



Scottish
Commission
on Social
Security

Scottish Commission on Social Security

Scrutiny report on draft Regulations:

Disability Assistance (Miscellaneous Amendments) (Scotland) Regulations 2023

Submitted to the Scottish Government and the Scottish Parliament's Social Security Committee on 19 May 2023.

SCoSS/2023/02

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About the Scottish Commission on Social Security

The Scottish Commission on Social Security (SCoSS) plays an essential role in the development and delivery of a Scottish Social Security system based on fairness, dignity and respect.

We provide independent scrutiny of the Scottish social security system and our full functions are set out in section 22 of the Social Security (Scotland) Act 2018.¹

We provide detailed analysis of proposed social security regulations which are referred to us by Ministers, making recommendations for improvement where necessary.

Our role is also to scrutinise the Scottish Government's delivery of the commitments set out in the Social Security Charter.²

We are separate from the Scottish Government, and we carry out our work independently of both Scottish Ministers and the Scottish Parliament.

The Scottish social security principles

SCoSS takes the Scottish social security principles, as laid out in the Social Security (Scotland) Act 2018, into consideration when scrutinising proposed social security legislation and regulations. The Scottish social security principles are:

- (a) social security is an investment in the people of Scotland,
- (b) social security is itself a human right and essential to the realisation of other human rights,
- (c) the delivery of social security is a public service,
- (d) respect for the dignity of individuals is to be at the heart of the Scottish social security system,
- (e) the Scottish social security system is to contribute to reducing poverty in Scotland,
- (f) the Scottish social security system is to be designed with the people of Scotland on the basis of evidence,
- (g) opportunities are to 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,
- (h) the Scottish social security system is to be efficient and deliver value for money.

¹ [Social Security \(Scotland\) Act 2018 \(legislation.gov.uk\)](https://legislation.gov.uk)

² [Our Charter \(socialsecurity.gov.scot\)](https://socialsecurity.gov.scot)

Report outline

This report details our views on the provisions in the draft Disability Assistance (Miscellaneous Amendments) (Scotland) Regulations 2023. All of the Scottish social security principles are important to successful delivery of social security in Scotland, and in relation to these draft Regulations SCoSS identified principles (a), (b), (e), (f) and (g) as key in guiding our scrutiny.

Principal findings

Through the scrutiny process, the Commission has not identified any conflict between the Regulations and underlying policy aims, and the social security principles and the Scottish Government's human rights obligations. In the main we are satisfied that the draft Regulations achieve the policy aims.

Individuals transitioning from Child Disability Payment (CDP) to Adult Disability Payment (ADP) will not have their payment cycles altered or interrupted and risks of overpayments should their ADP award be lower than their CDP award will be mitigated. Risks of overpayments for individuals moving from Disability Living Allowance (DLA) to ADP will similarly be mitigated.

Where ADP awards will be higher than an individual's previous award, steps have been taken to ensure that individuals will not lose out as a consequence of aligning payment cycles or processing times.

As our report details, there are opportunities for the Scottish Government to improve the clarity of some of the draft Regulations, and it will aid the Scottish Government's policy aims to continue to work closely with the Department for Work and Pensions (DWP) to ensure transitions from DLA/Personal Independence Payment (PIP) are as smooth as possible.

The Commission looks forward to the Scottish Government's response and welcomes views on how its scrutiny and reporting can be continuously improved.

Summary of recommendations and observations

Observation 1: On this occasion a full set of impact assessments have been provided, which SCoSS welcomes. The recognition by officials of the usefulness of undertaking these as a matter of good practice is also welcomed, as are the Scottish Government's plans to seek user views on the best approach to publishing data on decision making by condition groups.

Recommendation 1: The Scottish Government should ensure that guidance to decision-makers clearly explains how the dates for the last payment of CDP and the first payment of ADP are established. Communications to individuals moving from CDP to ADP should state the expected dates at the earliest opportunity.

Recommendation 2: Social Security Scotland should advise individuals transferring from CDP to ADP of the potential for additions to UK benefits payable to the individual, their parent or a carer to be affected. The Scottish Government should work closely with the DWP to explore how take-up of increased entitlements in the UK system can be maximised and how the risk of overpayments can be minimised where the move to ADP results in reduced entitlement in the UK system.

Recommendation 3: The Scottish Government should explain what steps it is taking to ensure individuals still in receipt of DLA or PIP receive the correct guidance on where to report a change of circumstances and that the Department for Work and Pensions and Social Security Scotland follow the correct processes when changes of circumstances are reported.

Observation 2: SCoSS welcomes the Scottish Government's decision to reconsider draft Regulation 5(3), which would have extended the maximum time an applicant might potentially be required to wait for a review determination to be completed.

Observation 3: SCoSS welcomes the additional clarity draft Regulations 5(2), 5(5) and 5(6) together provide.

Executive summary

Introduction

The draft Regulations stipulate how recipients of Child Disability Payment (CDP), Disability Living Allowance (DLA) and Personal Independence Payment (PIP) will transition to Adult Disability Payment (ADP). In relation to the transition from CDP to ADP the draft Regulations aim to ensure a smooth transition by maintaining the recipient's current payment cycle. In relation to the transition from DLA/PIP to ADP the draft Regulations aim to clarify how changes of circumstances are administered and when increases and decreases to awards resulting from changes of circumstances take effect.

CDP to ADP journey

Individuals transitioning from CDP to ADP will receive a determination on their ADP award. Following this determination, they will receive one further CDP payment (four-weekly in arrears or seven days in advance, in line with their current payment cycle) and their entitlement to CDP will end on that day. Their entitlement to ADP will begin on the day after this last CDP payment, and they will receive their first ADP payment following the same payment cycle as their previous CDP payment cycle.

Individuals whose ADP award is greater than their previous CDP award will have their first ADP payment backdated to ensure they are not disadvantaged by this change. Where an ADP award is lower than the previous CDP award the change in award will take effect on the date of the first ADP payment, ensuring individuals will not receive an overpayment.

We welcome these changes as they reduce the potential for complications and disruption for the recipient at the point of transition (with e.g. monthly expenditures such as rent, direct debits etc.) but note the potential for some individuals to be slightly disadvantaged, as an increase in their entitlement to a UK benefit is delayed.

DLA/PIP to ADP journey

Where an individual has been selected for transfer to ADP but then reports a relevant change of circumstances to the Department for Work and Pensions (DWP) before their transfer determination has been made, the draft Regulations stipulate that the DWP should not take any action on the basis of this information, but should pass it on to Social Security Scotland. Social Security Scotland will then take that information into account when making its subsequent review determination.

When the review determination results in a higher award for individuals transferring from DLA to ADP, the effective date of this award is the date of transfer. An affected individual is therefore entitled to a back payment to the value of the additional amount between the date of transfer and the date on which the review determination takes effect.

When the review determination results in a higher award for individuals transferring from DLA to ADP, the effective date of this award is the date of the review determination. This avoids the risk of overpayments in the period between transfer and the review determination.

The draft Regulations make no changes to current practice, but do simplify the existing Regulations. We welcome the additional clarity these amendments will bring.

1. Introduction

1.1 Overview

The Scottish Commission on Social Security (SCoSS) is pleased to present its report on the draft Disability Assistance (Miscellaneous Amendments) (Scotland) Regulations 2023 (henceforth referred to as the ‘draft Regulations’). This 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 2018³ (henceforth referred to as ‘the Act’). Section 97 states that the Commission must report on draft Regulations proposed to be made under any section in Chapter 2 of Part 2 or Section 79 of the Act.⁴

In this report, the term ‘CDP Regulations’ refers to the Disability Assistance for Children and Young People (Scotland) Regulations 2021, which establish the Child Disability Payment (CDP). The term ‘ADP Regulations’ refers to the Disability Assistance for Working Age People (Scotland) Regulations 2022, which establish the Adult Disability Payment (ADP). The term ‘Transitional Provisions Regulations’ refers to the Disability Assistance for Working Age People (Transitional Provisions and Miscellaneous Amendment) (Scotland) Regulations 2022, which primarily concern transfers from Disability Living Allowance (DLA) to ADP.

During the scrutiny process, the Scottish Government has indicated (sometimes in response to questions or comments from SCoSS) that it intends to make some changes to the draft Regulations as referred to SCoSS. Further comments appear below.

1.2 Human rights and principles

As required by the Act, our scrutiny was undertaken with regard to the Scottish social security principles⁵ and relevant provisions of human rights law. Disability benefits make some contribution towards the extra costs individuals may incur as a result of disability. As such, they play a role in enabling disabled people to enjoy their right to an adequate standard of living (article 11 ICESCR;⁶ article 28 CRPD⁷) and their rights to independent living, social inclusion and mobility (articles 19, 20, 29 and 30 CRPD).

Since the standard rates of income replacement benefits do not take account of additional disability-related costs, the provisions of disability benefits and the additions to means-tested benefits that some recipients of disability benefits can access⁸ also are steps towards helping disabled people enjoy their right to social security on a more equal basis (article 9 and 2 ICESCR; article 28 CRPD).

However, in themselves the draft Regulations with which this report is concerned make only a very limited contribution to the fulfilment of these rights. This is because they do not affect the level of awards and make only small changes to the conditions

³ [Social Security \(Scotland\) Act 2018 \(legislation.gov.uk\)](https://legislation.gov.uk)

⁴ Other than in relation to regulations made only for the purpose of the consolidation of earlier regulations (section 97(11)).

⁵ Social Security (Scotland) Act 2018 asp 9 s 1.

⁶ [International Covenant on Economic, Social and Cultural Rights \(ohchr.org\)](https://www.ohchr.org)

⁷ [Convention on the Rights of Persons with Disabilities \(un.org\)](https://www.un.org)

⁸ For example, the severe disability premium within income-related Employment and Support Allowance.

of entitlement. Their focus is more on ensuring that transitional provisions put in place by previous Regulations are used appropriately and that movement from child to adult disability benefits, or from UK to Scottish disability benefits, happens smoothly without undue disruption to affected individuals' lives or finances. As such, they may be best understood as contributions to the fulfilment of the principles that the devolved social security system should operate efficiently (principle (h)) and in the interests of those who require assistance (principle (g)).

1.3 Impact assessments

The impact assessments published alongside draft Regulations are a useful resource in assessing whether the Regulations contribute to the fulfilment of the social security principles or human rights obligations. Previously, the Scottish Government has not consistently provided impact assessments for draft Regulations that are not associated with any change of policy, which is the stated position on the current set. Officials have confirmed that the process of undertaking impact assessments can help identify unforeseen impacts and is good practice for the development of all legislation.

The Fairer Scotland Duty assessment, Child Rights and Wellbeing Impact Assessment and Equality Impact Assessment (EQIA) predict that the amendments intended to smooth the transition from CDP or DLA to ADP (notably those that enable the continuation of established payment cycles) will have a positive impact on groups such as those with protected characteristics. However, in relation to the EQIA, there are some protected characteristics (such as race and religion/belief) where no data is available; this makes it difficult to establish potential impact. Also, currently, published data on disability of CDP/ADP recipients does not distinguish between particular impairments or conditions to enable any differential impact to be assessed.

Stakeholders who responded to SCoSS's call for evidence on the draft Regulations called for enhanced data collection such as this. Citizens Advice Scotland (CAS) called for the routine publication of data on the main reported condition of new CDP and ADP applications, broken down by award type. CAS noted that the DWP's existing 547 condition categories could form a basis for this. Stakeholders also recommended data collection on reasons for applications being unsuccessful, numbers of applicants with an unsuccessful redetermination request who do not pursue an appeal, and outcomes of consultations by format (i.e. face-to-face, online or telephone).

“In order to ensure that the agency is tracking how well processes are working for all, as well as to ensure that staff are continuously learning, the agency should systematically collect and publish data. This is a crucial way of ensuring longer-term improvements to the system.”

Child Poverty Action Group in Scotland

We welcome information from officials that data is already being collected by broad condition groups, that there are aspirations to publish this data in future and that users' views will be sought on the best format for doing so.

Observation 1: On this occasion a full set of impact assessments have been provided, which SCoSS welcomes. The recognition by officials of the usefulness of undertaking these as a matter of good practice is also welcomed, as are the Scottish Government's plans to seek user views on the best approach to publishing data on decision making by condition groups.

We also note that the impact assessments reflect involvement with stakeholders. In particular, the proposed amendments appear to be a welcome response to engagement with young disabled people on the challenges associated with the transition from child to adult benefits. This is in keeping with principle (f), which states that the devolved social security system is to be designed with the people of Scotland.

The Business and Regulatory Impact Assessment projects 'minor additional work' for public and third sector organisations with a role in social security, mainly consisting of the need to update staff knowledge. Longer term, it predicts a reduction of the administrative burden on public bodies as details of the case transfer process are clarified. The Island Communities Impact Assessment does not identify any specific impact on island or other remote communities.

2. CDP to ADP journey

2.1 Maximum age for receipt of CDP

Regulation 4 of the CDP Regulations stipulates that CDP is normally payable to individuals under 18 years old and sets out the limited circumstances in which an individual in receipt of CDP can continue to receive the benefit after their 18th birthday. Draft Regulation 3(3) amends these provisions, largely to further narrow the circumstances in which a CDP award can continue after the individual turns 18.

The CDP Regulations currently contain broad provisions allowing any 'transferring individual' – that is, someone who has moved or is moving from DLA to CDP – or any individual who is awarded CDP in Scotland on the basis that they were previously in receipt of DLA in another part of the UK, who then reaches the age at which they are required to transfer to ADP, to continue to receive CDP until their ADP application is determined, or until their 19th birthday, whichever comes first.

Scottish Government officials have explained to SCoSS that the original policy intent was for this to be a transitional provision only, affecting the early cohort of CDP recipients as they transfer to ADP. Accordingly, the amended Regulation will stipulate that transferring individuals and DLA recipients who move to Scotland from another part of the UK will only automatically be able to receive CDP after turning 18 if their 18th birthday falls on or before 31 December 2023.

Scottish Government officials have advised SCoSS that the purpose of the provisions was to protect individuals who only had a narrow window between the introduction of ADP and their 18th birthday from gaps in entitlement because they may not have had sufficient time to apply for ADP and receive a determination of an ADP application quickly enough. This risk should not exist with subsequent cohorts who will have received the full suite of correspondence from age 16 that encourages them to make an application for ADP. Transferring individuals turning 18 on or before 31 December 2023 have not received this same correspondence due to them being transferred to CDP later.

Nonetheless, CPAG's submission of evidence to SCoSS suggested that it ought to remain possible to continue a CDP claim beyond the 19th birthday for *all* individuals who have applied for ADP before turning 18 but not received a determination.

Another new provision – Regulation 4(1C) CDP Regulations – stipulates that certain individuals in these two groups can continue to receive CDP for a very short period *after* their 19th birthday.⁹ This will only apply when a determination of entitlement to ADP is made less than four weeks before the individual's 19th birthday. In such cases, the individual will receive one more payment of CDP, which might fall up to four weeks after their 19th birthday, with the ADP award commencing on the following day.¹⁰

This is a welcome measure that will avoid the risk of a gap in entitlement, or the disruption of a change of payment cycle at the point of transition to ADP, for a cohort that will already (and recently) have gone through the challenge of moving from DLA to CDP. If the determination is that the individual is *not* entitled to ADP, then the CDP award will end on their 19th birthday.

In response to an enquiry from SCoSS, the Scottish Government has stated that it is monitoring and prioritising the small number of ADP applications that concern individuals in the final months of a CDP award in order to minimise the risk of CDP payments ending before entitlement to ADP has been determined. Officials reported that 57% of ADP applications are determined in 41 to 80 working days and there is no significant difference in processing times for applications made by CDP recipients.

Other groups who are currently able to continue a CDP award after their 18th birthday under Regulation 4(1B) CDP Regulations – individuals whose award is under the special rules for terminal illness (no upper age limit) – are unaffected by these amendments. Following discussions with SCoSS, Scottish Government officials have advised SCoSS that Regulation 4(1B) CDP Regulations will be revised to more explicitly state that no upper age limit applies to terminally ill CDP recipients. This does not appear to make any difference legally, but will bring welcome additional clarity.

Regulation 58(2)(a) ADP Regulations adds that, where a person has applied for ADP whilst receiving CDP, but whose ADP determination is not made until after the CDP award has come to an end, their entitlement to ADP begins on the date of determination. In this scenario there would be a gap between the end of the entitlement to CDP and the beginning of the entitlement to ADP.

Scottish Government officials have advised SCoSS that there are no scheduled reviews of CDP after the recipient's 16th birthday, so a CDP award is likely to end only on request or because a change of circumstances is reported.

⁹ The draft Regulations as referred stated that such individuals 'may continue to be paid' CDP. Following enquiries from SCoSS, the Scottish Government has advised that the Regulations to be laid before Parliament will more clearly state that individuals in the relevant circumstances will remain *entitled* to CDP.

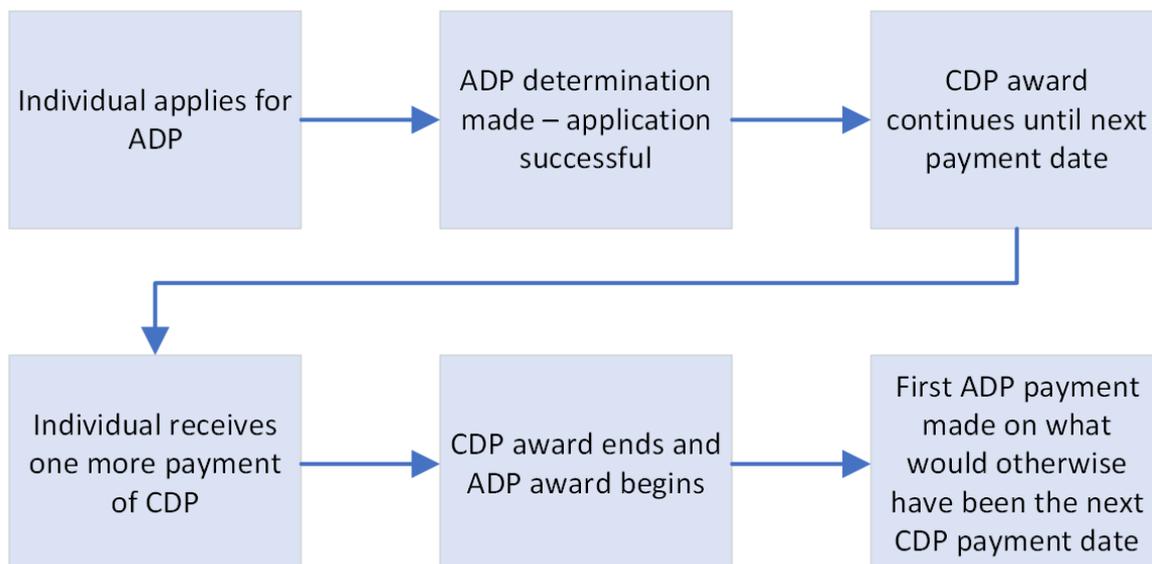
¹⁰ In practice, few, if any, individuals who move to Scotland between now and the end of 2023, having previously been in receipt of DLA in another UK country, will be affected. At this point, almost all people of the relevant age in England, Wales and Northern Ireland will have been required to apply for PIP.

2.2 Point of transition/payment cycle

The draft Regulations contain a number of provisions whose purpose is to ensure that when an individual transfers from CDP to ADP, their disability benefit remains on the same payment cycle. For both benefits, most people are paid four-weekly in arrears, while those whose award was made under the special rules for terminal illness are paid weekly in advance.

Draft Regulation 3(5) amends Regulation 29 CDP Regulations to clarify that when an individual in receipt of CDP is awarded ADP, the CDP award ends on the date that the ADP award begins. Correspondingly, draft Regulation 4(4) amends Regulation 58 ADP Regulations to stipulate that when an individual still in receipt of CDP is awarded ADP, entitlement to ADP begins on either the day after the next CDP payment following the ADP determination (if payment is made four-weekly in arrears) or seven days after the next CDP payment following the ADP determination (if payment is made weekly in advance). At present, Regulation 58(2) ADP Regulations simply states that an ADP award begins on the date of determination.

In effect, this means that, following these amendments, the transfer journey looks like:



The intent behind these provisions is welcome as changes to payment dates could be confusing and might create budgeting problems, for example if direct debits are scheduled to come out of the individual's bank account the day after CDP payments are received.

This is clearly in the interests of individuals who require assistance (in accordance with principle (g)) and, despite increasing the administrative complexity of the CDP-ADP transition, could help ensure the overall efficiency of social security in Scotland (in accordance with principle (h)) by avoiding additional calls to Social Security Scotland or increased demand for the Scottish Welfare Fund. It is also in keeping with the Charter commitment to minimise stress in people's engagement with the devolved system (Processes that work: 4).

However, the way the relevant provisions for CDP and ADP are worded creates some ambiguity: CDP entitlement ends on the day that the ADP award begins, while the ADP award begins on the day after (or seven days after) the last CDP payment.

While SCoSS feels it might be clearer to state in Regulation 29 CDP Regulations that the final day of the CDP award is the day before the first day of the ADP award, as defined by Regulation 58 ADP Regulations, we are pleased to have received assurances from Scottish Government officials that these provisions will not create any gap in entitlement.

“The transfer from CDP to ADP may be the first time a younger person has applied for a benefit in their own right as opposed to a parent/carer doing it in the past on their behalf.

Therefore, accessible, well informed, and independent support and advice is vital. This is particularly important as the young person may be managing transitions in other areas of their life such as in education, employment, care, and support. These transitions can have a major impact on whether support previously offered will continue or not, as well as change the nature of support provided.”

The Royal National Institute of Blind People Scotland

Recommendation 1: The Scottish Government should ensure that guidance to decision-makers clearly explains how the dates for the last payment of CDP and the first payment of ADP are established. Communications to individuals moving from CDP to ADP should state the expected dates at the earliest opportunity.

2.3 ADP award higher or lower than CDP award

Many individuals are likely to move from CDP to ADP with their award unchanged in monetary terms. The lower and higher rate mobility components of CDP are paid at the same rate as the standard and enhanced rate mobility components of ADP, while the middle and highest rate care components of CDP are paid at the same rate as the standard and enhanced rate daily living components of PIP. However, some people will see their award change, either because of changes to their condition or because of differences in the conditions of entitlement between the two benefits.

The measures to maintain payment cycles by making one CDP payment following an ADP determination and then commencing ADP mean some individuals will have a short delay (of up to four weeks) in the time it takes for an increase in entitlement to take effect. The Scottish Government has advised SCoSS that any necessary back payment will be received as part of the first ADP payment.

Stakeholders who submitted evidence on the draft Regulations to SCoSS have, however, expressed concern that, where the ADP award is higher than the previous CDP award, the effective delay to the start date of the ADP claim might result in a short delay in entitlement or increases in reserved benefits. This could include additions to a low-income benefit paid to the parent of the disabled young person, the young person’s own Universal Credit award or a Carer’s Allowance award.

Scottish Government officials have confirmed to SCoSS that, where the ADP award confers entitlement to a higher addition to the UK benefit than the CDP award,¹¹

¹¹ This would typically be because the daily living component of ADP is at a higher rate than the care component of CDP, or because the ADP award includes the daily living component whereas the CDP award only included the mobility component.

entitlement to the addition will only commence on the first day of entitlement to ADP, the day after the last CDP payment. There would therefore be a short delay in receipt of the addition to the UK benefit than would be the case if entitlement to ADP began on the date of determination. Individuals in this position would therefore be slightly disadvantaged by the measures to maintain payment cycles.

Where the ADP award is lower than the previous CDP award, the affected individual stands to gain (albeit only slightly) as a result of the draft Regulations, as their higher CDP award will continue for up to four weeks longer than is the case under the ADP Regulations as currently framed. If the ADP award conferred entitlement to lower or no additions to UK benefits, the higher additions flowing from the previous CDP award would also continue for slightly longer.

If an individual in receipt of CDP receives a determination that they are *not* entitled to ADP, then the CDP award would continue until the 18th birthday or if the ADP determination were made after they turned 18 it would stop when the ADP determination was made. However if they were a case transferee or moved to CDP by cross border move and turned 18 before the end of 2023 their CDP would continue to age 19. Any resulting additions to the individual's or their parent's UK benefit would also remain in place until CDP entitlement came to an end.

If an ADP applicant who was entitled to CDP at the time of application, but whose CDP award comes to an end before the determination of the ADP application, is subsequently awarded ADP, the previous CDP payment cycle is irrelevant. Draft Regulation 4(4) inserts new Regulation 58(2)(a) ADP Regulations, which states that in these circumstances the ADP award would begin on the date of determination. Such cases seem likely to be rare, as the Scottish Government has advised SCoSS that no reviews of CDP entitlement will be scheduled after the 16th birthday.

Recommendation 2: Social Security Scotland should advise individuals transferring from CDP to ADP of the potential for additions to UK benefits payable to the individual, their parent or a carer to be affected. The Scottish Government should work closely with the DWP to explore how take-up of increased entitlements in the UK system can be maximised and how the risk of overpayments can be minimised where the move to ADP results in reduced entitlement in the UK system.

3. DLA/PIP to ADP journey

3.1 Changes of circumstances

Two provisions in the draft Regulations concern the treatment of changes of circumstances that occur while an individual previously in receipt of either DLA or PIP is in the process of transferring to ADP (a process that typically takes around three months).¹² Draft Regulation 4(5) inserts a new paragraph 12(1) into Schedule 2 of the ADP Regulations, which concerns PIP-ADP transfers. Draft Regulation 5(4) inserts a new Regulation 14 into the Transitional Provisions Regulations, which concerns DLA-ADP transfers.

Each provision stipulates that, where an individual has been selected for transfer to ADP but then reports a relevant change of circumstances to the DWP before their

¹² [Adult Disability Payment Official Statistics \(socialsecurity.gov.scot\)](https://socialsecurity.gov.scot)

transfer determination has been made,¹³ the DWP should not take any action on the basis of this information, but should pass it on to Social Security Scotland. Social Security Scotland then takes the information into account when making its subsequent review determination. Some stakeholders who submitted comments to SCoSS on the draft Regulations indicated that this process has not always worked as intended.

“Advisers have also detailed cases in which anxiety has been caused by the issuing of a review form by the DWP after the transfer process has already been triggered by a claimant reporting a change.”

Citizens Advice Scotland

“Where a claimant wishes to report a change of circumstances that may affect entitlement, however, we have seen a small number of cases where they have been passed between the DWP and Social Security Scotland with the claimant being unclear who should take responsibility for the review.”

ENABLE Scotland

Scottish Government officials have advised SCoSS that the purpose of these provisions is to clarify that changes of circumstances should be reported to the DWP rather than Social Security Scotland in the period between an individual being selected for transfer and the making of a transfer determination. At face value, though, the Regulations appear to stipulate how Social Security Scotland and the DWP should treat changes which have been communicated to the DWP, rather than communicating to claimants where they should report changes.

There is value in this kind of clarification, particularly given stakeholders’ reports of apparent confusion about how this kind of information should be treated. However, if the Scottish Government has identified a need to ensure transferring individuals know where to communicate changes of circumstances, further steps might still be required to address this need. This could include a further amendment to the Regulations, but clarity in communication with individuals selected for transfer and guidance to ensure that DWP and Social Security Scotland staff fully understand the process would arguably be more important.

Recommendation 3: The Scottish Government should explain what steps it is taking to ensure individuals still in receipt of DLA or PIP receive the correct guidance on where to report a change of circumstances and that the Department for Work and Pensions and Social Security Scotland follow the correct processes when changes of circumstances are reported.

3.2 Review determinations

The draft Regulations as supplied to SCoSS for scrutiny included a proposal (draft Regulation 5(3)) to lengthen the maximum time allowed for Social Security Scotland

¹³ The transfer determination has the effect of ending the individual’s DLA or PIP award and starting an ADP award at exactly the same rate, without reference to the ADP conditions of entitlement. The transfer determination is followed by a review determination, when the transfer award is superseded by a new award based on the ADP conditions of entitlement.

to make a review determination in respect of individuals transferring from DLA to ADP. The review determination is the final stage in the transfer process from DLA to ADP. The transferring individual first receives notice that they have been selected for transfer, then receives a transfer determination, under which an award of ADP is made at the same rate as the previous DLA award. This is followed by a review determination, when the now-transferred individual's ADP award is determined against the ADP conditions of entitlement.

Regulation 12 of the Transitional Provisions Regulations stipulates that the review determination should be made within 12 months of the notice of intention to transfer. Draft Regulation 5(3) proposes changing this, so that the review determination would have to be made within 12 months of the transfer determination. This would have had the effect of increasing the maximum available time for completion of the review determination by the duration of the transfer process, typically around three months.

In our previous report on the Transitional Provisions Regulations, SCoSS noted that the envisaged maximum “would be quite a long time for a transferring individual to wait to find out what their actual ADP award will be and to have to live with that uncertainty.”¹⁴ Scottish Government officials have advised SCoSS that draft Regulation 5(3) will not now be taken forward and that they are confident that review determinations can be completed to the originally stipulated schedule, with some of the more complex cases taking around six months to review.

Observation 2: SCoSS welcomes the Scottish Government's decision to reconsider draft Regulation 5(3), which would have extended the maximum time an applicant might potentially be required to wait for a review determination to be completed.

3.3 Increases and decreases of entitlement following review

Draft Regulation 5(5) clarifies the rules that apply when an individual who has transferred from DLA to ADP receives a review determination that they are entitled to ADP at a higher rate than the award flowing from the transfer determination.

Regulation 45 ADP Regulations sets out a fairly complex set of rules on the date from which an increase in entitlement takes effect, depending on the circumstances (notably, when the change took place and when it was reported to Social Security Scotland). However, draft Regulation 5(5) amends Transitional Provisions Regulation 15 to make clear that, in all cases, when the review determination results in a higher award for individuals transferring from DLA to ADP, the effective date is the date of transfer. This means an affected individual would be entitled to a back payment to the value of the additional amount between the date of transfer and the date on which the review determination takes effect.

Draft Regulation 5(6) serves a similar purpose in cases where an individual who has transferred from DLA to ADP receives a review determination that they are entitled to ADP at a lower rate than the award flowing from the transfer determination, or not at all. It confirms that the relatively complex rules in Regulation 46 ADP Regulations should be disregarded in favour of the rule in Regulation 16 Transitional Provisions

¹⁴ [Disability Assistance for Working Age People \(Transitional Provisions and Miscellaneous Amendment\) \(Scotland\) Regulations 2022: scrutiny report \(socialsecuritycommission.scot\)](#)

Regulations. This states that the reduction of entitlement takes effect from the date of the review determination.

This is important from the transferring individual's point of view as it avoids the risk of overpayments in the period between transfer and the review determination.

Regulation 16 Transitional Provisions Regulations also stipulates that, when the review determination is that the individual is entitled to ADP at the same rate as was awarded in the transfer determination, this, too, is effective from the date of the review determination. However, this has little practical effect on the transferring individual.

In SCoSS's view, these amendments do not change the processes already provided for by Regulations 15 and 16 Transitional Provisions Regulations. Nonetheless, there is value in clarifying that the provisions of Regulations 15 and 16 Transitional Provisions Regulations take priority over those in Regulations 45 and 46 ADP Regulations in the case of individuals transferring from DLA to ADP. Previously, this purpose was served by Regulation 10(f) and (g) Transitional Provisions Regulations. Draft Regulation 5(2) omits these two provisions, avoiding duplication. It is arguable that the Transitional Provisions Regulations will be clearer following these amendments.

Observation 3: SCoSS welcomes the additional clarity draft Regulations 5(2), 5(5) and 5(6) together provide.

In discussion with SCoSS, Scottish Government officials noted that, in the case of transfers from PIP to ADP, individuals are treated as though they were already in receipt of ADP when they reported the change of circumstances that triggered their transfer determination. Any increase in entitlement is backdated to the date that the change was reported, as long as the change was reported within a month of the change occurring, or within 13 months of the change occurring if there is a "good reason" for the delay in reporting. Individuals transferring from DLA to ADP are arguably disadvantaged compared to those transferring from PIP to ADP, as they will only benefit from any higher entitlement from the date of transfer. However, this is in line with the treatment of individuals transferring from DLA to PIP within the UK system.

4. Clarifications/rectifications

Draft Regulation 3(4) inserts a new Regulation 9A into the CDP Regulations. This clarifies that an individual subject to EU social security Regulations can only be entitled to CDP if the UK is the competent state for the payment of sickness benefits to that individual. Draft Regulation 4(2) inserts an equivalent provision – Regulation 20A – into the ADP Regulations. These are in addition to the rules about the payment of CDP to EEA nationals resident in the UK, or to UK nationals resident in the EEA, that already appear in the CDP Regulations (Regulations 8 and 9) and ADP Regulations (Regulations 19 and 20). The new provisions appear to be uncontroversial.

Draft Regulation 3(5) amends Regulation 29 CDP Regulations to clarify that, when an individual in receipt of CDP dies, the end date of the CDP award is the date of death. Draft Regulation 4(3) makes an equivalent change to Regulation 48(b) ADP Regulations, to clarify that an ADP award also ends on the date of death. These amendments appear to be uncontroversial.

5. Carer's Allowance entitlement

Draft Regulation 2 amends the residence and presence conditions for the receipt of Carer's Allowance, as set out in Regulation 9(2) of the Social Security (Invalid Care Allowance) Regulations 1976 to include CDP and ADP as qualifying benefits. The amendments stipulate that an individual in receipt of Carer's Allowance can continue to receive the benefit despite being absent from Great Britain for more than four weeks, if the reason for their absence is to provide care to someone in receipt of the care component of CDP (middle or higher rate) or the daily living component of ADP (standard or enhanced rate).

In relation to the principles, the amendment is a straightforward change which aims to ensure equal treatment of Carer's Allowance recipients in different parts of Great Britain (in accordance with principle (g)) and protect Scottish carers' enjoyment of their right to social security (in accordance with principle (b)) by stipulating that carers who temporarily leave the UK to care for an individual in receipt of a Scottish disability benefit are treated the same way as those who are caring for an individual in receipt of one of the reserved disability benefits (DLA, PIP or Attendance Allowance). As noted in the Equality Impact Assessment, the beneficiaries of the amendment are likely to be mainly female.

6. Approach to scrutiny

In keeping with our role to scrutinise social security regulations, this report provides commentary in connection with human rights and the social security principles set out in Section 1 of the Social Security (Scotland) Act 2018,¹⁵ as operationalised via Our Charter.¹⁶

The Minister for Social Security and Local Government referred the draft Regulations to SCoSS,¹⁷ along with the Policy Note,¹⁸ on 24 February 2023. We were given a deadline for reporting of 19 May 2023.

Scottish Government officials helpfully provided a briefing on issues related to the draft Regulations at our Board meeting of 30 March 2023. This report reflects information they provided. We are grateful for the efforts made by officials to keep us apprised of developments.

SCoSS wrote to a number of stakeholder organisations requesting written submissions in response to the draft Regulations. We are grateful for the timely, important and informative responses we received, which have informed this report in a number of respects. The responses also included information and views relating to the wider context of how disability assistance is operating; we are grateful for these and will take them into account in future work relating to the issues raised.

¹⁵ [Social Security \(Scotland\) Act 2018 \(www.legislation.gov.uk\)](http://www.legislation.gov.uk)

¹⁶ [Social Security Scotland - Our Charter](#)

¹⁷ [Referral – The Disability Assistance \(Miscellaneous Amendments\) \(Scotland\) Regulations 2023 \(socialsecuritycommission.scot\)](#)

¹⁸ [Policy Note, Disability Assistance \(Miscellaneous Amendments\) \(Scotland\) Regulations 2023 \(socialsecuritycommission.scot\)](#)

Annexe A: Summary of key provisions in the draft Regulations

A1. Transitioning from CDP to ADP

- Individuals who will turn 18 on or before 31 December 2023 will be able to continue receiving CDP beyond their 18th birthday, until their ADP application is determined or until their 19th birthday.
- Individuals in receipt of CDP who are awarded ADP will receive one further CDP payment, after which their CDP payments will cease and their ADP payments will begin.
- ADP payment dates will therefore align with the individual's CDP payment dates.
- Where the ADP award is higher than the CDP award, the first ADP payment will include a back payment covering the period between determination of the ADP application and commencement of the award.
- Where the ADP award is lower than the CDP award, the ADP amount will not be backdated and therefore no overpayment will result.

A2. Transitioning from DLA/PIP to ADP

- Individuals who have been selected for transfer to ADP should report any change of circumstances to DWP.
- DWP should not take any action on the basis of this information, but should pass it on to Social Security Scotland.
- Social Security Scotland should take this information into account when making its subsequent review determination.
- Where the ADP review determination results in an award higher than the DLA award, the higher rate is backdated to the date of transfer.
- Where the ADP review determination results in an award lower than the DLA award, or no award, the lower rate (or cessation of payments) is effective from the date of the review determination and therefore no overpayment will result.

A3. Other provisions

- Individuals subject to EU social security Regulations can only be entitled to CDP or ADP if the UK is the competent state for the payment of sickness benefits to that individual.
- If an individual in receipt of CDP or ADP dies, the end date of the award is the date of death.
- An individual in receipt of Carer's Allowance can continue to receive the benefit despite being absent from Great Britain for more than four weeks, if the reason for their absence is to provide care to someone in receipt of the care component of CDP (middle or higher rate) or the daily living component of ADP (standard or enhanced rate).

Annexe B: Stakeholder engagement

SCoSS received written submissions from the following stakeholder organisations:

- Child Poverty Action Group in Scotland
- Citizens Advice Scotland
- ENABLE Scotland
- The Royal National Institute of Blind People Scotland

SCoSS express their thanks for these organisations' contributions and expertise.

Annexe C: Scrutiny timeline

24 February 2023	Draft Regulations formally referred to SCoSS by the Minister for Social Security and Local Government.
30 March 2023	SCoSS Board Meeting discussion with officials.
March-April 2023	External stakeholders consultation
14 April 2023	External stakeholders' views received (Annexe B).
19 May 2023	SCoSS report signed off and laid.
TBC	Regulations laid in Parliament.
TBC	Regulations into force.