

Fairer Scotland Duty Summary

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| Title of Policy, Strategy, Programme etc | Disability Assistance for Working Age People (Scotland) Regulations 2022 |
| Summary of aims and expected outcomes of strategy, proposal, programme or policy | <p>The Social Security (Scotland) Act 2018 (the 2018 Act) sets out the broad framework for the delivery of devolved social security in Scotland. On 1 April 2020, the Scottish Ministers took executive and legal competence for disability benefits, including Disability Living Allowance for Children, Attendance Allowance and Personal Independence Payment.</p> <p>These benefits will continue to be delivered during a transition period by the Department for Work and Pensions under the terms of an Agency Agreement agreed with the Scottish Government to ensure the safe and secure devolution of disability benefits.</p> <p>The Scottish Government intends to replace Disability Living Allowance for Children, Personal Independence Payment and Attendance Allowance with new forms of assistance under the 2018 Act. These new benefits will be delivered by Social Security Scotland on behalf of Scottish Ministers.</p> <p>The Disability Assistance for Working Age People (Scotland) regulations sets out how we will deliver our replacement for Personal Independence Payment; Adult Disability Payment. This was formerly known as Disability Assistance for Working Age People. It will replace Personal Independence Payment for people living in Scotland between the ages of 16 and state pension age.</p> |

The regulations set out the detailed rules surrounding entitlement to Adult Disability Payment which will replace Personal Independence Payment.

The regulations also make provisions for the Personal Independence Payment to Adult Disability Payment case transfer process.

In addition to supporting new applications, Scottish Ministers will make provision for the transfer of responsibility for delivering disability benefits for individuals who receive Personal Independence Payment in Scotland from the Department for Work and Pensions (DWP) on behalf of Scottish Ministers to Social Security Scotland, and for changing the disability benefits for these individuals from Personal Independence Payment to Adult Disability Payment. We refer to this process as “case transfer”.

The cases and supporting information for these clients will transfer to Social Security Scotland once new applications for Adult Disability Payment are available to all clients across Scotland. Based on estimates provided by the Scottish Government’s Communities Analysis Division, there are around 290,000 individuals whose benefits will transfer from Personal Independence Payment to Adult Disability Payment.

We have prioritised ensuring the safe and secure transition of current clients. Scottish Ministers have set out a number of case transfer principles which we have used to guide the development of our approach to case transfer.

The principles are:

- **Correct payment at the correct time** – ensuring that the case transfer process is designed so that clients will receive the

same amount for the Scottish benefit as they received for the corresponding UK benefit.

- **No re-applications** - we will not require clients to apply for their new benefit as part of the case transfer. We will work with DWP to move clients automatically to Social Security Scotland and the corresponding new Scottish benefit.
- **No face to face DWP re-assessments** - we will, wherever possible, ensure that no-one will be subject to a face to face re-assessment by DWP when new applications for Adult Disability Payment are open across Scotland.
- **Complete as soon as possible** – Scottish Ministers have been clear that they want to complete the transfer of cases as soon as is possible in a way that will not create unacceptable risks for clients.
- **Clear communication with clients** – we will inform our clients the date their case will be transferred and will keep them informed at the various stages of the case transfer process.

This policy is closely aligned with the Healthier, Wealthier and Fairer Strategic Objectives, and contributes to the following National Outcomes:

- We respect, protect and fulfil human rights and live free from discrimination;
- We tackle poverty by sharing opportunities, wealth, and power more equally;
- We live in communities that are inclusive, empowered, resilient and safe; and
- We grow up loved, safe and respected so that we realise our full potential.

Summary of evidence

This Fairer Scotland Duty assessment has been developed drawing on a range of primary research, including 3 public consultations, engagement with those with lived experience via focus groups, as well as ongoing consultation with stakeholders through our independent Disability and Carers Benefits Expert Advisory Group (DACBEAG) and the Ill Health and Disability Benefits Stakeholder Reference Group.

This work also drew upon interviews conducted via the Scottish Government's Social Security Experience Panels. The Panels involve people with lived experience of the benefits that are coming to Scotland, and have over 2,400 members drawn from people across Scotland. In 2019, a further round of recruitment took place, targeting specific groups identified as being underrepresented such as ethnic minorities and young people.

A specific survey regarding the case transfer process was sent out to Experience Panel members in February 2019. 559 responses were received and a summary of these responses was published.

Despite the continuing impact of coronavirus, work with Experience Panels has continued, with engagement helping to inform our policy.

The Scottish Health Survey 2018 provides an accurate estimate of the number of disabled working age people in Scotland. For young people aged 16-24, 24% of young people have a limiting longstanding illness. This number raises to 30% for individuals aged between 25-34, 32% between 35-44, 46% between 45-54 and, finally, 60% between 55-64.

In 2019, there were 3,522,626 people aged between 16-65 in Scotland. As of July 2020, there

were 273,901 people in Scotland entitled to Personal Independence Payment. This accounts for roughly 7.8% of this demographic.

The link between poverty and disability

Research has shown that poverty disproportionately affects those having a disability, with disabled people experiencing higher poverty rates than the rest of the population.¹ 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.²

Scotland-wide, there are higher levels of 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

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

2 https://www.npi.org.uk/files/3414/7087/2429/Disability_and_poverty_MAIN_REPORT_FINAL.pdf

for their income) have one or more children with a disability or long-term illness. Recent statistics have found that, compared to non-disabled people in the United Kingdom (81.7), disabled people had a significantly lower rate of employment (53.6%). In Scotland, a recent publication identified that 45.6% of disabled people were employed compared to 81.1% of non-disabled individuals. In 2018, almost half of disabled people between 16-64 in Scotland were economically inactive (49.7%), compared with 15.9% of non-disabled people.

35% 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 an adult with a disability or long-term illness. A further 25% of 'struggling to get by' families (unemployed or working part-time, half of which are single-parent families) have one or more adults with a disability or long-term illness. In households without children, 50% of 'insecure singles' (defined as workless, primarily single individuals living in social housing) had a disability or long-term health condition. This rises to 68% for 'detached singles'. This group is similar to the 'insecure singles' group with the addition that they are less likely to have internet access or to participate in cultural activities, making them more disconnected.

Even where one or more individual in the household is in employment, the same level of income secures a lower standard of living than it would for a household without someone with a disability or long-term health condition. This is because disabled people face higher costs than non-disabled people, such as the cost of specialist equipment, therapies and home adaptations to manage a condition. Travel costs too, may be higher as individuals have to afford

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| | <p>the cost of taxis to and from hospital where it is not possible to use public transport (and/or public transport may not be available).</p> <p>Research conducted by the Papworth Trust³ showed that the annual cost of bringing up a disabled child is three times greater than for a non-disabled child. Disabled people face higher costs than non-disabled people, such as the cost of specialist equipment, therapies and home adaptations to manage a condition.⁴ Travel costs too, may be higher as families have to afford the cost of taxis to and from hospital where it is not possible to use public transport (and/or public transport may not be available).</p> <p>Poverty amongst disabled people is likely to be exacerbated in light of the COVID-19 crisis, UNICEF highlighted that: ‘In the context of the COVID-19 pandemic, persons with disabilities may have increased risk’,⁵ and the report in particular makes connections between the pandemic and poverty, with disabled people likely to be disproportionately impacted.</p> |
| <p>Summary of assessment findings</p> | <p>Improved application and advice</p> <p>Making the application process more accessible and the provision of comprehensive pre-application advice and support, through a choice of channels, is intended to make it easier for individuals to secure the financial support that they are entitled to.</p> <p>Making the process of applying for Adult Disability Payment easier will potentially mitigate the risk of increasing the existing levels of adults living in poverty.</p> |

³<https://www2.le.ac.uk/departments/law/research/cces/documents/the-energy-penalty-disability-and-fuel-poverty.pdf>

⁴ <https://www.irf.org.uk/income-and-benefits/>

⁵http://www.internationaldisabilityalliance.org/sites/default/files/covid19_response_considerations_for_people_with_disabilities_190320.pdf

Similarly, not requiring an application as part of the case transfer process will ensure those with ongoing awards of Personal Independence Payment will make it easier for individuals to make the transition to Adult Disability Payment.

Improved decision making

Where possible, we will use existing supporting information to make a determination for Adult Disability Payment. Clients can provide us with supporting information themselves or can ask us for support in requesting it from other parties. We are working closely with other parts of the public sector to make it easy for clients to nominate professionals to share information with us on their behalf.

Currently clients have to obtain their own supporting information, which can result in them paying a charge for that information. If Social Security Scotland collect this information on their behalf it potentially mitigates the risk of increasing the existing levels of adults living in poverty.

In the minority of cases where no formal sources of information are available, case managers will be able to use their discretion, informal sources of information and the advice and guidance available to them to reach a decision. This will ensure that clients who do not have formal sources of information are not disadvantaged. It also has the potential to reduce barriers for some individuals to apply for the financial assistance they are entitled to. Therefore, this approach is likely to have a positive impact on reducing inequality.

For case transfer clients, their Adult Disability Payment award will be based on their Personal Independence Payment award, including forms and evidence already contained in Department for

Work and Pensions records, so collecting further information should not be required.

Client consultations

Our new approach to information gathering will reduce the number of consultations that will take place and, if a consultation is required, it will take place at a time and place that suits the needs of the individual. Consultations will take place primarily over the phone with individuals having the option to request that it take place in person at a time and place that suits them, including at home or a separate location of their choosing which meets their needs.

Reducing the number of consultations and conducting them in a way that suits the needs of clients, will reduce the stress and anxiety caused and remove the requirement for individuals to travel long distances, often to unfamiliar locations. Where a client participates in a consultation for Adult Disability Payment, they will be given a bespoke appointment duration based on the needs identified by the case manager. Social Security Scotland practitioners will be given the time they need to fully understand the impact of a client's condition or disability.

The application of the eligibility criteria

We are taking steps to apply the eligibility criteria differently to how it is currently applied by the Department for Work and Pensions to ensure that all clients are treated equally and fairly. The way in which eligibility and entitlement will be decided for Adult Disability Payment will be fundamentally different to how it is decided for Personal Independence Payment.

Unlike Department for Work and Pensions, we will not require evidence of every impact that the client reports. We recognise that Department for

Work and Pension's approach presents particular challenges for individuals with limited mobility, or with variable health conditions such as Multiple sclerosis. This is because a GP is often not able to describe the impact of someone's health condition on their day to day mobility needs. Instead, the supporting information we require to make a decision on entitlement need only be consistent with the needs detailed by a client on their application.

We will properly apply the reliability criteria. This means that someone can only be considered able to complete an activity if they can do so safely, repeatedly, in a reasonable time, and to an acceptable standard. Instead of this simply being a tick box exercise, this criteria will be enshrined in law and it will be used to ensure a full account of how a client experiences an activity such as moving around is produced. This will help ensure that clients who are entitled to financial assistance will receive it and thereby positively impact on reducing inequalities.

Terminal illness

Our new definition of terminal removes the arbitrary six month time limit used in the current definition.

Allowing medical professionals to use their clinical judgement on a case-by-case basis will mean that a broader range of conditions will be able to be accounted for and, thus, allow more individuals to be entitled to Adult Disability Payment through Special Rules for Terminal Illness. This will also allow individuals who need support to receive it more quickly.

Clients who are eligible for Adult Disability Payment through Special Rules for Terminal Illness will automatically be entitled to the enhanced rates of the daily living and mobility

components. This will help mitigate the risk of increasing the number of individuals living in poverty.

Award duration and reviews

Awards will be rolling with no fixed end date and reviews will be light-touch. This will help to reduce stress and anxiety associated with coming to the end of an award for assistance before a review is complete.

By continuing entitlement while a review is taking place, we will further help to mitigate any fear of a financial cliff edge by ensuring that individuals continue to receive the assistance they are entitled to until a case manager has made a new determination. This process still enables Social Security Scotland to undertake reviews to determine continuing entitlement to Adult Disability Payment. 66% of respondents to our Consultation on Disability Assistance agreed with this approach alongside general agreement from our Experience Panels.

The introduction of lifetime awards for individuals with conditions which are unlikely to change will cut down on the number of unnecessary reviews of awards individuals will need to go through. Our initial proposal to set awards of between 5-10 years for people whose condition or disability is unlikely to change was agreed with by 58% of respondents to our Consultation on Disability Assistance. However after receiving further feedback from stakeholders and people with lived experience of disability, work is underway to establish parameters that could be put in place for the provision of indefinite awards for certain clients whose needs are very unlikely to change.

Smooth transition between Child Disability Payment and Adult Disability Payment

The transition from Child Disability Payment to Adult Disability Payment has been designed to minimise gaps in entitlement and to ensure that the process is as smooth as possible for clients. This will have a positive impact as it will be significantly less disruptive for the young person than the current system.

Young people in receipt of Child Disability Payment will be required to make an application to Adult Disability Payment. This is because the differences between Adult Disability Payment and Child Disability Payment eligibility criteria mean different and additional information is needed to make a decision on entitlement.

However, the intention is that a Child Disability Payment client's entitlement to that form of assistance will only end if they are determined to be entitled to Adult Disability Payment. This will provide clients with the security of knowing that if they are not entitled to Adult Disability Payment, they will continue to receive the Child Disability Payment they are entitled to. The regulations have been drafted to ensure this transition is aligned so that clients do not experience a gap in payment or, conversely, receive unnecessary overpayments which then require to be recovered.

There will also be extensive support and advice available to clients undergoing this process; support will be available through a choice of channels. It will be made clear to all clients that there are some instances in which it will be in an individual's interests to remain in receipt of Child Disability Payment for as long as possible, and others where they may receive more favourable entitlement to Adult Disability Payment. We will recommend that clients access independent advice in order to make an informed decision about what is best for them.

Residence and Presence conditions

The Scottish Government has considered the implications of removing or adjusting the existing DWP residence and presence conditions. This is the type of policy change which could potentially have implications for individuals moving around the UK whilst in receipt of Scottish disability assistance. There may also be issues around eligibility for a range of payments, exemptions and entitlements associated with reserved UK benefits which remain within the control of DWP, eligibility for which currently depends on receipt of a UK disability benefit.

A majority of respondents to the consultation on Disability Assistance agreed with the proposed approach taken to residence and presence tests for Adult Disability Payment. However, we also received suggestions about how we could change the rules, including the removal or shortening of the 'past presence test'.

In developing the past presence test for Adult Disability Payment, we considered the responses to the consultation on disability assistance, the need to maintain a test that would retain access to reserved passported payments and entitlements, and the latest developments in human rights jurisprudence. The past presence test thus requires that all individuals should require 26 of the past 52 weeks' presence in the UK to establish eligibility for Adult Disability Payment, in accordance with the most recent developments in case-law.⁶ Individuals who are terminally ill do not need to satisfy the past presence test, nor do individuals who are awarded refugee status, or individuals who are within the scope of the UK-EU withdrawal agreement.

⁶ TS (by TS) v SSWP (DLA); EK (by MK) v SSWP (DLA) [2020] UKUT 284 (AAC)

The past presence test will impact UK nationals returning to Scotland, and third country nationals who have immigration status that allows them access to public funds. Scottish Government analysts highlighted significant challenges in relation to the data available on the size of these groups and interactions with social security benefits.

From the analysis available, the relative change in size of cohorts eligible under adjusted past presence tests is expected to be small. Previous analysis suggests that the impact of removing the past presence test for PIP in its entirety for UK Nationals moving to Scotland from outside the EEA might affect some 175 people. As the six month test, rather than outright abolition of the test, is provided for in the Adult Disability Payment regulations this number will likely be smaller in practice.

There would be a further cohort of people moving to Scotland from outside the European Economic Area (EEA) who could be eligible, if they hold a visa that allows them access to public funds. Data constraints make it very difficult to assess the number of such individuals who might be affected any further reduction or removal of the award.

Re-determinations and appeals

Extending the time individuals have to request a re-determination to 42 days will have a positive impact as it will provide more time to seek advice or support when challenging a decision. This was stressed as being important by organisations who responded to our Consultation on Disability Assistance even though, overall, there was general agreement to the initial proposed time limit of 31 days (58%).

We noted concerns raised by a small number of respondents that a short timescale may deter

individuals from challenging a decision. We want to ensure that no one is disadvantaged by time limits for challenging a decision. Extending the time individuals have to request a re-determination may help to encourage people to challenge a decision they do not agree with. If Social Security Scotland has made a mistake during initial decision, this will help to ensure that individuals receive administrative justice.

When we asked respondents to our 2019 consultation if Social Security Scotland should have a time limit of 40-60 days to complete the re-determination process, 60% agreed. We have settled on giving Social Security Scotland 56 days to complete the re-determination process.

While some stakeholders felt that this was an excessive period for someone to be left without clarity over their award level or eligibility, it is important that enough time is given to collect any supporting information that might be needed on behalf of an individual, so that a case manager can make an informed decision about their entitlement to Adult Disability Payment .

This will be beneficial as it will ensure that individuals and their families or carers will have certainty about how long Social Security Scotland has to complete a re-determination. Similarly, by enabling individuals to appeal directly to the First-tier Tribunal should Social Security Scotland be unable to complete the re-determination process within the timescale, this will further reduce any uncertainty and, consequently, make people feel more confident in challenging a decision they do not agree with.

Short-term assistance

Continuing entitlement to Adult Disability Payment during the re-determination and appeals processes through the introduction of Short-term

assistance will help to mitigate a loss in household income experienced in the current system wherein, during mandatory reconsiderations and appeals, individuals are not entitled to disability benefits. This will allow individuals entitled to Adult Disability Payment to continue to meet the additional costs of having a disability.

Introducing Short-term assistance will help to mitigate the risk of increasing the number individuals in poverty by ensuring that, if a mistake has been made by Social Security Scotland, they will continue to receive the payments they would have been entitled to should the mistake not have been made.

Engagement with our Experience Panels found that participants believed that Short-term assistance would make it more likely for people to challenge decisions by Social Security Scotland . There was an emphasis on Short-term assistance reducing financial pressure and giving people more confidence in challenging decisions they did not agree with.

Additionally, Short-term assistance is a non-recoverable payment made by the Scottish Government (except in cases of fraud or error), avoiding the need for clients to worry about having to pay it back should their re-determination or appeal be unsuccessful. This will help to prevent a further reduction in household income and increase financial security in these circumstances, something which was stressed by respondents to our 2019 consultation (87% agreed that Short-term assistance should not be recoverable).

There was disagreement from respondents to our consultation to the proposal that Short-term assistance should be subject to deductions in respect of an overpayment agreement. Only 49%

agreed with many stating that because disability assistance is essential to meeting the additional costs associated with having a disability, reducing this level of assistance could cause hardship . We have considered this carefully but where a deduction is being made, an individual will already have had dispute rights against the determination that put that deduction in place. Financial and other circumstances will have been considered as part of that process.

Scottish Commission on Social Security - scrutiny of the draft Regulations

Under section 97 of the Social Security (Scotland) Act 2018, the Scottish Commission on Social Security (SCoSS) was asked to provide a scrutiny report on the regulations. On 25 June 2021, the Scottish Government provided redrafted regulations to SCoSS, with a policy note to accompany the regulations. SCoSS published its supplementary scrutiny report on 1 October 2021, making 24 recommendations and two observations in relation to the draft regulations.

Some of the case transfer provisions were provided to SCoSS for information. However, the case transfer provisions are made under section 95 of the Social Security (Scotland) Act 2018. As such, Scottish Ministers are not required to refer them to SCoSS for formal scrutiny.

The Scottish Government will publish its formal response to both reports when laying these regulations before the Scottish Parliament.

Independent review of Adult Disability Payment and monitoring

We plan to establish a group to undertake a review of Adult Disability Payment to commence in summer 2023. The members and chair of the group will be drawn from outside the Scottish

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| | <p>Government. The group will also secure input from people with lived experience.</p> <p>Holding the review in summer 2023 will provide the opportunity for Social Security Scotland to administer Adult Disability Payment for a full year so the necessary data and feedback from individuals can influence the recommendations.</p> <p>The review will be wide ranging to allow consideration of the suitability all of the activities, descriptors and supporting criteria. The review will allow a measurement of the extent to which Adult Disability Payment has reduced the negative impacts identified in this Fairer Scotland Duty including any impact on poverty and inequality.</p> <p>We will then make the independent report and recommendations publically available to allow for transparency, scrutiny and visibility.</p> <p>Recommendations and Conclusion</p> <p>This Fairer Scotland Duty has identified that overall, the introduction of Adult Disability Payment to replace Personal Independence Payment and the case transfer process has the potential to have a positive impact on reducing inequality and tackling poverty for disabled people in Scotland.</p> |
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