the mobility component which can be received after the relevant age, under regulation 25 of the Disability Assistance for Working Age People (Scotland) Regulations 2022 only applies to determinations without application made under regulation 48(a) of those regulations. We are, therefore, confident that for both the transfer and review determinations, individuals over the state pension age who are transferring from Daily Living Allowance to Adult Disability Payment can be awarded either rate of both the daily living and mobility components of Adult Disability Payment, with no restriction.

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This response will be laid in Parliament along with the Regulations. I have also issued a copy to the Convener of the Social Justice and Social Security Committee. Thank you again for your continued significant contribution to shaping disability assistance in Scotland.

Best regards,



BEN MACPHERSON

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Scottish Government response to Scrutiny Report

Responses to recommendations and observations

1. The Scottish Government should publish its plans for managed migration from Disability Living Allowance to Adult Disability Payment (or to whatever devolved provision is made for older claimants) at the earliest opportunity, being mindful of the desirability of appropriate scrutiny by SCoSS and legislators whether or not this involves the making of further regulations.

Scottish Government response:

Accept. We are still finalising our plans for the managed transfer the awards of individuals currently in receipt of Working Age Disability Living Allowance and for the transfer of Disability Living Allowance awards for those who were 65 or over on 08 April 2013. When clients' who were over 65 on 08 April 2013 have their awards transfer to Social Security Scotland they will continue to be managed as Disability Living Allowance awards. We are still considering whether the managed case transfer for remaining Working Age Disability Living Allowance awards should be to Adult Disability Payment or whether these should move to Social Security Scotland but also remain on Disability Living Allowance. We will ensure these clients' awards are transferred to Social Security Scotland in line with our case transfer principals. There will be no need to apply for their Scottish assistance and no break in their entitlement. We will need to reach agreement with the DWP on any proposed process and we will share our plans at the earliest possible opportunity ahead of introducing further regulations to facilitate these transfers in due course.

2. The Scottish Government should modify Regulation 3(3) of the ADP Regulations as it applies to transferring individuals to state that there are three weekly rates of the daily living component.

Scottish Government response:

Accept. Taking this on board we have modified Regulation 3(3) of the ADP Regulations as suggested, Regulation 10(a) in the draft Regulations applies this modification.

3. To avoid perceptions that the proposed lowest rate daily living component will be a permanent feature of ADP, the Scottish Government should consider amending draft Regulations 5(1), 5(2) and 5(3)(a) so that, for transferring individuals only, the daily living component of ADP consists of transitional, standard and enhanced rates.

Scottish Government response:

Accept. We have taken this on board and have amended Regulations 5(1), 5(2) and 5(3) (a) of the draft Regulations as suggested.

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4. The Scottish Government should explain why an increase in award flowing from a change of circumstances is only backdated to the start of the ADP claim and not to the date when the change of circumstances was reported to the DWP.

Scottish Government response:

Accept. If someone on Working Age Disability Living Allowance reports a relevant change of circumstances, there is currently no way to review the person's award to consider what the effect would be on their Disability Living Allowance award. Instead, the DWP process is to invite the client to apply for Personal Independence Payment. Similarly, while Social Security Scotland can determine a person's entitlement to Adult Disability Payment, we do not have the processes in place to consider someone's entitlement to Disability Living Allowance. Therefore, to avoid the person being invited to claim Personal Independence Payment we will transfer them on a 'like for like, *interim* basis' onto Adult Disability Payment and then review their entitlement to ensure they are on the correct level of award for their current circumstances. We will then backdate any increases in their award to the beginning of the initial transfer determination. Our approach is that decreases will only take effect from the day that decrease is determined – that is the day the review completes. These decreases are not backdated to the point of transfer.

5. The Scottish Government and Social Security Scotland should develop an approach to supporting individuals who receive a reduced or no award following review of their transitional ADP award, as in other circumstances.

Scottish Government response:

Accept. Such a decision would only be reached after a full consideration of the client's entitlement to Adult Disability Payment, based on their current circumstances. If an award is decreased, the change will only take effect from the date the decision is made. There will, therefore, be no overpayment the person could be asked to repay. Short-term assistance would be available to anyone who wished to seek a re-determination or appeal such a decision. We are also looking at ways in which we can support clients who lose the enhanced mobility component and are part of the Accessible Vehicle Equipment Scheme. Any client that is over the state pension age may also be able to claim for Attendance Allowance in such circumstances, and we are considering ways we could work with the DWP to make this process more straightforward.

6. SCoSS asks the Scottish Government to outline any consideration it has given to applying a 'no one worse off' principle to some or all groups of transferring individuals – whether those intended to migrate under the draft Regulations or those subject to managed migration in the future.

Scottish Government response:

Accept. Our top priority is to ensure the safe and secure transfer of disability and carer benefits for all Scottish people. By taking the approach of 'like-for like' case transfers, we are seeking to ensure that no one is worse off as a result of their award being moved to Social Security Scotland. Our case transfer principles have been developed through extensive engagement with stakeholders and with our experience panels and include a clear commitment that clients will continue to receive the right payment at the right time.

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7. The Scottish Government should share its plans for supporting transferring individuals to avoid or cope with problems resulting from the interaction of reserved and devolved disability benefits/assistance, for example the mutual exclusivity of ADP and attendance allowance awards.

Scottish Government response:

Accept. Scottish assistance is legally equivalent to the DWP administered benefits they replace for purposes of being a qualifying benefit and for passported benefits. We are working to make sure the transfer is communicated to all relevant bodies that administer passported benefits or those benefits for which the Scottish assistance is a qualifying benefit. On the specific point on Attendance Allowance, we recognise that any client that is over the state pension age that is found not to be entitled to Adult Disability Payment may also be able to claim for Attendance Allowance and we are considering ways we could work with the DWP to make this process more straightforward.

8. Given the likely complexity of Disability Living Allowance to Adult Disability Payment migration from the perspective of transferring individuals and others, SCoSS invites the Scottish Government to share details of any work being undertaken to develop a communication strategy in line with its various obligations under the 2018 Act, Our Charter and the Convention on the Rights of Persons with Disabilities. One aim should be to raise awareness of the key differences in eligibility criteria between Disability Living Allowance and ADP so that adults in receipt of Disability Living Allowance, whose circumstances have not changed since April 2020, can judge whether it would be in their interests to request transfer to ADP. Any such campaign should be tested with stakeholders to ensure clarity.

Scottish Government response:

Accept. We are in the process of finalising a clear communications plan to explain the process and what it will mean for those transferring over and those who will remain with the DWP on Disability Living Allowance. While Social Security Scotland cannot advise clients on their individual circumstances, we will clearly explain the differences between Disability Living Allowance and Adult Disability Payment. We will also signpost people to third sector organisations for independent advice and support and we will refer people to the advocacy service, where required, to support them through the process. Finally, local delivery colleagues will be available in the person's locale to provide face to face support for anyone who requires it, at any stage of this process.

Observation 1: In view of the importance of ensuring social security regulations fall within the regulation-making powers in the Social Security (Scotland) Act 2018, SCoSS welcomes the Scottish Government's confirmation that it believes the draft Regulations are within the scope of section 31 and paragraph 1 of schedule 5 to the Act.

We welcome this observation.

Observation 2: While endorsing the use by default of a two-stage transfer process from Disability Living Allowance to ADP, SCoSS welcomes the use of a direct, one-stage transfer for adult Disability Living Allowance claimants who appear likely to qualify for ADP under the special rules for terminal illness.

We welcome this observation.

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Observation 3: SCoSS accepts that a longer period for re-determinations to allow for evidence gathering is unavoidable but considers that it should be realistic to aim for many if not most re-determinations to be completed well within the allotted 182 days.

We welcome this observation. Our aim will be to complete the re-determinations as soon as practicable, allowing time for sufficient evidence taking to properly assess an individual's entitlement to Adult Disability Payment.

Observation 4: The transitional provisions imply differential treatment of people who migrate to ADP depending on whether they previously received Disability Living Allowance or PIP, particularly if their ADP or PIP award is lower than their DLA award. SCoSS notes the difficulty of avoiding this unequal treatment given the commitment to a safe and secure transfer, the maintenance of parity in the eligibility criteria for ADP and PIP, and the necessity of completing case transfers within a short period.

We welcome this observation.

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Further provisions added to the Regulations since the Commission's report

Provisions to be made using the regulation making powers in section 31(2), 36(2) and 52 of the Social Security (Scotland) 2018 Act, referred to the Commission on 12 April 2022.

The main purpose of the Regulations is to put in place case transfer processes for those clients on Working Age Disability Living Allowance that wish to transfer or would otherwise have to apply for Personal Independence Payment. These Regulations must be in force by Adult Disability Payment national launch to meet our commitment that, wherever possible, we will transfer clients after the national launch of Adult Disability Payment before they have to undergo a DWP face-to-face assessment. Therefore, we do not wish to delay these Regulations beyond 06 May. Nor do we wish to delay bringing further clarity to regulations providing for assistance already in payment, and ahead of the national launch of Adult Disability Payment. The Scottish Government, therefore, consider it appropriate to lay the provisions found in Part 4 of the Regulations before the Commission has formally reported on these.

The Commission's response of 4 May 2022, following its initial consideration of the further provisions referred on the 12 April 2022, noted the Commission accepted the need to have complete, robust regulations in place before the national roll-out of Adult Disability Payment, and that incorporating these amendments into the original set of regulations is the most time-efficient way to achieve this. The Commission also made a further recommendation in that letter on a technical matter in relation to Regulation 19(5) of the Regulations, which is responded to below.

Amendments to the Disability Assistance for Working Age People (Scotland) Regulations 2022

Persons who have reached the relevant age: other exceptions

The amendment made at regulation 19(5) of the Regulations, to include regulation 24(e) within the Disability Assistance for Working Age People (Scotland) Regulations 2022 ensures that the age limit provided for at regulation 22(1) (b) is not applied to clients transferring from Working Age Disability Living Allowance to Adult Disability Payment. The age limit will be disapplied for all determinations in relation to Adult Disability Payment that are to be made for the transferring individuals. The Commission queried in their letter of 4 May 2022 whether there was a clear legal mechanism for Adult Disability Payment to be awarded, including the mobility component, at the review stage. The definition of 'transferring individual' has, as a result of this query, been updated within the Regulations, to ensure that an individual will be recognised as a 'transferring individual' at every stage of their transfer, and for any future determinations of their entitlement to Adult Disability Payment. This, together with the addition of regulation 24(e), means that the age limit will be consistently disapplied for clients transferring from Disability Living Allowance to Adult Disability Payment.

As a result of this query, the definition of 'transferring individual' within paragraph 7 of part 3 to schedule 2 of the Disability Assistance for Working Age People (Scotland) Regulations 2022 has also been amended within the Regulations. This will ensure that similarly, the age requirement will be consistently disapplied for all transferring individuals moving from Personal Independence Payment to Adult Disability Payment.

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In relation, then, to the mobility component – this will be able to be awarded to clients transferring from Disability Living Allowance to Adult Disability Payment, without restriction, at both the initial transfer determination and review determination. These clients will only be subject to any limitations on their mobility component if, once they have fully transferred, they later receive a determination under regulation 48(a) of the Disability Assistance for Working Age People (Scotland) Regulations 2022. At this point, they will be subject to the limitations on the mobility component that they can receive after the relevant age, as set out under regulation 25 of those regulations.

Mobility criteria over the relevant age

The policy intent across disability assistance is that financial assistance is not provided to meet the mobility needs of individuals arising once they are over state pension age. This is due to the reasonable expectation that everyone's mobility is likely to become limited at some point once they have reached this stage of life. To that end, regulation 25 of the Disability Assistance for Working Age People (Scotland) Regulations 2022, places limitations upon the mobility component that a client in receipt of Adult Disability Payment can receive once they have reached the relevant age, such that they will not be able to become entitled to that component at a higher rate than they have already been receiving for a pre-existing condition, and may only continue to receive that rate where it results from substantially the same condition or conditions in respect of which it was previously received.

The amendment made to regulation 25 puts beyond doubt that clients who are only in receipt of the daily living component of Adult Disability Payment may not begin to receive the mobility component for a new condition once they reach the relevant age.

Entitlement under special rules for terminal illness

The amendment to regulation 26 clarifies that terminally ill clients should be recognised as having obtained maximum points for all activities, and having satisfied the conditions for the enhanced rates of both components in terms of regulations 5(3) and 6(3).

When an increase in entitlement should take effect

Regulation 45 of the Disability Assistance for Working Age People (Scotland) Regulations 2022 provides for when an increase in a client's entitlement should take effect. It is intended that when someone has had in the payment of some or all of their award reduced to £0 as a result of being in alternative accommodation, they should be put back into payment from on the day that they leave the alternative accommodation. The amendment made to include regulation 45(1)(ca) provides clarity on when payment should begin again when an individual leaves alternative accommodation.

The amendments to 45(1)(a) extends this provision to regulation 48(e) which has been added for transferees in receipt of Working Age Disability Living Allowance to receive a determination without application if the Disability Living Allowance they were receiving before they transferred changes once they are in receipt of Adult Disability Payment. The amendment to regulation 45(1)(c) removes "or error" to ensure consistency with regulation 49.

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When a decrease in level or cessation of entitlement takes effect

The amendment to regulation 46(1)(a) extends this provision to regulation 48(e) which has been added to provide for transferees in receipt of Working Age Disability Living Allowance to receive a determination without application if the Disability Living Allowance they were receiving before they transferred changes once they are in receipt of Adult Disability Payment. The amendment to regulation 46(1)(c) removes “or error” to ensure consistency with regulation 49.

Determination following change of circumstances etc.

The amendment to include regulation 48(e) ensures that a determination without application will occur when the rate of Working Age Disability Living Allowance that an individual was receiving before they are moved onto Adult Disability Payment changes.

Child Disability Payment to Adult Disability Payment

Clients moving from Child Disability Payment to Adult Disability Payment have their entitlement to Adult Disability Payment begin on the date their determination of entitlement is made, unlike other applicants, for whom entitlement begins in terms of the principles set out at regulation 35(4) to (6). Regulation 58(3) of the Disability Assistance for Working Age People (Scotland) Regulations 2022 makes provision for clients who become entitled to Adult Disability Payment, having up until that time been entitled to Child Disability Payment, to receive a payment of the value of Adult Payment that they would have received for the period between when their entitlement would have begun under regulation 35(4) to (6), and when their entitlement in fact begins (being the date of their determination for Adult Disability Payment). The amendments to regulation 58(3) have the effect that if an individual’s entitlement to Adult Disability Payment is higher than their entitlement to Child Disability Payment has been, the additional payment will be reduced by the Child Disability Payment they were entitled to during the period.

Short-term Assistance

The short-term assistance provisions in the Disability Assistance for Working Age People (Scotland) Regulations 2022 are amended to clarify the off-setting of that will occur when short-term assistance has been paid for a period during which entitlement to Adult Disability Payment is subsequently determined. Individuals who are to be paid Adult Disability Payment for the same period as they have already received short-term assistance, at the same or a lower rate than the short-term assistance and Adult Disability Payment already paid for that period, will see the Adult Disability Payment that they are to be paid for that period reduced to £0. This is due to their already having received payment for that period. In all other cases, the Adult Disability Payment to be paid will be reduced by the sum of short-term assistance and Adult Disability Payment that has already been received for that period.

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Delegated Powers and Law Reform Committee recommendations

The following amendments address recommendations made by the Delegated Powers and Law Reform Committee in January 2022 in their scrutiny of the Disability Assistance for Working Age People (Scotland) Regulations 2022. Amendments are made to the following:

- regulation 7(2), which sets out how an individual's ability to carry out both daily living and mobility activities is to be determined, to add a reference to column 2 of the table in Part 3 of schedule 1;
- regulation 2, to omit the definition of "medical treatment", to put beyond doubt that the definition at regulation 16 will apply;
- regulation 2, remove an unnecessary definition of "EU withdrawal agreement";
- regulation 17(4), to remove the unnecessary definitions of "civil partnership" and "person who is living with another person as if they were in a civil partnership"; and
- regulation 2, to include a definition of "qualifying services" on the face of the Regulations.

Amendments to the Disability Assistance for Children and Young People (Scotland) Regulations 2021

Delegated Powers and Law Reform Committee recommendations

The amendment at regulation 6 the definitions of "civil partnership" and "person who is living with another person as if they were in a civil partnership" are removed. This aligns with changes made to the Disability Assistance for Working Age People Regulations (Scotland) 2022 as a result of recommendations made by the Delegated Powers and Law Reform Committee.

When an increase in level of entitlement takes effect

The amendments made to include regulation 28(1) (ca) provides clarity on when payment should begin again when an individual leaves alternative accommodation.

Short-term Assistance

The short-term assistance provisions in the Disability Assistance for Children and Young People (Scotland) Regulations 2021 are amended to clarify the off-setting of that will occur when short-term assistance has been paid for a period during which entitlement to Child Disability Payment is subsequently determined. Individuals who are to be paid Child Disability Payment for the same period as they have already received short-term assistance, at the same or a lower rate than the short-term assistance and Child Disability Payment already paid for that period, will see the Child Disability Payment that they are to be paid for that period reduced to £0. This is due to their already having received payment for that period. In all other cases, the Child Disability Payment to be paid will be reduced by the sum of short-term assistance and Child Disability Payment that has already been received for that period.

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Transitional provisions made under section 95 of the Social Security (Scotland) Act 2018

Frequency of payments

Disability Living Allowance is currently paid on a weekly in advance, 4 weekly in arrears or 3 weekly in arrears and 1 week in advance payment cycle. Child and Adult Disability Payment are only paid 4 weekly in arrears, unless an individual meets the special rules for terminal illness when they will be paid weekly in advance. Because of these differences, provision is made in these regulations to amend regulation 25 of the Disability Assistance for Children and Young People (Scotland) Regulations 2021, and regulation 36 of the Disability Assistance for Working Age People (Scotland) Regulations 2022 so that any individual currently paid Disability Living Allowance weekly in advance can also be paid Child or Adult Disability Payment weekly in advance once they have transferred. Further provision is made to maintain individuals' current payment schedule as we move them onto a 4 weekly in arrears payment cycle, by providing for a week of overlapping entitlement to both Disability Living Allowance and Adult Disability Payment at the end of the individual's Disability Living Allowance award.

It is not anticipated that any individual in receipt of Personal Independence Payment is currently paid in the 3 weekly in arrears and 1 week in advance payment cycle. However, as this cannot be confirmed Scottish Ministers intend, as a precaution, to make provision through these regulations for the same solution as for those transferring from Working Age Disability Living Allowance.

Regulation 4 of the ADP Regulations (SSI 2022/54), which states that an individual is not entitled to ADP while they are entitled to Personal Independence Payment or Disability Living Allowance, and section 77(4) of the Welfare Reform Act 2012 and section 71(7) of the Social Security Contributions and Benefits Act 1992 which respectively state that someone cannot be entitled to Personal Independence Payment or Disability Living Allowance when they are entitled to Adult Disability Payment, are disapplied for the overlapping week.

Amendments to the Personal Independence Payment (Transitional Provisions) Regulations 2013

The amendment removes Paragraphs at regulation 3 which provides for invitations to individuals entitled to Disability Living Allowance to apply for Personal Independence Payment.

The amendment removes regulation 20(5) which provides for invitations to individuals entitled to Disability Living Allowance to apply for Personal Independence Payment following a change of circumstance.

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