

## Fairer Scotland Duty Assessment

<p><b>Title of Policy, Strategy, Programme etc.</b></p>	<p><b>The Scottish Child Payment Regulations 2020 and the Disability Assistance for Children and Young People (Scotland) Regulations 2021 (Miscellaneous Amendments) Regulations 2022</b></p>
<p><b>Summary of aims and expected outcomes of policy</b></p>	<p>The Fairer Scotland duty requires the Scottish Ministers to pay due regard to how they can reduce inequalities of outcome caused by socio-economic disadvantage when making strategic decisions.</p> <p>Socio-economic disadvantage can be described as:</p> <ul style="list-style-type: none"> <li>• Low/no wealth</li> <li>• Low income</li> <li>• Area deprivation</li> <li>• Socio-economic background</li> <li>• Material deprivation</li> </ul> <p>The draft regulations make miscellaneous amendments to the Disability Assistance for Children and Young People (Scotland) Regulations 2021 and the Scottish Child Payment Regulations 2020 in order to:</p> <ul style="list-style-type: none"> <li>• confirm the date when the period for Ministers carrying out a re-determination of entitlement begins where the First-tier Tribunal set aside a decision by the Scottish Ministers not to accept a request for a re-determination of entitlement to Scottish Child Payment;</li> <li>• make it clear that individuals with refugee status are exempt from one of the residence conditions (the habitual residence test);</li> <li>• remove the ability for clients who are currently in receipt of Disability Living Allowance, Personal Independence Payment or Armed Forces Independence Payment to make a pre-emptive application for Child Disability Payment;</li> <li>• clarify that the costs of any qualifying services can be met wholly or in part by a local authority, when determining if the individual is being looked after by a local authority and is in a care home, or alternative accommodation outside the United Kingdom;</li> <li>• require Ministers to determine whether an individual is entitled to short-term assistance in circumstances where the First-tier Tribunal for Scotland set aside a decision by the Scottish Ministers not to accept a request for a re-determination of entitlement to Child Disability Payment.</li> </ul> <p>The draft regulations also provide a framework for how Scottish Ministers will exercise the power to suspend awards of ongoing assistance under the Social Security (Scotland) Act 2018 in order to:</p>

- safeguard an individual's entitlement to assistance where Ministers have arranged for a person to receive assistance on behalf of that individual and this arrangement is placing the individual at risk of financial abuse;
- safeguard the individual's entitlement to assistance in circumstances where Ministers have arranged for a person to receive assistance on behalf of that individual and the person whom Ministers have made arrangements with can no longer continue in that role;
- manage the situation where an individual who is entitled to Child Disability Payment has reached the age of 16 years and there is not yet an appropriate arrangement in place for paying assistance to, or for benefit of, that individual (since the is now an adult);
- provide individuals with a better opportunity to provide information, which Ministers require in order to review entitlement to either Child Disability Payment or Scottish Child Payment, before Ministers will decide to end entitlement on account of the information not being provided.

#### **Re-determinations**

The regulations make two similar and technical miscellaneous amendments to the Disability Assistance for Children and Young People (Scotland) Regulations 2021 and the Scottish Child Payment Regulations 2020. These amendments relate to the situation where the First-Tier Tribunal has found that Ministers were wrong to refuse an individual's request for a re-determination of entitlement to Child Disability Payment or Scottish Child Payment (as the case may be). These amendments also address comments made by SCoSS.

#### **Disapplication of the Habitual Residence Test for Refugees**

This provision seeks to disapply the Habitual Residence Test, which usually requires 1-3 months residence in a particular place to be satisfied, from individuals who have been awarded refugee status in the UK. This mirrors UK policy and practice, and ensures that refugees do not have to wait to become eligible for Child Disability Payment once they have been awarded status.

#### **Pre-emptive Applications**

The regulations amend the Disability Assistance for Children and Young People (Scotland) Regulations 2021 to remove the ability for individuals entitled to Personal Independence Payment, Disability Living Allowance or Armed Forces Independence Payment to make a pre-emptive application for Child Disability Payment. The ability to do this undermines the carefully planned and negotiated process for transferring these individuals from

receiving a UK Government administered disability benefit to a Scottish Government administered one.

### **Effect of time spent in care homes and legal detention**

The regulations amend the Disability Assistance for Children and Young People (Scotland) Regulations 2021 to clarify that the costs of any qualifying services can be met wholly or in part by a local authority, when determining if the individual is being looked after by a local authority and is in a care home, or alternative accommodation outside the United Kingdom. The Scottish Government considers that this change removes any ambiguity about when a child or young person is considered to be resident in alternative accommodation or is being looked after by a local authority.

### **Suspension of ongoing payments**

Under the 2018 Act (as originally enacted), there was no mechanism to allow for the temporary holding-back of payments of on-going assistance as an individual was simply entitled to assistance, or they were not. The Scottish Government consulted on this lack of mechanism as a result comments made by the Scottish Commission on Social Security when SCoSS. The comments were made when reviewing the policy position that individuals who reside in care homes, and other types of accommodation in which the individual's care needs are met at public expense, should not be entitled to the care component of disability assistance. As respects this position, SCoSS recommended that:

“the Scottish Government should ensure that the simple processes, passported exemptions and entitlements, and certainty of award currently available to people entering or leaving a care home are not lost to those getting CDP. One route to achieving this is to consider amending the Act to enable entitlement to remain while payment is suspended.”

The Scottish Government consulted stakeholders on this recommendation. The consultation revealed that SCoSS' use of the term 'suspended' in this context was different to how the DWP refer to this term. SCoSS were using the term to refer to the act of permanently stopping an individual's payments for a temporary period and then recommencing payments without awarding a back-dated amount of assistance in respect of the period of the suspension. The Scottish Government do not call this suspension but refer to it as making a nil-award or reducing the value of the award, or a component of it, to £0. The DWP refer to a suspension as when an individual's payments are temporarily held-back, but, as soon as the suspension ends, an individual immediately

	<p>becomes entitled to back-dated payment in respect of the period of suspension. The consultation revealed that there was a policy need to both have powers to make a nil award and to suspend assistance in the DWP sense of the term. These regulations provide for the suspension of payments in the DWP sense of the term.</p> <p>During the passage of the Social Security Administration and Tribunal Membership (Scotland) Bill, the Scottish Ministers brought forward an amendment at Stage 2 that introduced a power to suspend payment of forms of assistance payable under the 2018 Act in prescribed circumstances in accordance with regulations.</p> <p>The Scottish Government has been clear that the use of the power to suspend should not be punitive – it should be used to protect clients’ entitlement to assistance, and to give clients the opportunity to re-engage with Social Security Scotland if they fail to provide information where requested. It should be acknowledged that the ability to suspend assistance interferes in an individuals’ right to that assistance. Being able to suspend in broad circumstances would not be showing due regard to the needs mentioned in the public sector equality duty. However, we believe that utilising suspensions in the manner expressed in the regulations provides for use in limited circumstances and contains adequate safeguards which will allow suspensions to be used in such a way as to be beneficial to clients.</p>
<p><b>Summary of evidence</b></p>	<p>In July 2016 the Scottish Government launched a public consultation to support the development of a framework that would become the Social Security (Scotland) Bill. 521 formal written responses were submitted, of which 241 were from organisations and 280 from individual respondents<sup>1</sup>.</p> <p>In 2017 the Scottish Government set up Social Security Experience Panels, with over 2,400 people with lived experience across Scotland registering as panel members<sup>2</sup>.</p> <p>The ‘Disability Assistance in Scotland’ Consultation launched in March 2019. This sought the views of the people of Scotland on the three proposed disability assistance benefits. The consultation received 263 replies, of which 74 were from stakeholder organisations and 189 were from individuals<sup>3</sup>.</p> <p>The Scottish Government has also undertaken managed consultation with stakeholders through the Ill Health and Disability Benefits Stakeholder Reference Group, with a managed</p>

<sup>1</sup> Scottish Government (2017) [Analysis of Written Responses to the Consultation on Social Security in Scotland](#)

<sup>2</sup> Scottish Government (2017) [Social Security Experience Panels - About Your Benefits and You: quantitative research findings](#)

<sup>3</sup> Scottish Government (2019) [Disability assistance in Scotland: analysis of consultation responses](#)

consultation with several stakeholder organisations, including Child Poverty Action Group in Scotland, Citizens Advice Scotland, Inclusion Scotland, Support in Mind Scotland and SAMH to inform the high-level policy principles for suspensions.

Further information on consultation specifically with regards to suspensions is detailed in the Policy Note to these Regulations, including the range of key stakeholders who helpfully set out their views on the use of suspensions in June 2020, helping to further refine our policy approach to both the application of suspensions and the safeguards associated with them.

#### The link between poverty and disability

Research has shown that poverty disproportionately affects disabled people, with disabled people experiencing higher poverty rates than the rest of the population<sup>4</sup>. UK-wide, disabled people make up 28% of people in poverty and a further 20% of people in poverty live in a household with a disabled person. This statistic is largely replicated in Scotland where around 410,000 households in poverty (42% of all households in poverty) include a disabled person or are disabled themselves<sup>5</sup>.

Scotland-wide, there are higher levels of child material deprivation in households containing a disabled person, at 20% compared to households without a disabled person (at 8%). There are higher rates of food insecurity among disabled people (18%) compared to non-disabled people (5%). There is a higher likelihood of living in relative poverty after housing costs with a disabled person in the household (24% of families with a disabled person compared to 17% of families with no disabled members). If disability benefits are not counted towards household income, this raises to 30%. 'Family' in these circumstances referred to the core family in a household, comprising one or two adults and children, if any.

Disability and unemployment/under-employment are positively correlated. 14% of 'workless families' (defined as families where parents are predominately out of work or have little connection to the labour market; who live in social rented accommodation and are reliant on benefits for their income) have one or more children with a disability or long-term illness.

A further 17% of 'struggling to get by' families (unemployed or working part-time, half of which are single-parent families) have one or more children with a disability or long-term illness<sup>6</sup>. Child material deprivation in households containing a disabled person

<sup>4</sup> <https://www2.le.ac.uk/departments/law/research/cces/documents/the-energy-penalty-disability-and-fuel-poverty-pdf>

<sup>5</sup> [https://www.npi.org.uk/files/3414/7087/2429/Disability\\_and\\_poverty\\_MAIN\\_REPORT\\_FINAL.pdf](https://www.npi.org.uk/files/3414/7087/2429/Disability_and_poverty_MAIN_REPORT_FINAL.pdf)

<sup>6</sup> <https://www.gov.scot/publications/poverty-perspective-typology-poverty-scotland/pages/5/>



with the purpose of aligning existing rules on CDP entitlement with the policy intention which is to help improve outcomes for disabled children and young people by providing financial assistance to help meet the additional costs associated with care and mobility needs, as a result of being disabled. Providing more clarity around the rules will help ensure that all individuals are treated equally and fairly.

Conferring powers on Ministers to suspend payments of disability assistance or the Scottish Child Payment, if not implemented carefully, has the potential to deepen inequalities of outcome felt by disabled persons and low-income households with young children. This is because while assistance is suspended, the individual entitled to it cannot be paid it.

However the Scottish Government is implementing this policy in such a way as to aim to reduce these inequalities of outcome. The draft regulations allow for assistance to be suspended in a narrow range of circumstances, as set out above, while safeguarding against the risk that Ministers could suspend assistance in a disproportionate manner. A suspension would be disproportionate if the hardship caused by the temporary suspension outweighs the aim of suspension under each circumstance.

The Regulations provide that Scottish Ministers may suspend assistance in the following circumstances:

- the Scottish Ministers have made arrangements for a person to receive the assistance on the individual's behalf, and the Scottish Ministers consider that it is necessary to suspend the assistance-
  - because the person with whom the Scottish Ministers have made arrangements is unable to continue to receive the assistance,
  - in order to protect the individual from the risk of financial abuse,
  - the individual is entitled to Child Disability Payment and has reached the age of 16 years and there is not yet an appropriate arrangement in place for paying assistance to, or for benefit of, that individual (on account of the individual now being an adult),
- under section 54(1A) of the 2018 Act, the Scottish Ministers have issued a decision to suspend assistance to the individual due to a failure to provide information which the individual is yet to provide.

This approach avoids conferring a blanket power upon Scottish Ministers to suspend assistance. The Scottish Government has listened carefully to the views of stakeholder organisations in defining the limited range of circumstances in which payment of devolved assistance should be suspended.

The Scottish Government's approach has also been informed by the principle that suspension of assistance is not to be used in a punitive manner. This will be supported by clear operational and decision-making guidance for staff in order to make robust, fair and rational decisions.

The draft regulations also contain the following safeguards:

- a right to require the Scottish Ministers to review the decision to suspend;
- a duty on the Scottish Ministers to have regard to an individual's financial circumstances before deciding to suspend assistance and when reviewing a decision to suspend assistance;
- provision on when suspension must end; and
- the right to be notified about:
  - a decision to suspend;
  - the reasons for the decision;
  - any steps that the individual might take in order for the Scottish Ministers to consider ending the suspension; and
  - the right to request a review of the decision.

#### Reviewing the decision to suspend assistance

A review of a decision to suspend assistance will be a two-part decision. First, the Scottish Ministers will decide if they are required under the regulations to end the suspension. In which case, the suspension must be immediately ended and the client will receive a backdated amount of assistance, under the latest determination of entitlement, in respect of the period when the suspension was in place.

If the Scottish Ministers decide that they are not required to end the suspension, they will then decide, at their discretion, whether or not to maintain the suspension, having regard to the individual's financial circumstances.

Giving individuals an immediate right to have a suspension terminated would not protect the individual from potentially being liable to repay overpayments. Ministers can avoid making such overpayments by maintaining the suspension until Ministers are in a position to make a determination without application.

In particular, it would not protect the individual from overpayments in situations where Ministers are close to being ready to make a determination, and Ministers believe that the client has been being overpaid under the last determination of entitlement.

#### Having regard to a client's financial circumstances



The Scottish Ministers will trust what clients tell them about their circumstances and will not suspend assistance if it will cause financial hardship. If the Scottish Ministers decide not to suspend assistance, they will clearly communicate to the client the risk of continuing to receive assistance which they may become liable to repay at a later date. This approach to considering an individual's financial circumstances is likely to support individuals who are socio-economically disadvantaged by low wealth.

#### Provision on when suspension must end

The Regulations specify the circumstances in which a suspension must come to an end, so as to provide certainty for clients and their advisers. This also ensures that Social Security Scotland staff can be provided with clear guidance about when the suspension should be lifted.

#### Notification of suspension

Clients will be informed in writing:

- of the decision to suspend assistance;
- the reasons for the decision;
- of any steps that could be taken to end the suspension; and
- of their right to request a review of the decision.

Clients will also be informed in writing:

- when the suspension ends and how much they are immediately entitled to under the latest determination of entitlement as a result of the suspension ending; and
- the outcome of any review of the decision to suspend.

The Scottish Government considers that these measures are reasonable and proportionate in ensuring that clients are protected from the risk of financial or economic abuse, and from the risk of overpayments. The safeguards as set out will mitigate the potential for causing hardship, particularly amongst the children, women, carers, disabled people and families on a low income.

The alternative approach of ending a client's entitlement to assistance in each of these cases is likely to be considerably more harmful, when considered against a temporary suspension of payments.

#### Monitoring and review

On-going stakeholder engagement with key organisations – such as the Child Poverty Action Group, Rights Advice Scotland, Young Scot, DACBEAG, and our Ill Health and Disability Benefit Stakeholder Reference Group – will provide the Scottish

	<p>Government with an opportunity to monitor the impact of the changes made by these regulations.</p> <p>The Communities Analysis Division within the Scottish Government will also run a comprehensive evaluation programme to consider the impact of the changes made by these regulations, with a full suite of equalities data.</p>
<b>Sign off</b>	<p>Ian Davidson Deputy Director Social Security Policy Division</p>