SUBMISSION TO SCOSS - DACYP REGULATIONS

DETERMINATIONS WITHOUT APPLICATION (DWA)

Right to review

The draft regulations do not provide an effective mechanism to challenge a refusal to change an individual's ongoing entitlement to DACYP. This is a significant loss of rights compared to the current DLA rules. We understand that the Stakeholder Reference Group's advice on length of awards was caveated with the condition that an individual must have a right to have an ongoing award reviewed. The draft regulations do not give this right. Re-drafting regulation 30 could resolve this issue.

In DLA, if a child's condition has worsened a parent can ask the DWP to review the DLA award. If the DWP does not think it merits an increased award, the parent has a right to appeal. This is an important right to maintain. Social Security Scotland will not get all these decisions right first time.

In practice, while this is an important right, it is one that advisers take care is exercised with caution. People are not advised to ask for reviews unless they have a strong case because of the risk of losing the award they already have.

While this right exists in the UK system generally, and for DLA, PIP and AA in particular, there is an aspect of the UK system where it does not exist. This is where a person makes a repeat claim for ESA after being found 'fit for work'. Experience of people affected by the lack of appeal rights in this situation shows how people could be impacted by a similar lack of rights in DACYP. Normally people are paid while waiting to be assessed for ESA as long as they supply a fit note from their GP. But if it is a repeat claim, no ESA is paid unless they provide evidence of a new health condition or significant deterioration and the DWP decides (before the person is actually assessed) whether they are **likely** to pass. There is no route to challenge this decision. This means claimants can be left without money for long periods of time and do not have an opportunity to make their case. In the context of DACYP, it could mean people are left on the wrong award with no way to challenge it.

CASE STUDY: Having failed the work capability assessment for ESA, a lone parent reclaimed after her condition worsened. This was refused on application and mandatory reconsideration and is now pending appeal. DWP decided that the client's condition has not worsened. The client has not been paid any ESA since her new claim was made. There is no right of appeal against the determination that her condition has not worsened. #6549

Necessary DWA provisions not provided for in the draft regulations

- **Test cases.** The draft regulations contain no provision to undertake a DWA as a result of a test case. A test case is an appeal that determines a point of law. It effectively changes the law. Once decided in the courts, it can mean that other awards decided on the same point of law are wrong and should be reviewed. There are DLA regulations that allow for an award to be superseded from the date of a test case decision but no similar DACYP regulations.
- **Date new determination takes effect.** Where there is a change of circumstances that affects entitlement but was not a change that the individual was required to notify under s56 of the Act, the regulations do not say the date from which the DWA should take effect.
- **Gradual improvements in condition**. Regulation 33 allows retrospective changes to an award where an individual's condition has improved gradually over time. The date of the DWA is set by the date on which the 'change' took place (or should have been notified). It is very hard for people to know at what point their needs have gone below the threshold for their level of award. This could lead to overpayments and potential prosecutions for fraud for individuals whose condition has improved gradually over time. In contrast, the DLA rules provide that an individual's entitlement is only altered from the date of a change if it could reasonably be expected that the person knew of the relevance of the change.

Example where DWA provisions seem not to operate as intended

Regulation 30 could be split into those situations where a DWA 'must' be done and those where it 'may' be done.

- Examples of where it 'must' be done would be when requested by an individual, where a claimant leaves a care home/residential school and under the situations described in Regs 30(1)(a)(ii),(iii),(iv),(b),(e) and (g).
- Examples of where it 'may' be done would be under the situations described in Regs 30(1)(a)(i),(iv),(v) & (f).

Without this change Scottish Minister would, for example, be required to make a DWA under 30(1)(a)(v) even if the individual has made an agreement to pay back the money directly, or under 30(1)(f) in almost any circumstances.

REDETERMINATION TIMESCALES

The draft regulations (regulation 34) reduce individuals' rights and risk creating an additional complex layer of decision making.

The draft regulations reduce the time limit in which an individual can request a re-determination from 13 months for DLA to 42 days for DACYP, unless the individual can show good reason. (Note: The limit for the UK system was 1 month until CPAG was involved in a successful case that effectively extended the limit to 13 months.)

This creates an additional decision-making process to determine good reason. This kind of discretionary decision-making in the system is not only resource intensive administratively but, in our experience, disadvantages many people who struggle to navigate such rules.

CASE STUDY: A client's PIP stopped because she failed to attend a medical. She has a brain injury and did not understand the letter. She may have been able to show good reason for her failure to attend but neither she nor her carer were aware of this. Several months later she made a new claim, and was awarded PIP, but lost out on several months of entitlement.

Extending the time limit to request a re-determination to 365 days would resolve these issues. There would still be a strong incentive for an individual to submit a re-determination request as soon as possible, which could be strengthened with clear publicity and guidance to individuals and those supporting claimants.

CARE HOMES, RESIDENTIAL SCHOOLS, PRISONS, HOSPITALS AND HOSPICES

The decision to allow those who partially fund the costs of staying in a care home or residential school to receive the care component of DACYP and the decision to allow children and young people who are in detention to receive the mobility component are welcome. However, the fact that entitlement ends rather than payment being suspended, due to the way the Act is drafted, potentially causes significant problems.

1. Parents of disabled children will get less universal credit. Parents of children in residential schools or respite care for more than 28 days or for short periods less than 28 days apart will lose entitlement to DACYP and therefore also lose entitlement to the disabled child element of universal credit.

2. At present, the process for reinstating DLA when a child is 'on leave' from a care home or a residential school is very straightforward because payment of DLA has been suspended but entitlement has continued. Under the draft regulations, entitlement has ended so a new application is needed. A new application requires a new assessment and carries the risk of reduced entitlement. If payment is suspended, there is no risk when it is restored.

CASE STUDY: Young person with high level needs is in residential school but returns to his parents at the weekend. The mobility component of DLA can continue to be paid while he is in residential accommodation and the DLA (care component) should be apportioned and paid for the days that he is at home. #8898

This could be resolved in a number of ways, for example:

- The Act could be amended to allow the suspension of payments of assistance. This power may also be needed as other forms of assistance are rolled out, and changing the Act now would allow for that flexibility in the future. For example, carer's allowance is not paid to people who get a full state pension, but the 'underlying entitlement' allows individuals with a low income to access an additional premium in their pension credit and council tax reduction.

- DACYP care component could continue to be paid during stays in care homes and residential schools.

RESIDENCE AND PRESENCE CONDITIONS

- The Scottish Government has not taken the opportunity to relax the past presence test or create further exceptions to it. This test currently causes significant difficulty for a small number of disabled children and their families. The costs of abolishing or significantly reforming the test would presumably be small.

CASE STUDY: A 5 year old with leukaemia is not eligible to claim DLA because she has not been living in the UK for 2 years yet. #673

- There is a risk that someone could be found not to be ordinarily resident in Scotland, and also not ordinarily resident in England or Wales, or they could simply make a claim in the wrong jurisdiction. A reciprocal agreement could ensure anyone ordinarily resident in the Great Britain would be entitled to either DACYP or DLA and claim made in either would count as a claim in the relevant jurisdiction.

MOBILITY COMPONENT CRITERIA

- The Scottish Government has not taken the opportunity to relax the conditions around severe mental impairment and behavioural problems (regulation 7(2)(d)). DLA rules require the child to get the highest rate of the care component as well as have a severe mental impairment and behavioural problems. This excludes any child who sleeps through the night and has no night time needs because the highest rate of the care component is only payable if a child has needs both day and night (or is terminally ill). The removal of this rule would only benefit a small number of families. However, allowing children with high needs who cannot mobilise safely to access additional income or the Motability scheme would be a great help to those families.

CASE STUDY: Child is severally autistic. High rate mobility has been refused on the basis that the child makes a conscious decision not to walk outdoors rather than being virtually unable to walk because of physical disability. Child is not getting high rate care, otherwise may have been able to qualify for high rate mobility as someone is in receipt of high rate care and who has a severe mental impairment. #1769

- The lower rate mobility test compares the needs of a child to those of other children of the same age. Regulation 6(2) reduces what are two tests in DLA to a single test in DACYP. The equivalent test for the care component in regulation 5(2) retains both of the tests that DLA currently uses. If the drafting remains as it is, then children who need a different ***type*** of guidance or supervision than a child of the same age, but not a 'substantially greater' ***amount*** of guidance or supervision may no longer qualify.

- The higher rate mobility test in regulation 7(1) includes a completely new requirement that a child needs 'substantially more guidance or supervision' than a child of the same age. It is not clear whether this is a deliberate policy change or a drafting error. There is no equivalent DLA provision. If a policy change, it will mean that some children who would have been entitled to the higher rate mobility component of DLA will not be entitled to the same rate of DACYP.
- The regulations do not provide a lower age limit for the higher rate of the mobility component, except where a child is entitled under the special rules for terminal illness. It is not clear whether this is a policy change or an oversight.
- Regulations 7(2)(g) and (h) provide two alternative routes to the higher rate mobility component that do not exist for DLA. Regulation 7(2)(d) closely matches the current eligibility criterion for children with a severe mental impairment, so it appears that the separate inclusion of paragraphs (g) and (h) may be a drafting error.
- The regulations do not make it explicit that a child can only qualify for one rate of the mobility component of DACYP. In contrast, regulation 5(5) only allows entitlement to one rate of the care component.
- There is no test of past and future needs (equivalent to regulation 5(3) for the care component) for the mobility component of DACYP. A child could qualify with needs lasting for just a few weeks, as the regulations are drafted.
- Regulation 7(6) which defines 'severe mental impairment' for the higher rate mobility component follows the current DLA rules. DLA rules were intended to apply to children and adults whereas DACYP is only for children. The definition is not wholly relevant to children. For example, the brain continues to develop well into adulthood.[1] There is an opportunity to simplify the rule to remove reference to incomplete physical development of the brain given that this applies to all children.

TERMINAL ILLNESS

- Regulation 11(8)(b) does not include a DS1500 for DLA as relevant information for treating a child as terminally ill. It is not clear why this is not relevant information. If it is not included, this could cause problems for:
    - children who transfer from DLA to DACYP;
    - children who move from rest of the UK to Scotland;
    - GPs (who may complete a DS1500 rather than BASRiS as it is more familiar).

  The regulation should be amended to include a DS1500 for any purpose ie, for DLA and PIP, as well as for ESA or UC.

- In Regulation 5(6), the reference to paragraph 2(b) appears to be a drafting error. It appears most likely that the intention is to refer to paragraph (3)(b). However, if this is the case, paragraph 3(b)(ii) seems to mean that the reference is redundant. If the intention of the reference is to impose a test of 'additional needs' for terminally ill children, this is a requirement that does not exist in DLA, and may restrict whether

[1] NMcM v SSWP [2014] UKUT 312 (AAC)

children are treated as terminally ill, even if they are expected to die within 6 months.

MAKING PAYMENTS/APPOINTEESHIP

- Section 58 of the Act only allows appointees when a claimant is deceased, or when they are incapable within the meaning of the Adults with Incapacity (Scotland) Act. There is no specific power to appoint someone to act for a child.

- Regulation 24 provides that payment is always made to the person specified in the application. This seems to lack clarity and raises the following potential problems.
    1. It appears to allow a child to make a claim for disability assistance for themselves. It is unclear if this is the policy intention.
    2. It allows Social Security Scotland a very broad discretion who to pay without any clear guidance or process for managing disputes. Such disputes may arise either between possible carers or between the child and their carers, particularly when the young person turns 16. There are potential benefits to having a system that allows the agency some discretion about who they pay, but clear guidance must be published and there must be a clear route to challenge any decision and allow an independent body, such as the SPSO, to offer an independent route to challenge decisions on who is responsible for a claim.

CASE STUDY: Child lived with his mum in England who was his appointee for DLA until he turned 16 when he decided he wanted to live with his dad in Scotland. Dad has child benefit and the UC child element in place, but mum has refused to relinquish appointeeship for DLA. Payment of DLA was suspended for 4 months while the DWP looked into the situation and eventually decided that mum should remain the appointee. There is no mechanism for disputing this decision. #8628

- For DLA a claim for a child under 16 must be made by an appointee, usually the child's parent. When a child reaches 16, the DWP procedure is to ask whether they will continue to need an appointee and usually carry out a home visit to assess the young person's capacity. It is important that children and young people in Scotland have the same degree of clarity around the processes when they turn 16, and a way to challenge any decision that is made.

DATE OF CLAIM

In regulation 25(4), which determines the date of claim, it is not clear what information is required to 'construct a record'. While this could be clarified in guidance, it would be better to have a clear legal way in which the date of claim is established, for example by stating

that any notification of the intention to claim is sufficient to secure the start date of eventual entitlement.

CASE STUDY: The Early Warning System has received a number of case studies about universal credit claimants who have initiated a claim online but it has since been closed and never put into payment. It would appear this is because they failed to provide sufficient information to progress the claim but is often unclear.

SHORT-TERM ASSISTANCE AND DACYP

If an individual is awarded short-term assistance and subsequently awarded DACYP as a result of a re-determination or appeal, it appears that short-term assistance and DACPY will both be payable for the period between the determination that reduced the award and the re-determination or appeal. This may be the issue that the draft policy note suggests remains to be settled in relation to short-term assistance.

WINTER HEATING ASSISTANCE

- Regulation 19 allows for a determination of entitlement for winter heating assistance when a child is entitled to DACYP. We believe that it should also be available to children in Scotland entitled to DLA.
- Regulation 19(3) makes reference to regulation 33 which seems to be a drafting error.
- Regulation 19 allows winter heating allowance to be paid to someone 'in receipt' of DACYP. This suggests it will only be paid to children or young people who receive DACYP themselves. This is confirmed by the accompanying policy document. If the intention is that winter heating allowance is paid to the person who is paid DACYP this would mean that in a household with two disabled children if different people were to be paid DACYP then they would receive two winter heating allowance payments. However, if DACYP for both children were paid to one person they would only receive one winter heating allowance payment.

CASELAW

At present the DACYP regulations take no account of the body of DLA caselaw. It is caselaw that defines some of the basic terms. It is far from certain that tribunals dealing with DACYP cases would apply DLA caselaw. To provide clarity for people and consistent decision making, terms established by DLA caselaw should be defined in the DACYP regulations. For example, the meanings of 'continual' and 'night' have a settled meaning in relation to DLA that are not set out in the DACYP regulations.

The Scottish Government may want to consider how future DLA caselaw may influence DACYP over time.

CASE STUDY: Tribunal judge in child DLA appeal declared that autism is not a severe mental impairment or arrested development of the brain. He also said that the child had reasonable intelligence measured by his school performance. However case law states that autism is

arrested development and that IQ and academic ability are not a measure of ability to apply intelligence to real world situations so should not come into it. #2627

BLIND AND VISUALLY IMPAIRED CHILDREN

The drafting of regulation 7(2)(f) means that the test for the higher rate mobility component is that the child is **either** blind **or** has a severe visual impairment. The equivalent test for DLA is that a child is either blind **and** deaf, or has a severe visual impairment. If this drafting is correct it seems the test for DACYP is relaxed, with no requirement to be both blind and deaf. For DLA, caselaw has established that 'blind' means 'loss of sight to such an extent to render the claimant unable to perform any work for which eyesight is essential' – it is not clear whether it is the intention to use this test for DACYP. In practice, this is obviously not a suitable test to apply to young children. The legal test should be one that is easy to provide evidence for in Scotland.

CASE STUDY: Client is getting the UC disabled child element having responded to a question asking if her child is blind. In Scotland, children are no longer 'certified' blind, but this is the legal criteria in UC and CTC. Child DLA has been refused but a mandatory reconsideration has been requested. #751

CARE COMPONENT CRITERIA

In regulation 5(3A), the reference to paragraph 5(3) appears to be a drafting error and should probably refer to paragraph 5(2). If not, then there are problems with both para 2 and para 3 of Reg 5 regarding entitlement for 16 and 17 year olds.

Applications made while in a care home

- Regulation 16 allows someone to make a new application while in a care home or residential school and have the care component paid for 28 days. This is a change from DLA regulations. (There appear to be no restrictions on making a new claim after a previous claim has ended following a DWA under regulation 30(1)(a)(ii).) It appears that someone whose DACYP award starts while in a care home, and whose entitlement ends 28 days later can make a new claim for DACYP and be entitled for a further 28 days, repeating this pattern indefinitely.
- Regulation 18 says for the avoidance of doubt, being in a hospice has no effect on DACYP care component. This could also refer to being in a hospital.

AGENCY TIMESCALES

- Regulation 34(2) gives the agency 56 days to carry out a re-determination. This timescale needs to allow the agency enough time to gather information to make the correct decision. If set too low, there will be cases where the agency runs out of time and asks the individual if they want to appeal or allow the agency an extension. While on the face of it this gives a person choice over how to proceed, in reality, allowing the agency more time does not give an extension of the time limit to

appeal. The risk is that people unwittingly lose their (absolute) right to appeal. The Scottish Government should monitor whether 56 days is the right balance between speedy resolution and sufficient information gathering eg, by collecting data on the number of cases that go to appeal under section 45 of the Act (where a re-determination is not made within the time limit) and the number of cases where the time limit is extended.

- Regulation 34(2) should be amended (to align with the The Early Years Assistance (Best Start Grants) (Scotland) Amendment (No. 1) Regulations 2019 Regulation 7) to allow, in the case where a re-determination is submitted outside the time limit, for the agency time limit to run from the date that it is accepted that the individual had good reason for the late re-determination request rather than the date the re-determination request was submitted.

GUIDANCE AND PROCESSES

There are areas where it will be important that there is clear publically available guidance to provide clarity to individuals and reassurance that the policy intention will be met.

For example:

- What duties to notify a change of circumstances are placed on people under section 56 of the Act?
- How applications for short-term assistance are made at re-determination and appeal stage.
- What processes are in place to safeguard people before making any determination to reduce or stop their payment? For example, this might be extra contact or visits for people with mental health conditions, learning disabilities or cognitive impairment.
- How power to decide against an applicant who does not respond to a request for information will be used in practice (ie, under regulation 29(2)(b) and under section 54 of the Act).
- How powers under regulation 33(2) will be used to fix a different date for a change of circumstances to take effect.