



RESPONSE TO SOCIAL JUSTICE COMMITTEE'S CONSULTATION ON THE SOCIAL SECURITY (SCOTLAND) AMENDMENT BILL

January 2024

The Child Poverty Action Group (CPAG) in Scotland works for the one in four children in Scotland growing up in poverty. We collect evidence from families living in poverty and campaign for solutions to bring about a society where children have a fair chance in life free from hardship. We provide training, advice and information on social security to frontline workers to make sure families get the financial support they need.

Part 1 – Childhood assistance

We welcome the change to the legislative footing of Scottish child payment so that it can become a standalone payment, 'childhood assistance.' This is something we have called for,¹ based on evidence from CPAG in Scotland's Early Warning System² which highlights that there are some low-income families who miss out on getting Scottish child payment now because it is a 'top-up' benefit, rather than stand-alone.

As a 'top-up' benefit, currently Scottish child payment is only payable to households who receive universal credit or another qualifying benefit. This limits who the payment can support. The qualifying benefits are legislated for by the UK government and are therefore outwith the Scottish government's control. If the UK government make changes to eligibility criteria, or the way that these benefits are calculated - for example decreasing the number of people who are entitled to them - this will have a corresponding impact on the number of families who are supported by Scottish child payment. If the Scottish government no longer relies on 'top-up' powers to make payments of Scottish child payment it will have greater control over who is entitled to a payment.

What this part of the Bill does

These provisions allow the Scottish government to make improvements to Scottish child payment, by closing gaps in entitlement and providing better support to families in work and out of work.

Regulations could give Social Security Scotland the power to make its own decision about who needs assistance, rather than following the Department for Work and Pensions, so that, for example, it could provide assistance when something has gone wrong with the reserved benefit. Scottish child payment could potentially be extended to other low-income groups who may be excluded from reserved benefits if income is just above the threshold, such as students, women in receipt of maternity allowance, and those in temporary or supported accommodation getting housing benefit, or it could be made universal.

In common with other types of assistance, the Bill sets out the framework for childhood assistance in broad terms. In our view, in principle, spelling out in more detail the intended scope of powers to make regulations would be more in line with the principle of social security being essential to the realisation of human rights. Rights in primary legislation cannot be removed as easily as those in regulations. However, opportunities to improve Scottish child payment are yet to be fully explored. To avoid inadvertently narrowing the potential for improvements, we are not proposing inserting in the Bill more detail of how the new powers should be used.

That said, we will be very disappointed if future childhood assistance regulations do not address the issues already identified with Scottish child payment as a 'top-up' benefit.

Questions about this part of the Bill

Schedule 6A(2) if inserted into the 2018 Act³ by s.1 specifies that regulations may provide that an individual is not eligible, despite being responsible for a child, if someone else is getting childhood assistance for the same child. We do not want this power to limit how children living between two families can be better supported and their human rights more fully realised. The Scottish government may wish to refer to recommendations made by the Social Security Advisory Committee on how best to support separated parents.⁴ As drafted, the Bill seems to prevent a payment to two households for a single child and it is not clear that the Bill allows parents sharing care to choose to have one parent receive Scottish child payment for one of their children and the other parent receive Scottish child payment for that child's sibling(s). We would ask the Scottish government to clarify their policy intention.

s.1(2) amends s.32(1) of the 2018 Act to state, 'Early years assistance is assistance to help towards meeting some of the **early** costs associated with having or expecting to have a child in the family.' We assume this is to distinguish early years assistance from childhood assistance, but the insertion of 'early' is not defined, is not necessary and may preclude the Scottish government making best start grants to older children in future if desired.

How the powers in this part of the Bill could be used

To close gaps in entitlement

Some low-income families who need the support that is provided by the Scottish child payment, are excluded because they do not receive a qualifying benefit. These situations, identified in case evidence from our Early Warning System, are examples of gaps that could be closed with a standalone payment.

- Most full-time **students** are excluded from claiming universal credit, but students who are parents on a low-income can claim universal credit. Student income is taken into account when calculating entitlement to universal credit. This means that some student parents on very low incomes are excluded from receiving universal credit and therefore cannot get Scottish child payment either.

- **Mothers who are on maternity leave** but who are not entitled to maternity pay from their employer, may be entitled to maternity allowance instead. Maternity allowance and statutory maternity pay are paid at the same rate but counted differently in a universal credit calculation. This results in some mothers not getting universal credit despite having the same income as another mother who gets statutory maternity pay.
- **Some families living in temporary homelessness accommodation** cannot get Scottish child payment. This is because it is housing benefit that pays for their housing costs, not universal credit, and housing benefit is not a qualifying benefit for Scottish child payment. This means that even a very low level of income is enough to prevent universal credit entitlement.
- **Parents with fluctuating earnings or weekly/4-weekly payment cycles** can lose entitlement to qualifying benefits for short periods of time due to a temporary increase in earned income, a change of circumstances, or due to the ways that universal credit works, resulting in families losing entitlement to Scottish child payment for one universal credit assessment period (one month), even though their income hasn't changed.
- Many **people from abroad** are unable to get Scottish child payment because they cannot get a qualifying benefit. Whilst immigration policy is reserved to Westminster, the Scottish government would have more flexibility to support people from abroad, using the Scottish child payment, if they were not tied to receiving a UK benefit.
- **Some families impacted by the two-child limit** miss out on Scottish child payment because they cannot get a qualifying benefit once the two-child limit is applied. There is no limit on the number of children eligible for the Scottish child payment, but there is in the qualifying benefits.

To introduce backdating

Scottish child payment cannot usually be backdated. Moving it to a stand-alone payment creates the opportunity to introduce backdating which we strongly recommend in order to provide support to families who may have missed out on their entitlement. For example:

A client applied for universal credit and waited five weeks for their first payment on 20th August. They applied for Scottish child payment and best start grant on 19th August when they found out that universal credit is a qualifying benefit. Universal credit was paid from 13th July, but Scottish child payment cannot be backdated so was paid from 19th August. (case from the Early Warning System)

A Polish mum was getting Scottish child payment for her two children, until the eldest turned six and was no longer eligible (pre-full roll out). The mum's Social Security Scotland records note that all correspondence must be sent in Polish, but when Scottish child payment was extended to children aged six and over, the invitation to claim Scottish child payment for her oldest child was sent in English. Mum's adviser spotted that she was only getting Scottish child payment for one child in February '23 and helped get the older child added back onto the award, but only from February and not November '22 because of the Scottish child payment backdating rules. (case from the Early Warning System)

To reduce impact of cliff-edges

Currently the loss of a small amount of universal credit, due to a small increase in earnings, can lead to a significant loss of Scottish child payment. Making Scottish child payment a stand-alone benefit provides an opportunity to explore ways of reducing the impact of cliff edges.

To improve take-up

Making Scottish child payment a stand-alone benefit would make it easier to align entitlement with the other five family payments and therefore increase the possibility of fully automating payments without application. This could avoid people missing out on this essential financial support because of difficulty applying.

Part 1 – Care experience assistance

What does this part of the Bill do?

S.2 of the Bill modifies the Social Security (Scotland) Act 2018 to include an entirely new type of financial assistance (s.93A) called 'care experience assistance'.

The 'scheme to provide care experience assistance' allows Scottish Ministers to establish one or more schemes to provide financial assistance to people who have had experience of the care system. The detail of who may be eligible, who will administer the scheme, the amount of assistance to be given and matters relating to the administration of such scheme or schemes is to be set out in regulations.

The intention of this new provision is, at least initially, to establish a Care Leaver Payment (currently being consulted on). The Policy Memorandum indicates the 'preferred delivery vehicle' for the Care Leaver Payment will be informed by evidence and the views and experiences of those with experience of care and of delivering support to care experienced people. The intention appears to be that the delivery vehicle will not be Social Security Scotland:

"By taking the approach set out in the Bill, the Care Leaver Payment can still be delivered in a timely manner without tying the delivery mechanism to Social Security Scotland. This approach will ensure the service is designed and delivered to best meet the needs of those with care experience alongside careful consideration being given to value for money." (paragraph 45)

Comment

CPAG in Scotland believes in the default of all assistance being developed and delivered by Social Security Scotland, unless there is very good reason. This ensures that the development and delivery of the assistance is in keeping with the Scottish social security principles such as dignity and respect, contributes to the realisation of human rights and the reduction of poverty, as well as continuous improvement.

The provisions in the new s.93A give wide-ranging regulation-making powers, including powers regarding reviews and appeals. CPAG in Scotland believes it is crucial that Scottish Ministers take up these powers so as individuals have a clear legal route to challenge a determination regarding care experience assistance. Other assistance under the 2018 Act comes with the right of redetermination and appeal, rather than review. Any challenge rights under this part should be equivalent (and ideally the same) as those for other types of assistance. Different mechanisms for challenging decisions cause confusion and difficulty for individuals and advisers trying to navigate the social security system.

As the Bill is currently drafted care experience assistance will not be subject to the scrutiny of the Scottish Commission on Social Security. While it may be delivered by someone other than Social Security Scotland, we believe it would be wrong for it not to have the benefit of expert, independent scrutiny.

Part 2 – Applications for assistance

S.3 repeals s.52B of the 2018 Act. This provision allowed a late application to be treated as made in time if the delay in applying was due to COVID.

Repealing this section contrasts with s.4 of the Bill which is replacing the specific COVID provisions for late redetermination requests and appeals with a more general discretion to allow late requests. It is not clear why the Scottish government is willing to allow late requests, but not late applications for benefits.

Allowing late applications when the delay was related to COVID was useful, but there are other legitimate reasons why applications are delayed. For example:

A lone parent with learning difficulties always got help from her mum with benefit applications until she passed away. The lone parent has not received any Best Start grants or Scottish child payment despite two of her children being under the age of five. An application for Scottish child payment was started but declined after eight months because the lone parent was not able to provide supporting evidence requested without her mum's help. The lone parent will likely have missed out on some Best Start grants completely. She will get Scottish child payment from when she successfully applies but will not be able to get it backdated. (case study from the Early Warning System)

Currently regulations specify different application deadlines depending on the type of assistance. It would improve the system for people in vulnerable situations if regulations allowed late applications when there are good reasons for the delay.

The Scottish government should confirm that existing powers in the 2018 Act would allow regulations to permit late applications.

Allowing late applications can be particularly important for single payment benefits such as Best Start Grants, as if you miss the deadline to apply, you completely miss out on that payment. With ongoing benefits such as Scottish child payment, although there can be a significant loss, you can get the benefit from the date you applied but may not get it backdated for a period before you applied.

Part 3 – Determinations and redeterminations of entitlement to assistance

s.4 Re-determination and appeal deadline in exceptional circumstances

s.4 introduces a new right to make a redetermination request or appeal more than a year after the relevant determination in 'exceptional circumstances'. This replaces the previous exception to the one-year absolute time limit which could be lifted solely if the delay was due to COVID.

We welcome this provision. It is a step towards realising the right to a fair hearing in more circumstances. It reflects existing case law⁵ which allows absolute deadlines to be lifted by the courts in exceptional circumstances where that is required to ensure access to justice. For example,

Astrid's adult disability payment determination letter was sent to her old address, so she did not get it. Social Security Scotland sent a duplicate letter when asked and she requested a redetermination as soon as she got it, but this was now more than a year after the original determination was made. (hypothetical example)

We would like to see other changes made to deadlines to improve rights for individuals. The deadline to request a redetermination is 42 or 31 days depending on the benefit. The difference in deadlines is confusing for individuals and advisers, and is too short. The deadlines should be aligned and extended. This would require amendments to regulations.

s.5 Withdrawal of request for redetermination

s.5 inserts a new provision allowing an individual to withdraw a redetermination request and preventing Social Security Scotland from carrying out a redetermination if this request is withdrawn.

We welcome this provision in principle but seek assurances that individuals will not be pressurised to withdraw their request for a redetermination and will be given the option of reinstating their request within a reasonable time limit. For example,

Tofiq's application for adult disability payment is refused. He requests a redetermination but later withdraws his request when someone from Social Security Scotland tells him there is not much chance of it succeeding. When Tofiq tells his welfare rights officer, she thinks there is a chance of the redetermination succeeding and advises him to reinstate his request. (hypothetical example)

The option to re-instate the request will require an amendment to the Bill.

s.6 Redetermination after the period allowed

There is a deadline for Social Security Scotland to complete a redetermination. For adult disability payment, child disability payment and short term-assistance this is 56 calendar days and for other Scottish benefits 16 working days. If the redetermination is not done within the time limit, Social Security Scotland must notify the individual, who may then proceed to appeal.

s.6 clarifies that the individual will be given the option of waiting for the redetermination to be completed before deciding whether they wish to appeal. We welcome this provision as it specifically permits Social Security Scotland to continue with the redetermination and provides more certainty to the individual, which the current legislation lacks.

An individual has received a letter from Social Security Scotland advising they have not been able to re-determine his adult disability payment determination within the 56-day time limit and that he can now appeal. The individual is unsure what to do. (Case from the Early Warning System)

s.7 New determination of entitlement after error

Currently, if Social Security Scotland is responding to an appeal and wishes to change the determination, the only thing it can do is ask the First-tier Tribunal to make the determination it ought to have made.

Evidence from the Early Warning System highlights that this causes the unnecessary stress of an appeal for the individual and unnecessary administration for Social Security Scotland and the Tribunals Service.

A client is currently awaiting a Scottish child payment appeal. The Social Security Scotland appeals officer conceded that the decision is incorrect and should have been changed at redetermination. Social Security Scotland currently do not have the power to make a new determination and stop the appeal, instead it must request that the tribunal award Scottish child payment. (Case study from the Early Warning System)

s.7 introduces a duty for Social Security Scotland to make a new determination if:

- the First-tier tribunal has not yet decided the appeal, and
- it has been identified that the original determination is less generous than it should have been due to an error, and
- the individual has consented to a new determination being made.

We welcome this provision as it allows individuals to access their full entitlement without having to wait for an appeal and will reduce unnecessary stress and administration. However, it would benefit from some modification.

s.49A(1)(b) specifies that there must have been an 'error'. The requirement for an error to be identified arguably requires a decision maker to look for something legally wrong with the previous determination, whereas it could simply be a different view of the same facts – as discussed in a recent Upper Tribunal for Scotland decision. In this case, whilst the only new information provided by the appellant was the appeal form, the response from Social Security Scotland took a different view of entitlement based on the same facts and argued for an award of the enhanced rates of adult disability payment as opposed to no award at all.⁶ The requirement for an 'error' should be removed from this provision so that common cases like this will be clearly within its scope.

If the individual is unhappy with the new determination, rather than proceed to appeal, they must request a redetermination of the new determination. This extra step introduces an unnecessary barrier and delay for the individual and will take up Social Security Scotland resources. For example:

Alisha was awarded the standard rate daily living component of adult disability payment. Believing she should also have got the mobility component, she requested a redetermination and subsequently appealed. When Social Security Scotland was preparing for the appeal, it decided that Alisha should have been awarded the enhanced daily living component. Social Security Scotland contacts Alisha and asks if it can make a new determination.

- *If she agrees, Social Security Scotland will make a new determination and start to pay the enhanced rate. Alisha still believes she should also be getting the mobility component, so she will have to request a redetermination of the new determination, but*

- *If Alisha does not agree to the new determination being made, she will have to wait until the appeal is heard before she can be paid the enhanced daily living component, with no guarantee that the tribunal will agree that it should be awarded. (hypothetical example)*

s.49B(1)(c) should be removed and s.49B(1)(d) modified so that the individual can proceed directly to appeal once the new determination under s49A is made.

s.8 Appeal to first-tier tribunal against process decisions

Process decisions refer to a decision about bureaucracy rather than entitlement. For example, whether the claim was made on the right form, rather than whether the individual should get the benefit. If an individual receives a process decision, they cannot request a redetermination but must instead request a process appeal.

s.8 makes clear that if an application or redetermination is not made on the correct form, the tribunal can either allow the appeal or refuse it.

This section provides a degree of clarity to the tribunal but would benefit from including further detail about the factors that the tribunal hearing a process appeal can/must consider if an application is not in the correct form.

We also propose:

- replacing the power to make a further process decision to reject a claim with a requirement to make a determination on the available evidence (to prevent people who cannot meet evidence requirements getting stuck in a process decision loop).
- inserting a further right of appeal to the Upper Tribunal which would help develop case law around process decisions.

Part 4 - Assistance given in error

s.9 Liability for assistance given in error

At present individuals can challenge a decision about whether an overpayment has occurred, through the redetermination and appeals process. However, if the individual agrees that they have been overpaid, but does not agree that they should have to repay the overpayment, there is no route to challenge this unless Social Security Scotland takes steps to recover the money paid.

Overpayments may be recovered either via a debt collection process, or via deductions from ongoing payments of Scottish benefits. Requiring people to challenge their liability through the debt recovery process creates needless anxiety for people. An individual must wait until steps are taken to recover the overpayment before they can challenge their liability. This may be a considerable period after the decision that an overpayment has occurred and is inconsistent with the principles of dignity and respect.

s.9 of the Bill gives individuals the right to challenge whether an overpayment should be recovered. This is very welcome, and we are pleased that the Scottish government has responded to our advice. In addition to the benefits for individuals, this allows for the development of caselaw and will help Social Security Scotland maintain accountability for any errors.

s.10 Exclusion from liability of an individual

This section provides protection for an individual's representative, as well as the individual, from liability for an overpayment when they have not contributed to an error, or could not have reasonably realised they were being overpaid. The insertion of s.64(5) into the 2018 Act essentially renders an individual responsible for errors caused or contributed to by their representative, unless the representative used that assistance for their own benefit.

We welcome protection for representatives where they have not contributed to the error, but are not convinced that s.64(5) reaches the correct balance. We would not want to discourage people from being representatives if they thought their mistakes could leave them liable for any overpayment, but as drafted this section could make representatives careless (or worse) and leave a vulnerable person paying for their representative's error or misinformation. It might be an error which that individual could reasonably be expected to notice but they relied on their representative's assurances that all was well. It could be difficult to ascertain how much of the overpayment is used for the benefit of the individual and thus how much liability rests with them, or how much should rest with the representative.

s.12 Liability of individual's estate

This amends s.69 of the 2018 Act to clarify that an individual's estate may be liable to repay assistance given in error, whether the determination is made prior to, or after the individual's death.

s.69(1)(b), if inserted, does not read well. If a decision is made under 64A(1) that the representative is liable because they used assistance for a purpose in breach of their duty, then one would expect it to continue to be recoverable from them and not from the estate of the individual claimant. It is possible that if the liability is split between the individual and representative then that part of the liability would be recovered from the individual's estate, but this is not clear.

If the decision under s.63 (Liability of individual for assistance given in error) or s.64 (Exclusion from liability of individual) is made after the individual's death, the executors of the individual's estate should be given challenge rights and Social Security Scotland should be required to inform them of those rights.

s.13 Assistance given in error – reviews and appeals

This section sets out the individual's right (and their representative's right) to request a review of any liability decision, appeal if not satisfied with the review, or to appeal if the review not done within the time limit. CPAG in Scotland welcome the introduction of the right to challenge liability to repay an overpayment, however we have concerns about the proposal that an individual can request a 'review' of the decision rather than a redetermination.

If an individual wishes to challenge whether there is an overpayment and whether they are liable to repay it, they may have to request a review **and** a redetermination. This could be confusing and cumbersome for individuals and representatives unless these challenges are combined in practice. There is a risk that individuals could request a review **or** a redetermination, but not the other.

Further complication could arise if both the individual and their representative are challenging whether there is an overpayment and liability to repay a part of said overpayment. As drafted an individual has a right to a review of whether they are liable to repay an overpayment (s.63), and a representative has the right to a review of whether they are liable to repay an overpayment (s.64A). If the overpayment has been apportioned it would be appropriate for the individual have the right to challenge whether the representative is liable to repay the overpayment as well.

An overpayment which the representative is liable to repay may be recovered from the individual's estate, but the right to challenge whether the representative is liable to repay the overpayment has not been conferred to the estate.

s.7 of the Bill inserts the power for Social Security Scotland to make a new determination following a redetermination and pending appeal. Similar provision should be made to allow a new decision to be made about liability to repay following a review. Although it would be simpler still, to have one redetermination process rather than a system of redeterminations and reviews.

Part 5 - Appointees

An appointee has the legal right to manage someone else's benefit award.

Power to make provision in relation to appointments made by a Minister of the Crown

s.14 provides regulation-making powers to enable an individual appointed by the DWP to act on behalf of a particular claimant, to be treated as appointed for the purposes of Scottish benefits. Where this happens, the Scottish Ministers are compelled, as soon as possible, to consider whether an appointment is required and, if so, who should be appointed. Scottish Ministers will also be required to consider whether to terminate the appointment, and in that case, whether to appoint another person to act on the individual's behalf.

CPAG in Scotland believe this provision is simply legally underpinning what already happens in practice.

Regulations should specify that an individual can request that the appointeeship be terminated if the appointee is not acting in the individual's best interests. Examples from the Early Warning System include cases of financial abuse and appointees who are no longer in contact with the individual.

Liability of appointees under sections 85A and 85B of the 2018 Act

s.15 creates a liability for the appointee to repay funds to the claimant where an appointee has acted;

- outwith their authority, or
- in breach of any duty or responsibility arising from the appointeeship, or

- after the appointeeship has ended,

unless they acted (or failed to act) reasonably and in good faith.

We are concerned that recovering a representative's liability from the individual award may cause the individual undue hardship for a fault to which they did not contribute.

We are curious as to why this section only applies to certain types of ongoing assistance – employment injuries assistance is excluded.

Part 6 – Information for audit

s.16 allows Ministers to request information from individuals for the purposes of auditing Social Security Scotland.

CPAG in Scotland are concerned that that s.16 inserts s.87B(6) which allows Social Security Scotland to suspend payment if the information is not provided. This is likely to prejudice individuals who have difficulty managing their affairs and engaging with bureaucracy and has the potential to stop payments to the most vulnerable individuals.

We recommend removing s.87B(6)-(8) and s.16(3) to make provision of audit information voluntary and to avoid unintended consequences for vulnerable individuals.

Part 8 – Scottish Commission on Social Security

The Bill will mean that almost all social security regulations are referred to the Scottish Commission on Social Security (SCoSS) for scrutiny, including regulations previously not in scope, such as best start foods. CPAG in Scotland is pleased that the scrutiny gap is being closed. We are in no doubt that rights are better protected and the social security system operates more effectively thanks to SCoSS's expert, independent scrutiny. However, the Bill introduces new provisions where the regulations have not been brought into scope for scrutiny – care experience assistance (s.2 introducing s93A(1)), compensation recovery (s.17 of the Bill introducing s.94A to 94W) and information for audit (s.16 of the Bill introducing s87B(5)). All should be subject to statutory scrutiny by SCoSS.

- Care experience assistance, also to be called care leaver payment, will be set up in regulations covering who can get a payment, how it is administered and all the other provisions that would be subject to scrutiny if it were another type of social security assistance. While it may be delivered by someone other than Social Security Scotland, we believe it would be wrong for it not to have the benefit of expert, independent scrutiny.
- The new compensation recovery scheme is consistent with the UK scheme which is subject to statutory scrutiny by the UK's scrutiny body, the Social Security Advisory Committee (SSAC). The Scottish scheme should be subject to scrutiny by SCoSS.
- The provisions on 'information for audit' are important and could impact significantly on people in vulnerable situations who are less able to negotiate complex social security systems.

Independent, expert, scrutiny should be built in to ensure that people's rights are properly considered and protected.

Contact

To discuss the content of this response further, please contact:

Kirsty McKechnie (Early Warning System (Scotland) Project Manager)

Email kmckechnie@cpagscotland.org.uk

Phone 0141 641 7091

¹ https://consult.gov.scot/social-security/scotlands-social-security-system/consultation/view_respondent?uuld=49560777

² <https://cpag.org.uk/scotland/ews>

³ In this response all references to the 2018 Act are to the Social Security (Scotland) Act 2018

⁴ <https://www.gov.uk/government/publications/ssac-occasional-paper-22-separated-parents-and-the-social-security-system/ssac-occasional-paper-22-separated-parents-and-the-social-security-system#about-this-report>

⁵ <https://www.casemine.com/judgement/uk/5a8ff82e60d03e7f57ebc354>,

<https://www.casemine.com/judgement/uk/5a8ff83760d03e7f57ebca41>

⁶ *NB v Social Security Scotland* [2023] UT 35 (file number UTS/AS/23/0030), available

at https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/upper-tribunal-pdfs-for-web/2023ut35.pdf?sfvrsn=243f4ab4_1