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23 March 2022

Elena Whitham MSP
Convener
Social Justice and Social Security Committee

By email only

Dear Convener,

I am pleased to provide a copy of the Scottish Commission on Social Security's scrutiny report on The Adult Disability Payment (Transitional Provisions) (Scotland) Regulations 2022.

This report was prepared after Scottish Ministers formally referred the draft regulations to the Commission on 10 February 2022, in accordance with the 'super-affirmative' procedure outlined in section 97 of the Social Security (Scotland) Act 2018.

A copy of the report has been submitted to the Minister for Social Security and Local Government and will be published on our [temporary webpage](#) once it has been laid in the Parliament.

We hope the Committee find this report helpful and we welcome your feedback.

Yours sincerely,

Dr Sally Witcher OBE
Chair
Scottish Commission on Social Security



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Scrutiny Report on draft Regulations:

The Disability Assistance for Working Age People (Transitional Provisions and Miscellaneous Amendment) (Scotland) Regulations 2022

**Submitted to the Scottish Government and the Scottish Parliament
Social Justice and Social Security Committee on 23 March 2022.**

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Summary of recommendations and observations

Recommendation 1: The Scottish Government should publish its plans for managed migration from DLA to ADP (or to whatever devolved provision is made for older claimants) at the earliest opportunity, being mindful of the desirability of appropriate scrutiny by SCoSS and legislators whether or not this involves the making of further regulations.

Recommendation 2: The Scottish Government should modify Regulation 3(3) of the ADP Regulations as it applies to transferring individuals to state that there are three weekly rates of the daily living component.

Recommendation 3: To avoid perceptions that the proposed lowest rate daily living component will be a permanent feature of ADP, the Scottish Government should consider amending draft Regulations 5(1), 5(2) and 5(3)(a) so that, for transferring individuals only, the daily living component of ADP consists of transitional, standard and enhanced rates.

Recommendation 4: The Scottish Government should explain why an increase in award flowing from a change of circumstances is only backdated to the start of the ADP claim and not to the date when the change of circumstances was reported to the DWP.

Recommendation 5: The Scottish Government and Social Security Scotland should develop an approach to supporting individuals who receive a reduced or no award following review of their transitional ADP award, as in other circumstances.

Recommendation 6: SCoSS asks the Scottish Government to outline any consideration it has given to applying a 'no one worse off' principle to some or all groups of transferring individuals – whether those intended to migrate under the draft Regulations or those subject to managed migration in the future.

Recommendation 7: The Scottish Government should share its plans for supporting transferring individuals to avoid or cope with problems resulting from the interaction of reserved and devolved disability benefits/assistance, for example the mutual exclusivity of ADP and attendance allowance awards.

Recommendation 8: Given the likely complexity of DLA-ADP migration from the perspective of transferring individuals and others, SCoSS invites the Scottish Government to share details of any work being undertaken to develop a communication strategy in line with its various obligations under the 2018 Act, *Our Charter* and the Convention on the Rights of Persons with Disabilities. One aim should be to raise awareness of the key differences in eligibility criteria between DLA and ADP so that adults in receipt of DLA, whose circumstances have not changed since April 2020, can judge whether it would be in their interests to request transfer to ADP. Any such campaign should be tested with stakeholders to ensure clarity.

Observation 1: In view of the importance of ensuring social security regulations fall within the regulation-making powers in the Social Security (Scotland) Act 2018, SCoSS welcomes the Scottish Government's confirmation that it believes the draft Regulations are within the scope of section 31 and paragraph 1 of schedule 5 to the Act.

Observation 2: While endorsing the use by default of a two-stage transfer process from DLA to ADP, SCoSS welcomes the use of a direct, one-stage transfer for adult DLA claimants who appear likely to qualify for ADP under the special rules for terminal illness.

Observation 3: SCoSS accepts that a longer period for re-determinations to allow for evidence gathering is unavoidable but considers that it should be realistic to aim for many if not most re-determinations to be completed well within the allotted 182 days.

Observation 4: The transitional provisions imply differential treatment of people who migrate to ADP depending on whether they previously received DLA or PIP, particularly if their ADP or PIP award is lower than their DLA award. SCoSS notes the difficulty of avoiding this unequal treatment given the commitment to a safe and secure transfer, the maintenance of parity in the eligibility criteria for ADP and PIP, and the necessity of completing case transfers within a short period.

1. Introduction

The Scottish Commission on Social Security (SCoSS) is pleased to present its scrutiny report on the draft Disability Assistance for Working Age People (Transitional Provisions and Miscellaneous Amendment) (Scotland) Regulations 2022.

These Regulations put in place transitional provisions to support the case transfer of working age people in Scotland in receipt of Disability Living Allowance (DLA)¹ to Adult Disability Payment (ADP). These individuals would have been due to transfer from DLA to Personal Independence Payment (PIP) which was established in 2013. However, before executive competence for disability benefits was transferred to the Scottish Government on 1 April 2020, the Department for Work and Pensions (DWP) had not completed migration from DLA to PIP. There were still around 42,000 adult DLA claimants with a postcode in Scotland at this point and the Scottish Government has told SCoSS that its most recent figures show a working age DLA case load of 38,000.

As the chart in Annex 1 shows, there are multiple possible routes onto ADP. The process for the cohort transferring directly from DLA to ADP is much more complex than transfer from PIP to ADP, as DLA eligibility is not assessed via descriptors and DLA components do not straightforwardly map onto ADP. In particular, DLA has three rates for the care component whereas ADP (and PIP) only have two rates of daily living component. Other differences include that DLA, unlike ADP and PIP, does not require that people cannot walk more than 20 metres in order to qualify for the higher rate of mobility component (and thus access to a Motability car). In some respects, ADP is more generous than DLA. A further complicating factor is that many DLA clients' records are still paper-based within the DWP system and these need to be used as a basis for confirming the eligibility of DLA recipients for ADP. Additionally there are challenges concerning how to provide for people who have reached the age of 65 since 2013, who to transfer to ADP and in what order, as well as how to deal with scope for inequitable treatment. Finally, the fact that some of the draft Regulations fall within SCoSS's remit to scrutinise and some do not, makes our task more complex too.

¹ Any client that was over 16 but under 65 on the 08th April 2013.

The Scottish Government's priority, and the one identified by people with lived experience, is for a safe, secure transfer ensuring no interruption to payments. While different ways to approach this exist, in the context of DLA to ADP transfers none are straightforward. The Scottish Government has chosen to go for a two-stage transfer process, whereby working age DLA claimants first transfer to ADP and continue to receive an award at the same rate as their previous DLA payment, then subsequently have their case reviewed against the ADP descriptors. This seems to us to be the better of the options available, albeit that the process will remain complex and potentially confusing.

2. Context and purpose of the draft Regulations

ADP is being introduced from March 2022. It will provide support with additional disability-related costs for individuals in Scotland aged 16 to state pensionable age (although 16-year-olds who already receive Child Disability Payment (CDP) will be entitled to remain on it until they turn 18, if they prefer, while those over pension age can stay on ADP and renew an existing claim). As such, it occupies the same niche in the Scottish social security system as PIP does in the UK system. Prior to the introduction of PIP in 2013, working age adults entitled to a disability benefit received DLA. (Around 1.5 million adult DLA claimants in Great Britain have migrated to PIP since April 2013)², but this process has not yet been completed. In April 2020, the Department for Work and Pensions (at the request of the Scottish Government) halted the migration process for Scotland-resident claimants. The DWP ceased active review of adult DLA cases, but any claimant resident in Scotland reporting a change of condition, or with an award review, or end of award was invited to apply for PIP under the PIP (Transitional Provisions) Regulations 2013. Other individuals could request to transfer to PIP if they wished. There is a clear incentive for some individuals over pensionable age to do so. Someone in receipt of just the care component of DLA cannot be awarded the mobility component after reaching pensionable age even if their mobility deteriorates, but *can* be awarded the mobility component when they apply for PIP (which will also be the case for those transferring to ADP).

² [Personal Independence Payment statistics to October 2021 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/statistics/personal-independence-payment-statistics-to-october-2021)

3. Approach to scrutiny

3.1 SCoSS's remit

These draft Regulations are to be made under sections 31, 43(5), 52, 95 and schedule 5 of the Social Security (Scotland) Act 2018. As has previously sometimes been the case, not all of this set of regulations fall within SCoSS's statutory remit to scrutinise. Sections 22 and 97 of the 2018 Act require the Scottish Government to submit regulations made within the scope of part 2, chapter 2, or section 79 of the Act to SCoSS for pre-legislative scrutiny. Section 31 falls within part 2, chapter 2, so regulations made on its authority are formally within scope for scrutiny by SCoSS. Section 31 empowers Scottish Ministers to make regulations concerning the eligibility rules and rates of payment of disability assistance. With the draft Regulations, the provisions that most obviously serve this purpose are Regulations 5, 6 and 9, which set bespoke eligibility criteria for adults transferring from DLA to ADP and create a new rate of payment, the lowest rate daily living component. Regulations 17 and 18 amend lists of definitions in the CDP and ADP Regulations, which are relevant to the eligibility criteria.

However, the provisions for transferring the awards of people in Scotland currently in receipt of DLA, who were over 16 and under 65 and in receipt of DLA at the introduction of PIP on 8 April 2013 to Social Security Scotland and ADP have for the most part been made under section 95 of the 2018 Act. Section 95 of the Act is not subject to formal scrutiny by SCoSS.³

While it may well be clear whether a given regulation falls within the scope of part 2, chapter 2, sometimes the line may be blurred. Even where clear, regulations that do not fall within our scope can have a direct bearing on those that do. It can be impossible to comment on the effect of one regulation in isolation without situating it within its context as a component part of a wider system.

³ What is and is not in scope for scrutiny by SCoSS is potentially confusing, as noted by the Disability and Carers Benefits Expert Advisory Group (DACBEAG) in its [Case Transfer report to Scottish Government](#) dated 24 July 2020. They suggest that complex issues like case transfer require expert scrutiny and could be referred to SCoSS under section 22(1)(b) of the Act. This allows the Scottish Ministers to ask SCoSS to prepare a report on any matter relevant to social security.

Further, our statutory remit requires us to provide scrutiny through the lens of the strategic context provided by the Scottish social security principles (set out in section 1 of the 2018 [Act](#)) and human rights. We also consider the implications for the [Social Security Charter](#). Similarly, it will often be hard to assess whether one regulation in isolation is compatible with these. Rather, to make sensible recommendations and observations (here, on the creation of a comprehensive set of arrangements for transferring adults in receipt of DLA to ADP) it is necessary to scrutinise in the round. For these reasons, while we have attempted to focus primarily on the regulations that appear to fall within our remit, we have on occasions gone beyond. Where a point made in this report is underpinned by a particular principle or provision of human rights law, this is highlighted in the text.

3.2 Scrutiny process

The draft Regulations scrutinised in this report were formally submitted to SCoSS on 10 February 2022 by the Minister for Social Security and Local Government, Ben Macpherson MSP, with a deadline for reporting of 21 March 2022.

We were able to consult key stakeholders and are very grateful for the timely, important and informative responses we received (please refer to Annex 3). These have informed the following report in a number of respects.

Officials from Social Security policy and Scottish Government Legal Group officials attended a SCoSS Board meeting and an ad-hoc meeting to discuss the draft Regulations. They also responded to written questions from the Commission. We thank them for their assistance.

4. Legislating for DLA-ADP migration

4.1 The challenge

The continued existence of a sizeable cohort of adult DLA claimants is a significant complicating factor in the introduction of ADP. It is possible to look at an individual's PIP award and state with a very high level of

confidence that the individual fulfils the criteria for an ADP award at the same rate. This is not the case with a DLA award. Although the problem might be reduced or overcome by allowing the DWP to continue to migrate claimants from DLA to PIP, with migration to ADP following thereafter, the Scottish Government preferred to stop DLA-PIP migration because of its concerns about the PIP assessment and decision making process,⁴ concerns the introduction of ADP is intended to address. This has created a need for a bespoke process for migrating adult DLA claimants directly to ADP, which must be set out in regulations.

4.2 Purposes and effects of the draft Regulations

The draft Regulations,⁵ which are summarized in Annex 2, aim to smooth the migration process from DLA to ADP for adult claimants. This is achieved by enabling individuals to move directly from DLA to ADP, whereas most people will move to ADP having first transferred to PIP. Migration will be a two-stage process, with a transitional award made on the basis of (and at the same rate as) the transferring individual's previous DLA award, followed by a review against the ADP criteria and descriptors within 12 months of transfer. The two-stage process is intended to lessen the Social Security Scotland delivery challenge that would result if each case were reviewed at the point of migration, in accordance with the need for efficiency as stipulated in principle (h).

Migration to a new social security benefit takes three forms:

- Natural migration means that an individual reaches a point at which their entitlement to benefit needs to be reviewed in any case, typically because of a change of circumstances.
- Voluntary migration means an individual requests to be moved to the new benefit.
- Managed migration means that the social security authority transfers individuals to the new benefit whose cases would not otherwise be reviewed and who do not ask to be moved.

⁴ For example, the role of private contractors in the process, the routine use of functional assessments and experience panel members' reports of how they felt treated by the system was noted in the Scottish Government's publication [Social Security Experience Panels – Personal Independence Payment Health Assessments Part two](#)

⁵ See Annex 2 for a summary.

The Scottish Government has stated that it intends to use the draft Regulations to facilitate natural migration of adult DLA claimants who report a change of circumstances to the DWP (which would otherwise trigger an application to claim PIP in the UK system) and voluntary migration of those who wish to move to ADP. This will leave a cohort of adults who remain on DLA for the time being. The Scottish Government has not set out a plan for future managed migration, but the wording of the Transitional Provisions Regulations does not limit their application to the natural and voluntary migration groups – in principle, they could also be used for managed migration. However, the Scottish Government has told the Commission that decisions on how managed migration will take place have yet to be made, with the process not getting underway until at least 2024 in any case (after the completion of managed migration from PIP to ADP). Bespoke arrangements will have to be made in the future to facilitate the transfer to the Scottish system of people who were older than state pensionable age on 8 April 2013 and remain in receipt of DLA.

While further stakeholder engagement will take place before the finalisation of any of these plans, it would be useful to have whatever insights are possible into thinking as it develops. The Child Poverty Action Group in Scotland's (CPAG) submission to SCoSS on the draft Regulations warns that there may be a scrutiny deficit if these Regulations are laid before the Scottish Parliament but MSPs are not fully informed of how they are likely to be used. This certainly appears to be a risk. If a new payment along the lines of a 'Scottish DLA' (one option under consideration by the Scottish Government) was created to receive individuals subject to managed migration into the devolved system, this would require new regulations, which would be subject to scrutiny by both SCoSS and the Social Justice and Social Security Committee. On the other hand, if managed migration were to proceed using the current regulations, there would presumably be no need for further legislation and therefore no need for pre-legislative scrutiny. This matters, because different routes will result in different outcomes for some transferring individuals. An individual whose mobility is restricted by a mental health condition or cognitive impairment is more likely to qualify for the mobility component of ADP at the enhanced rate than the mobility component of DLA at the higher rate, while one who can walk less than 50 metres but more than 20 metres is more likely to be entitled to the DLA mobility component at the higher rate but not to the ADP

mobility component at the enhanced rate. This would have implications not only for the level of the cash award, but for access to the Motability/Accessible Vehicles and Equipment scheme.

Recommendation 1: The Scottish Government should publish its plans for managed migration from DLA to ADP (or to whatever devolved provision is made for older claimants) at the earliest opportunity, being mindful of the desirability of appropriate scrutiny by SCoSS and legislators whether or not this involves the making of further regulations.

4.3 Impact

Overall, between April 2013 and December 2021 in Great Britain, 39% of adult DLA claimants who migrated to PIP received a higher award on reassessment and 14% saw no change. 21% received a lower award, while 25% received no PIP award.⁶ However, a high proportion of mandatory reconsiderations (19%) and appeals (81%)⁷ result in a higher award,⁸ so it is likely that the final proportion of increased or unchanged awards was higher. Just as migration from DLA to PIP or ADP creates winners and losers, the pausing of migration from DLA to PIP over the last two years will have created, and the future migration process will create, winners and losers (see section 6).

The impact of these differences is not limited to the disability benefit award itself. A change in the level of award, or the termination of an award of one or both component, may have implications for passported entitlements to cash benefits (such as a disability premium in an income-replacement benefit)⁹ or non-cash services, such as a Motability vehicle. Receipt of a qualifying disability benefit also confers exemption from the household benefit cap.¹⁰

⁶DWP [Personal Independence Payment: Official Statistics to October 2021](#), published 14 December 2021.

⁷ 67% of appeals result in a higher award being made by the tribunal, while in a further 14% of appealed cases the DWP makes a higher award without waiting for a tribunal hearing.

⁸ DWP [Personal Independence Payment statistics to April 2021](#), updated 14 September 2021.

⁹ Receipt of the DLA care component at any rate as an adult confers passported entitlement to premia in working tax credit, housing benefit, council tax reduction, a £10 'Christmas bonus' and universal credit as a student.

¹⁰ The benefit cap limits the benefit income of affected working age households to the equivalent of £20,000 per year outside London (not including top-up payments from the devolved Scottish system). Exemptions are also allowed on the basis of limited capability for work-related activity and current or recent employment with a minimum level of earnings. The majority of capped claimants lose up to £200 per universal credit assessment period (i.e. per month), but in August 2021 there were 20

4.4. Devising the transitional provisions

The making of any arrangements to enable adult DLA claimants to migrate directly to ADP without first having to move to PIP is in keeping with the Scottish Government's priority of improving processes and the user experience across the three forms of disability assistance. As noted above, allowing individuals to avoid the PIP assessment process has been a key objective here. This approach is grounded in evidence received through the social security experience panels, consultation responses and other stakeholder engagement.¹¹ The actual transitional provisions have a more limited evidence base, but the Scottish Government has informed SCoSS that it undertook detailed engagement with a small number of experience panel members as well as other key stakeholders, building on the previous advice of the Disability and Carers Benefits Expert Advisory Group.¹² We are told that this work has informed decisions on a two-stage transfer, payment patterns and communication strategy.

4.5 Competence

The draft Regulations are made in exercise of powers conferred by the Social Security (Scotland) Act 2018. Section 31 of the Act defines disability assistance (of which ADP is one form) as assistance given on account of a disability arising from a physical or mental impairment, or a terminal illness. In accordance with draft Regulation 5, transferring individuals will be awarded ADP at a given rate on the basis of a previous DLA award, not because they have demonstrated to Social Security Scotland that they have a disability arising from a physical or mental impairment (the situation will be different for individuals with a terminal illness).

households in Scotland losing more than £1,000 per assessment period – see DWP [Benefit cap: number of households capped to August 2021](#), published 14 December 2021.

¹¹ For example, see: [DWP benefits case transfers: survey findings - gov.scot \(www.gov.scot\)](#), [Disability Assistance for Working Age People \(Scotland\) draft regulations: scrutiny report - gov.scot \(www.gov.scot\)](#), [Social Security Experience Panels: designing the benefits case transfer process - gov.scot \(www.gov.scot\)](#) and [Social Security Experience Panels: case transfer survey and interview findings - visual summary - gov.scot \(www.gov.scot\)](#).

¹² Scottish Government [Disability and Carers Benefit Expert Advisory Group: transfer advice](#).

This potentially creates some uncertainty about whether these ADP awards, between the date of transfer and the date of the review determination, will in fact be within the scope of section 31. It is possible that draft Regulation 4(5) speaks to this risk. The regulation specifies that the determination without application that a transferring individual is entitled to ADP at a given rate is to be made on the basis of 'such information as the Scottish Ministers have received from the Secretary of State for Work and Pensions in respect of the transferring individual's entitlement to Disability Living Allowance' as well as any other relevant information. Draft Regulation 4(7) allows Social Security Scotland to work on the assumption that the information received from the DWP and the other relevant information the agency holds 'remains accurate on the date on which the determination is made'. The implication may be that the information communicated to DWP, which led it to make an award of DLA, is sufficient evidence of disability for a new award to be made within the scope of section 31.

The Scottish Government has confirmed to SCoSS that it is working on the basis that the previous DLA award does demonstrate that the transferring individual has a need for assistance on account of disability arising from a physical or mental impairment. The Commission agrees that this seems a plausible position to take, since that is the basis on which DLA is awarded, and the likelihood of the provisions falling outside the powers conferred by the Act seems low. However, the consequences of the provisions being ultra vires would be very high, as there would be no legislative basis on which to pay ADP to transferring individuals until completion of their case review, so it is important that the Scottish Government is confident on this point.

Observation 1: In view of the importance of ensuring social security regulations fall within the regulation-making powers in the Social Security (Scotland) Act 2018, SCoSS welcomes the Scottish Government's confirmation that it believes the draft Regulations are within the scope of section 31 and paragraph 1 of schedule 5 to the Act.

5. The two-stage transfer

5.1 Necessity and justification

The migration of adult DLA claimants to ADP poses a particular challenge to Social Security Scotland. Transferring individuals need to be awarded ADP at a rate that reflects their impairment and its impact on their daily living activities and mobility, but the differences between DLA and ADP mean this will be much less straightforward compared to PIP-ADP migration. At the same time, each case transfer will need to be completed in line with the period agreed with DWP, likely to be 13 to 17 weeks.

Not only is there a mismatch between the DLA and ADP eligibility criteria, but the information held by DWP on some transferring individuals will now be at least nine years old. The consequent, inevitable need for Social Security Scotland to gather a significant amount of information in order to make a conclusive determination of each individual's ADP entitlement would create a risk that the agency would be unable to complete transfers within the agreed period. This could result in gaps in payment, or increase the risk of error if there is a rush to meet the deadline. To mitigate this risk, the Scottish Government has elected to move transferring individuals to ADP through a two-stage process. A provisional award will be made at the point of transfer, based on the individual's previous DLA award. Each case will then be reviewed and re-determined as soon as possible thereafter, with a statutory requirement to complete reviews within 12 months of transfer. The Scottish Government has consistently stressed the need for a safe and secure transfer from the UK to devolved disability benefits, having identified this as a top priority through extensive engagement with users of the UK system.¹³ It makes sense to maintain this approach for this part of the migration process, although SCoSS notes that a year would be quite a long time for a transferring individual to wait to find out what their actual ADP award will be and to have to live with that uncertainty.

In the event that a review has not been completed within 12 months because Social Security Scotland is awaiting information from the transferring individual, Social Security Scotland will presumably have the option of using its power to suspend the award pending receipt of the

¹³ [Social Security Experience Panels: publications - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/social-security-experience-panels/).

information. Any such step should be taken sensitively and as a last resort, after making every effort to obtain the information including through the use of advocacy services and home visits (if requested by the individual) where appropriate.¹⁴

Further, the two-stage process has certain advantages to transferring individuals. Migration from DLA to ADP with same level of award, followed by review of the award, means individuals will benefit from Short-term Assistance (STA) if their award is reduced or terminated on review. STA's formal role is to support the right of appeal by making a payment equivalent to the amount lost if an individual's existing award is reduced or terminated, until the completion of any re-determination and appeal process. It also has the informal function of allowing the individual some breathing space to prepare for the drop in income should this ultimately be confirmed. STA would not have been available to anyone migrating from DLA to PIP, nor is it available to anyone who moves to ADP from another benefit¹⁵ – in such cases any loss of income would take effect immediately, albeit that back payment would be received if the award were increased on re-determination or appeal. In a sense, the remaining adult DLA claimants in Scotland will benefit from something akin to the 'mitigation' measure put in place in Northern Ireland, whereby anyone who received a reduced award on migration from DLA to PIP received a supplementary payment making good the loss until the conclusion of reconsideration and appeal. Arguably, then, there is an enhancement of certain individuals' social security-related rights in line with principles (b) and (g), and a measure of protection against poverty in line with principle (e).

An exception to the two-stage approach to transfers is made for DLA claimants who have reported a change of circumstances that indicates they are likely to qualify for ADP under the special rules for terminal illness. Anyone in this position will be made an immediate award on the basis of terminal illness and will not have to go through the two-stage transfer. The Scottish Government has told SCoSS that it will prioritise the transfer of this group. This appears to prioritise the interests of this particular group of people who require assistance by fast-tracking access to a higher award than would be available on DLA for some and

¹⁴ [Disability benefits: draft Suspension of Assistance \(Social Security\) \(Scotland\) Regulations.](#)

¹⁵ For example, a young person migrating from child disability payment to ADP at 18 or an adult DLA claimant who pre-empted the migration process by submitting an application for ADP.

minimising bureaucracy from the point of view of the transferring individual, in keeping with principle (g).¹⁶

Observation 2: While endorsing the use by default of a two-stage transfer process from DLA to ADP, SCoSS welcomes the use of a direct, one-stage transfer for adult DLA claimants who appear likely to qualify for ADP under the special rules for terminal illness.

5.2 Issues raised by the transitional lowest rate daily living component

Adult DLA claimants migrating directly to ADP will be in a unique position in that, legally speaking, their entitlement to ADP will not be based on the impact of an impairment on their mobility and daily living activities in accordance with the ADP descriptors. Rather, in accordance with Regulation 5, their award during the transitional period will be based solely on the components and level of their previous DLA award. After transfer, the award will be reviewed and a determination made against the statutory descriptors for ADP – draft Regulation 12 requires Social Security Scotland to complete this review within 12 months. The other major departure from the position of PIP claimants who migrate to ADP is the creation of an additional (and in practice temporary) ADP rate, the lowest rate daily living component. This rate is *only* available to adults who migrate from DLA to ADP having held an award of the DLA care component at the lowest rate. There is no list of descriptors for the lowest rate daily living component of ADP and no one will ever be awarded it outside this transitional context.

Draft Regulation 5(2) states that ‘the lowest rate of the daily living component is to be treated for all purposes as a payment of the daily living component within the meaning of Regulation 2 of the ADP Regulations’. As it stands there appears to be conflict between draft Regulation 5(2) and ADP Regulation 3(3) which states: ‘There are 2 weekly rates of the daily living component and 2 weekly rates of the mobility component’. It may also conflict with ADP Regulation 34, which

¹⁶ ‘opportunities are to be sought to continuously improve the Scottish social security system in ways which... put the needs of those who require assistance first’.

sets out the various rates of payment available across the two components.

This is important because any uncertainty about whether the transferring individual's award is in fact an award of ADP would also be uncertainty about their continued entitlement to any passported awards that depend on receipt of a qualifying disability benefit and in some cases their continued exemption from the benefit cap. Continuous improvement of the social security system should not involve the creation of uncertainty (principle g).¹⁷ Putting individuals unnecessarily at risk of losing passported entitlements (for example, a disability premium in a reserved benefit or a Motability vehicle) or being affected by the benefit cap would not advance the right to social security (principle b) or contribute to the reduction of poverty (principle e).¹⁸ Wording the Regulations unambiguously will minimise the risk of these things happening. The Scottish Government has advised SCoSS that it is confident that there is no issue of conflict with ADP Regulation 34, but is considering modification of Regulation 3(3) as it applies to transferring individuals. The Commission welcomes this response and encourages the Scottish Government to make what we feel is a necessary modification.

A further issue around the new lowest rate of the daily living component is the potential for confusion about its temporary nature. Transferring individuals will need to be clear from the outset that, although they will be placed on this equivalent lowest rate at the point of transfer, they will only remain there until their award is reviewed. The Scottish Government's stated intention is for this review to take place as soon as possible and, as noted, the draft Regulations put in place a statutory requirement to complete it within 12 months of transfer. Even if a person continues to meet what were the criteria for the lowest rate, they will be unable to continue on it. If they do not satisfy the descriptors for the standard rate of ADP, they will not receive any award of the ADP daily living component.

It should be possible to handle this in communication with transferring individuals, adhering to the commitment in *Our Charter* to simple, clear communication. Clarity may be harder to achieve where other groups, not in direct contact with Social Security Scotland, are concerned.

¹⁷ Principle (g) requires the Scottish Government to seek opportunities to continuously improve the Scottish social security system.

¹⁸ Principle (b) recognizes that social security is a human right, while principle (e) states that 'the Scottish social security system is to contribute to reducing poverty in Scotland'

People who consider themselves to have a disability but who do not qualify for the daily living component of PIP or ADP – particularly those who received the lowest rate care component of DLA before migrating to PIP – may become aware of the introduction of this ‘new’ rate and make futile applications for ADP in the hope that they will receive it. This would not be in the interests of those individuals and would create extra work for Social Security Scotland staff, affecting the efficiency of the transfer process and its overall operations, which might run contrary to principle (h).¹⁹

In its submission to SCoSS on the draft Regulations, CPAG in Scotland suggested that draft Regulation 5 should place all transferring individuals on a ‘transitional rate’ of ADP. The Commission agrees that a change of nomenclature might reduce confusion, but suggests it might be preferable to apply the term ‘transitional rate’ to what is currently being referred to as the lowest rate of the daily living component only. Keeping transferring individuals within the standard ADP/PIP structure of daily living and mobility component should be less likely to put the passporting function of an award in doubt in the period between transfer and review.

Recommendation 2: The Scottish Government should modify Regulation 3(3) of the ADP Regulations as it applies to transferring individuals to state that there are three weekly rates of the daily living component.

Recommendation 3: To avoid perceptions that the proposed lowest rate daily living component will be a permanent feature of ADP, the Scottish Government should consider amending draft Regulations 5(1), 5(2) and 5(3)(a) so that, for transferring individuals only, the daily living component of ADP consists of transitional, standard and enhanced rates.

5.3 Efficiency and value for money

It could be argued that the two-step transfer process places unnecessary costs on the Scottish social security system by making higher payments than some individuals would be entitled to were their claims reviewed at the point of transfer, or indeed had DLA-PIP transfers continued over the last two years. This is compounded by the availability

¹⁹ Principle (h) states that ‘the Scottish social security system is to be efficient and deliver value for money.’

of STA when this would not be available were the award reviewed at the point of transfer. Counter-arguments include that this is a price worth paying for the resulting enhancement of social security and appeal rights and the avoidance of the PIP assessment process. The Scottish Government has also told SCoSS that review at the point of transfer would make the migration process slower, less efficient and more onerous on the claimant. The justification for the chosen approach potentially becomes weaker in cases where the DWP has already been notified of a change of circumstances that is likely to have the effect of reducing or terminating entitlement prior to migration to ADP. Ultimately, as noted in previous SCoSS reports, the question of what constitutes value for money is a political one.

For transferring individuals who request a re-determination, the period in which Social Security Scotland is required to complete the re-determination is extended from 56 days (the period for most ADP re-determinations) to 182 days. In its submission to SCoSS on the draft recommendations, Inclusion Scotland suggested this was excessive. While the Commission would hope that, in a system that aspires to efficiency, most re-determinations would be completed considerably faster, we feel there may be reasons beyond Social Security Scotland's control that mean a longer-than-usual review period could be unavoidable in this situation. Most re-determinations take place in a context where evidence has already been gathered through the application form, supporting information and in some cases, a consultation. Any existing evidence held in transferring individuals' DWP case files will not be specifically focused on the ADP disability conditions and is likely to be some years old. Its evidential value is therefore likely to be lower and Social Security Scotland may well require additional time to gather information, which might include supporting evidence or a consultation.

Observation 3: SCoSS accepts that a longer period for re-determinations to allow for evidence gathering is unavoidable but considers that it should be realistic to aim for many if not most re-determinations to be completed well within the allotted 182 days.

6. Winners, losers and options for transitional protection

PIP was designed with a view to re-focusing support with the extra costs of disability on those with the greatest need, one of the underlying objectives of which was to reduce expenditure.²⁰ Many of the UK's leading social security experts expected that the move from DLA to PIP would create 'absolutely no winners ... just losers' in terms of entitlement.²¹ This has not been the case in practice: while there have certainly been 'losers', many claimants have seen their award increase and the overall case load is also larger than would have been the case had DLA remained in place for people of working age.²²

The eligibility criteria for ADP are, for the most part, closely modelled on those for PIP. They therefore, differ from DLA in a number of important ways that will create 'winners' and 'losers' (that is, individuals who receive a higher award and individuals who receive a reduced or no award) on completion of post-transfer reviews. The key differences are as follows:

- The care component of DLA has three rates – lowest, middle and highest. The daily living component of PIP and ADP has only two components – standard and enhanced. Many individuals who are only entitled to the lowest rate care component will not satisfy the eligibility criteria for the daily living component, at either rate.
- People who can only walk a very short distance are entitled to the mobility component of DLA at the higher rate. The legislation does not stipulate what counts as a very short distance, but in practice this means less than 50 metres. In PIP and ADP, access to the mobility component at the enhanced rate on the basis of a physical impairment depends on inability to walk more than 20 metres.
- The DLA care component is only payable at the highest rate to individuals who have overnight care needs. The PIP/ADP daily living component at the enhanced rate is available to anyone who has severely limited ability to carry out daily living activities, regardless of time of day.

²⁰ See the Office for Budget Responsibility [Welfare Trends Report January 2019](#)

²¹ R Sainsbury, cited by N Harris, 'Welfare reform and the shifting threshold of support for disabled people' (2014) 77 (6) *Modern Law Review* 888, 892.

²² Office for Budget Responsibility, [Welfare Trends Report](#) (CP02, London: HM Treasury, 2019).

- An individual whose mobility is restricted by a cognitive impairment or mental health condition is more likely to qualify for the mobility component at the higher rate under PIP or ADP than DLA.
- An individual with a diagnosis of a terminal illness is immediately entitled to both components of ADP at the enhanced rate. Terminal illness only confers automatic entitlement to the DLA care component, and only if the individual has a life expectancy of six months or less.²³

6.1 Individuals who would be better off on PIP or ADP than DLA

Stopping migration from DLA to PIP in April 2020 may have resulted in some individuals remaining on DLA who might have moved to PIP, and been financially better off as a result, had this not occurred.

Anyone who has informed the DWP of a change of circumstances will already have been invited to apply for PIP; if they did not do so, they will now migrate to ADP under the transitional provisions (natural migration). If, on review, they are found to be entitled to ADP at a higher rate than their DLA award, the increase will be applied from the date of transfer and a back payment made. However, there is no provision for back payment to cover the period between the date when the change of circumstances was reported and the date of transfer. It could be that stopping migration from DLA to PIP, with a view to putting the needs of those who require assistance first (in accordance with principle g) by avoiding the need for PIP assessments, may have resulted in some continuing to receive a lower award than would otherwise have been the case. It might also have the effect of reducing the contribution to reducing poverty (principle e).

Individuals whose ADP or PIP award would likely be higher than their DLA award for reasons other than a change of circumstances – for example, because their condition has a serious impact on their daily living activities but they have no overnight care needs – will not be among the group selected for transfer to ADP after the draft Regulations have been made. They would have been entitled to voluntarily apply for PIP in the period since April 2020 and will be entitled to request transfer to ADP once the regulations have been made. As with the ‘natural

²³ From the point of view of individuals with a terminal illness, ADP also differs from PIP. The special rules for terminal illness only confer entitlement to the PIP daily living component and only if the individual has a life expectancy of six months or less.

migration' cohort, any increase in entitlement following review will be applied from the date of transfer. However, social security rules are complex and there is no guarantee that people will know they are in this position. Indeed, it would be unwise to imagine that someone who has not in the last two years realised they would be better off on PIP will now realise that they would be better off on ADP, unless a concerted effort is made to educate the remaining adult DLA claimants about the differences between it and ADP and encourage them to seek advice.

The Scottish Government has told SCoSS that up to half of DLA-ADP transfers could be voluntary, chiefly because individuals transferring from DLA to ADP can claim the mobility component for the first time after reaching pensionable age, while those who remain in receipt of DLA cannot. Even for this group, though, assessing the benefits and risk of transferring will be difficult. The day to day impacts of disability are assessed under different qualifying criteria for ADP than DLA, and there may be a fear factor since some people will get less in a new ADP award than in their old DLA award. People will need very clear information and access to advice and advocacy, delivered as simply and clearly as possible.

Recommendation 4: The Scottish Government should explain why an increase in award flowing from a change of circumstances is only backdated to the start of the ADP claim and not to the date when the change of circumstances was reported to the DWP.

6.2 Individuals with reduced or no ADP entitlement

Ultimately, some transferring individuals will end up with a reduced or no ADP award following review. This will pose a new challenge to Social Security Scotland, although one that will continue to arise as disability and carer's assistance roll out and awards reach the point of review. While Social Security Scotland has always had to reject a proportion of applications that do not meet the eligibility criteria for the various forms of social security assistance it delivers, the launch of the various forms of disability assistance raises the prospect of individuals with an existing award being disentitled or having their award reduced. In the context of these transitional provisions, individuals' inevitable disappointment could be all the greater because of the emphasis that has been placed on developing a 'better' approach to social security under devolution. The

availability of STA means the cliff-edge will be somewhat less stark than in the UK system, albeit that passported awards could still be immediately lost even if the individual requests a redetermination. Ultimately, though, there are adults in receipt of DLA who will receive less money through ADP, or no award at all.

Social Security Scotland is required to deliver a service on the basis of dignity, fairness, respect and the various commitments in *Our Charter*.²⁴ This means a plan needs to be in place for dealing sensitively with these individuals and ensuring they can access support with budgeting in their changed circumstances and possibly with the emotional impact of the change.²⁵ SCoSS highlighted the need for Social Security Scotland to consider its role in ‘aftercare’ in our previous report on the Suspension of Assistance (DACYP) (SCP) (Scotland) Regulations²⁶ and the point is equally relevant here.

Having to disentitle people who do not, or no longer, fulfil the eligibility criteria for an ADP award at the level of their previous disability benefit means that determinations in the Scottish social security system will put some people at an increased risk of poverty. There is a tension here with principle (e),²⁷ and possibly with articles 19 and 20 of the Convention on the Rights of Persons with Disabilities,²⁸ since both the loss of income and in some cases the loss of a vehicle via the Motability scheme may affect people’s mobility and their ability to live independently and be included in the community. However, the Scottish Government has long made clear its reasons for prioritising a smooth transition from UK disability benefits to Scottish disability assistance and preserving the passporting function of disability benefits. Each of these put significant constraints on diverging from the eligibility criteria of their UK equivalents during the transitional period. To put the safe and secure transition or passporting function at risk could potentially expose greater numbers of people to an increased risk of poverty through loss of benefit, in addition

²⁴ [Our Charter](#) – in particular, see Part 1, ‘A people’s service’.

²⁵ [Suspension of Assistance \(Disability Assistance for Children and Young People\) \(Scottish Child Payment\) \(Scotland\) Regulations 2021 - draft: SCoSS scrutiny report - gov.scot \(www.gov.scot\)](#).

²⁶ [1. Introduction - Suspension of Assistance \(Disability Assistance for Children and Young People\) \(Scottish Child Payment\) \(Scotland\) Regulations 2021 - draft: SCoSS scrutiny report - gov.scot \(www.gov.scot\)](#).

²⁷ The Scottish social security system is to contribute to reducing poverty in Scotland.

²⁸ Article 19 recognises the equal right of all persons with disabilities to live in the community, with choices equal to others, while article 20 requires states to take effective measures to ensure disabled people’s personal mobility and independence. Loss of mobility could also have indirect implications for various other UNCRPD rights.

to making the transition less efficient. The Commission understands the reasons for the Scottish Government taking this approach in the short to medium term,²⁹ although the evident tension with principles and human rights underlines why there is a need for the Scottish Government to consider whether there is action it might take to prevent or mitigate losses, or soften the blow where they occur.

If there were a desire to adopt a 'no-one worse off' principle, whether on a short-term or ongoing basis, a number of 'mitigation' options are available to support individuals who would otherwise end up with a lower or no award following review. There is precedent for such an approach following social security reforms, notably the introduction of universal credit, but it would be unusual to offer transitional protection to individuals who naturally migrate due to a change of circumstances (as their award might reduce even if they remained on their previous benefits, in this case DLA). Transitional protection might be more relevant to voluntary migration or future managed migration.

- Individuals could be held on the award made at the point of transfer until completion of the scheduled independent review of ADP (see below). This might also preserve passported awards in the UK system, for which the Scottish Government would presumably have to recompense the UK Exchequer.
- Individuals could be held on STA until completion of the independent review. This option appears to be ruled out at present by draft Regulation 8, which stipulates that re-determinations must be completed within 182 days.
- In Northern Ireland, anyone who received a lower award on migration from DLA to PIP was given a payment equivalent to 75% of the loss for a period of one year, allowing more time to prepare for the drop in income.³⁰ This could be replicated in Scotland.
- In line with transitional protection for claimants moving to universal credit through managed migration from one or more of the 'legacy' benefits,³¹ eligible individuals (most likely those whose circumstances have not changed) could continue to receive a payment equivalent to their DLA award. This would not be subject

²⁹ [SCoSS Scrutiny report on draft regulations: Disability Assistance for Working Age People \(Scotland\) Regulations](#)

³⁰ [Welfare Supplementary Payment \(Loss of Disability Living Allowance\) Regulations \(Northern Ireland\) 2016 \(NISR 2016/250\) part 3.](#)

³¹ [Universal Credit Regulations 2014 \(SI 2014/1230\) part 4.](#)

to annual uprating, so in many cases the ADP award would eventually catch up with and exceed the transitionally protected award.

Adoption of any of these models, and identification of eligible individuals, could only be a political decision due to the additional costs and administrative complexity implied. These would be even greater if there were aspirations to maintain passported entitlements from DWP or compensate for their loss through a top-up payment under section 79 of the 2018 Act. There would be trade-offs between principles, most obviously poverty reduction (principle e) versus efficiency and value for money (principle h). In the absence of any statutory hierarchy of principles, which should prevail must also be a political decision. It is also worth noting that transitional protection for this cohort would prolong the inequality of treatment (noted below) between individuals migrating directly from DLA to ADP and those who have already migrated to or been refused PIP.

A final issue for this section is that a transferring individual who is now older than state pensionable age, who fulfils the eligibility criteria for the DLA care component but not for either ADP component, is likely to be entitled to Attendance Allowance (AA). This is a complex scenario. *Our Charter* requires Social Security Scotland to alert service users to other social security entitlements they might have.³² However, if an individual found ineligible for ADP on review then requests a re-determination and claims STA, while simultaneously applying for AA, they could effectively end up receiving awards of STA and AA for the same condition. There does not appear to be any legal obstacle to this, although such duplication might be argued to run against the spirit of what STA is intended for and of principle (h), which requires the Scottish social security system to deliver value for money. If Social Security Scotland decided on re-determination that the individual was in fact entitled to ADP, they would no longer be entitled to receive it had they been awarded AA in the meantime. The individual could then end their AA claim and reapply for ADP, but at the risk of being found again not to be entitled to ADP, this time with no entitlement to STA either.³³ Evidently

³² [Our-Charter_1.pdf \(socialsecurity.gov.scot\)](#), A People's Service, Item 11, p.8.

³³ STA is available when an existing award is reduced or terminated and the individual requests a re-determination or commences an appeal. It is not available when a new application for social security assistance is unsuccessful, which would be the case when an individual applies for ADP rather than being migrated to it from a DWP benefit.

there is a risk of gaps in entitlement, not only to the disability benefit but to any passported awards, as well as confusion.

In correspondence with SCoSS, the Scottish Government has acknowledged the complexity of the situation and said it will consider the interaction of ADP with reserved benefits. The Commission welcomes this commitment and hopes that some means – whether legal or practical – can be devised to remove the risk of an AA claim preventing someone from claiming ADP or at least to help transferring individuals navigate what has potential to be something of a minefield.

Recommendation 5: The Scottish Government and Social Security Scotland should develop an approach to supporting individuals who receive a reduced or no award following review of their transitional ADP award, as in other circumstances.

Recommendation 6: SCoSS asks the Scottish Government to outline any consideration it has given to applying a ‘no one worse off’ principle to some or all groups of transferring individuals – whether those intended to migrate under the draft Regulations or those subject to managed migration in the future.

Recommendation 7: The Scottish Government should share its plans for supporting transferring individuals to avoid or cope with problems resulting from the interaction of reserved and devolved disability benefits/assistance, for example the mutual exclusivity of ADP and Attendance Allowance awards.

6.3 Independent review of ADP

An independent review of ADP is scheduled to commence later in 2022.³⁴ This will be an opportunity for the Scottish Government to consider its response to negative comments from stakeholders on its decision to base the descriptors used to determine entitlement to ADP on those for PIP.³⁵ Retention of the ‘20 metre rule’ for entitlement to the enhanced rate mobility component was particularly controversial and the review will commence with a focus on the mobility component. Several of the stakeholder submissions during SCoSS’s scrutiny of the draft Regulations included statements about the desirability of the future revision of ADP eligibility criteria and/or rates of payment. Such matters

³⁴ [Adult Disability Payment: policy position paper - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/adult-disability-payment-policy-position-paper/pages/12.aspx).

³⁵ Scottish Government [Adult Disability Payment: consultation analysis](https://www.gov.scot/publications/adult-disability-payment-consultation-analysis/pages/12.aspx).

are beyond the scope of the draft Regulations, and therefore of this report, but there are possible implications for the migration process, particularly for decisions on the availability of transitional protection.

On one hand, the imminence of the review might be seen to strengthen the case for transitional protection. If, following the review, the Scottish Government were to decide to allow individuals to access the enhanced rate mobility component if unable to walk 50 (as opposed to 20) metres, then some form of transitional protection for those able to walk between 20 and 50 metres could avoid the loss of mobility, administrative burden and ill-feeling that would be associated with removing and then quickly restoring access to the Motability scheme. On the other hand, there is uncertainty around how long the review might take, what it might recommend and whether its recommendations would in fact be accepted by the Scottish Government. 'Transitional' arrangements could end up remaining in place for longer than necessary, only for ADP to continue to resemble PIP, or even to diverge further from DLA. Additional money would continue to be paid to some individuals for longer than necessary. Others might miss out on higher awards for longer than necessary because they did not realise they would be better off following review, although this risk could be reduced through an effective communication strategy.

6.4 Potential for unequal treatment of transferring individuals

The transitional provisions necessarily create an inequality of treatment between adults who migrate to ADP, depending on whether they were previously in receipt of PIP or DLA. Principle (b) acknowledges that 'social security is itself a human right and essential to the realisation of other human rights'. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, article 14 of the European Convention on Human Rights and similar provisions in other treaties prohibit discrimination in the enjoyment of human rights. Principle (g) requires the Scottish Government to seek opportunities to improve the devolved social security system in ways that 'put the needs of those who require assistance first' and 'advance equality and non-discrimination'. These principles require SCoSS to consider whether this unequal treatment is justified. According to the approach of the European Court of Human Rights and UK courts, unequal treatment flowing from the decisions of the legislature or executive on matters of social or economic

policy will only constitute discrimination contrary to article 14 if the difference of treatment is ‘manifestly without reasonable foundation’.³⁶

Those entitled to a reduced or no award in either component following migration may already have retained their (higher) award for longer thanks to the halting of DLA-PIP migrations in Scotland. Until their ADP claim is reviewed post-migration (and possibly longer if they subsequently receive STA), they will continue to receive payments for which they do not satisfy the descriptors that apply to individuals moving from PIP to ADP. Such payments are not regarded as overpayments, presumably because the review will be the first time the individual has their entitlement determined against the ADP or PIP criteria.³⁷ This places some people in Scotland who had already migrated to PIP as well as new ADP applicants who are not migrating from DLA or PIP at a relative disadvantage, as they will be unable to access the lowest rate daily living component at all or qualify for the higher rate mobility component if they can walk more than 20 metres. However, it seems likely that the Scottish Government could point to various reasonable justifications for this difference in treatment. These include the administrative expediency of the two-stage migration process,³⁸ the need to ensure that disabled people who have never been assessed for PIP are not arbitrarily disentitled as a result, the prevalence of transitional arrangements when any new social security benefit is introduced, which often involve some sort of advantageous treatment for a particular group of claimants, and the policy intent of avoiding the need for Scotland residents to go through the PIP assessment process.³⁹ The proportionality of the unequal treatment is arguably increased by the commitment to completing reviews as quickly as possible following transfer. Although the draft Regulations only require completion of

³⁶ [Stec v UK \(Admissibility\)](#) (65730/01) [2005] 41 EHRR SE18.

³⁷ In accordance with draft Regulation 16, any reduction in entitlement takes effect from the date on which the review determination is made.

³⁸ As noted above, this is arguably in keeping with principle (h) by ensuring efficiency of administration.

³⁹ While the unsuitability of the PIP assessment is to some extent a political judgement, this would likely be regarded by the courts as a matter on which the executive and legislature are entitled to take a view with little judicial scrutiny, as with the ‘fairness’ of the household benefit cap and two-child limit on universal credit and child tax credit awards – see [R \(on the application of SG\) v Secretary of State for Work and Pensions](#) [2015] UKSC 16 and [R \(on the application of SC\) v Secretary of State for Work and Pensions](#) [2021] UKSC 26.

reviews within a year of transfer, this political commitment emphasises the temporary, transitional nature of these initial awards.⁴⁰

Observation 4: The transitional provisions imply differential treatment of people who migrate to ADP depending on whether they previously received DLA or PIP, particularly if their ADP or PIP award is lower than their DLA award. SCoSS notes the difficulty of avoiding this unequal treatment given the commitment to a safe and secure transfer, the maintenance of parity in the eligibility criteria for ADP and PIP, and the necessity of completing case transfers within a short period.

7. Communication

The Scottish Government has modelled the structure, eligibility criteria and rates of payment for ADP on those for PIP with a view to limiting the complexity of the migration process for users and Social Security Scotland alike. Where individuals migrate directly from DLA to ADP, without first moving to PIP, the complexity escalates – as will be clear from this report. SCoSS members were appointed due to our expertise in social security – if we have found the issues raised by the draft Regulations challenging, this will be even more so for individuals who are subject to natural migration or in a position to request voluntary migration. For example, in Annex 1 we note that there are 11 routes into ADP.

There is a general need for anyone affected by the DLA-ADP transfer process to understand what is happening and why. This includes those who will not naturally migrate at this time, but will be subject to managed migration to the devolved system at a later date.

Individuals subject to natural migration will need to understand the provisional nature of their initial ADP award, notably for those who are initially awarded the lowest rate daily living component.

All transferring individuals will need to be clear about what information they need to provide to Social Security Scotland and when, particularly at the point of review. This includes cases where Social Security

⁴⁰ Note that, while *each* individual should be subject to the transitional arrangements for a maximum of 12 months, how long the transitional arrangements will remain in place for *some* individuals is uncertain and will depend on how long transfers continue to take place under the arrangements put in place by the draft Regulations.

Scotland considers suspension of payment because it has not received information from the transferring individual.

Adult DLA claimants who are not subject to natural migration will need to have sufficient information about the migration process and the differences between DLA and ADP to know whether it would be beneficial for them to request voluntary migration, and how to do so.

Particular complexities exist for individuals who would be in a position to apply for AA should their provisional ADP award be terminated on review.

The wider disabled population will need to understand that the lowest rate daily living component is only available to adult DLA claimants migrating to ADP, and not to new applicants.

Multiple stakeholders who provided views to SCoSS on the draft Regulations⁴¹ stressed the importance of clear (including easy-read) communication and, if necessary, advocacy to ensure that transferring individuals know what to expect and what is required of them at every stage of the process. All this would be in keeping with the commitment to clear communication in *Our Charter*,⁴² sections 4 to 6 of the 2018 Act⁴³ and article 21 CRPD.⁴⁴

Recommendation 8: Given the likely complexity of DLA-ADP migration from the perspective of transferring individuals and others, SCoSS invites the Scottish Government to share details of any work being undertaken to develop a communication strategy in line with its various obligations under the 2018 Act, *Our Charter* and the Convention on the Rights of Persons with Disabilities. One aim should be to raise awareness of the key differences in eligibility criteria between DLA and ADP so that adults in receipt of DLA, whose circumstances have not changed since April 2020, can judge whether it would be in their interests to request transfer to

⁴¹ Alliance, NAS, CPAG Scotland, SCLD, SAMH.

⁴² Social Security Scotland and the Scottish Government will: make communications, processes and systems as simple and clear as possible by testing them with the people who will use them [and] adapt processes and ways of communicating as much as we reasonably can to meet your needs and preferences.

⁴³ These sections require the Scottish Ministers to have regard to the importance of inclusive, accessible communication, independent advice and independent advocacy.

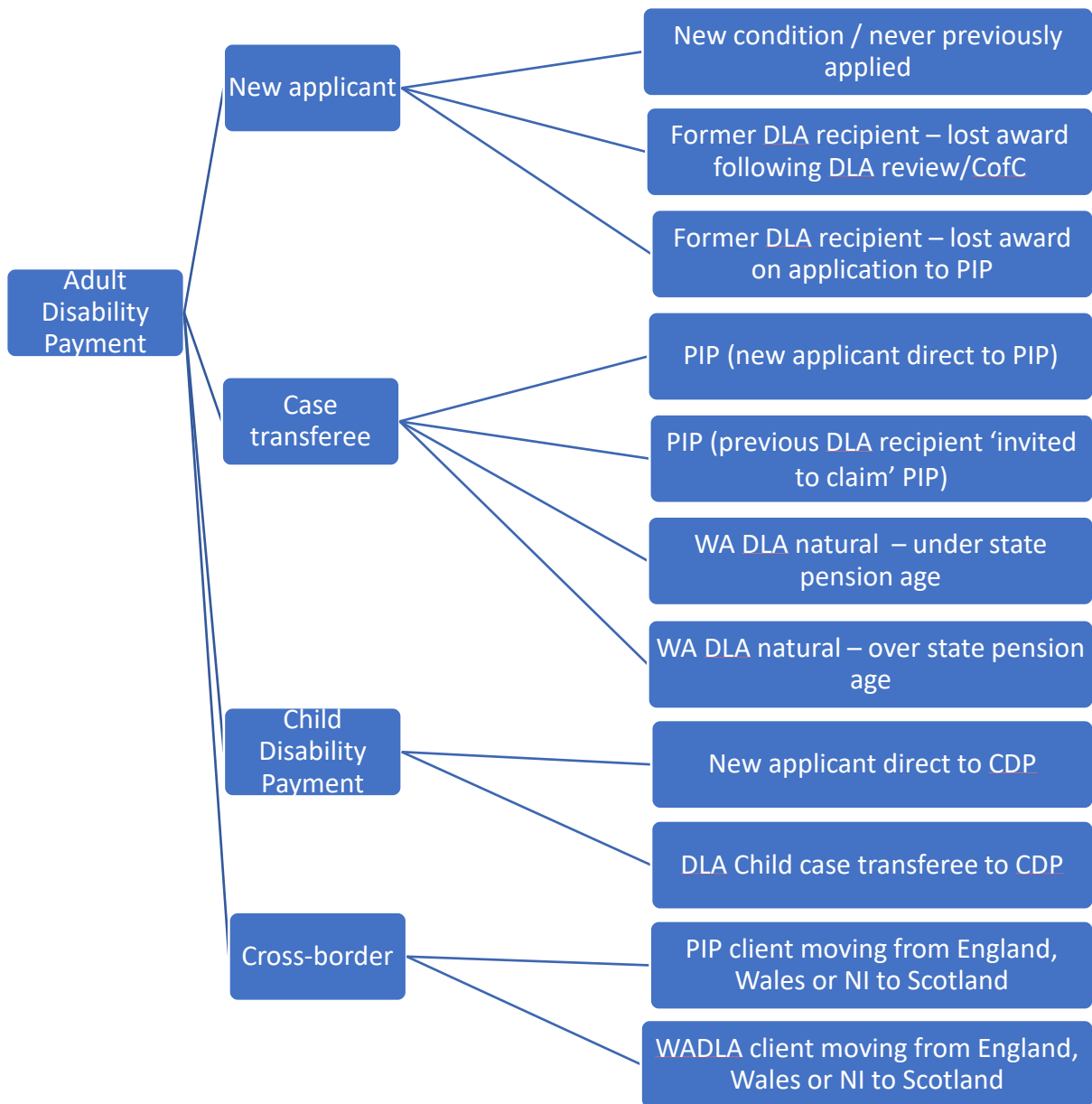
⁴⁴ This article recognises disabled people's right to seek, receive and impart information on an equal basis with others.

ADP. Any such campaign should be tested with stakeholders to ensure clarity.

8. Minor and technical issues

Draft Regulations 17 and 18 address what appear to have been examples of unnecessary inclusion or duplication of definitions and other drafting errors in the CDP and ADP Regulations. SCoSS has not identified any problems with these amendments.

Annex 1 - Routes into Adult Disability Payment



Annex 2 - The draft Regulations

The draft Regulations are composed of 18 provisions:

Regulation 1 states the title and commencement date.

Regulation 2 defines key terms that appear in subsequent regulations.

Regulation 3 requires Social Security Scotland to contact each adult DLA claimants identified as a 'relevant person' for migration to ADP, explaining the process. A 'relevant person' is defined in Regulation 2 as someone who is in receipt of DLA, appears likely to be eligible for ADP, was aged between 16 and 65 in April 2013 and meets the normal requirements of residence in or sufficient link to Scotland.

Regulation 4 requires Social Security Scotland, having fulfilled its duty under Regulation 3, to complete a determination without application of the relevant individual's (now the 'transferring individual') entitlement to ADP. The normal upper limit for new ADP claims – state pensionable age – does not apply to transferring individuals.

Regulation 5 stipulates that the determination under Regulation 4 must be made on the basis that:

Transferring individuals previously entitled to the care component of DLA at the lowest rate become entitled to the newly-created lowest rate of the ADP daily living component.

Transferring individuals previously entitled to the care component of DLA at the middle or highest rate respectively become entitled to the daily living component of ADP at the standard or enhanced rate.

Transferring individuals previously entitled to the mobility component of DLA at the lower or higher rate respectively become entitled to the mobility component of ADP at the standard or enhanced rate.

Regulation 6 specifies the rate of payment of the lowest rate daily living component, which is equivalent to the lowest rate care component of DLA.

Regulation 7 specifies that a transferring individual's DLA award terminates on the date that the ADP award commences.

Regulation 8 sets an extended period of 182 days for Social Security Scotland to complete any redetermination requests from transferring individuals (the normal period for ADP redeterminations is 56 days).

Regulation 9 allows a transferring individual with a terminal illness to move directly to the highest rate of each ADP component, regardless of the level of their previous DLA award.

Regulation 10 makes some procedural amendments to the ADP Regulations as they apply to transferring individuals only. Notably, a transferring individual who is resident in an institution can receive ADP for 28 days before their award is reduced to £0, even if they are receiving a DLA award of £0 at the point of transfer.

Regulation 11 provides that existing appointees who act on behalf of transferring individuals in connection with their DLA claims will provisionally remain in this role until Social Security Scotland has determined whether the individual continues to require an appointee and, if so, whom to appoint.

Regulation 12 requires Social Security Scotland to review the ADP entitlement of each transferring individual, other than those with a terminal illness, within 12 months of transfer (the Scottish Government has informed SCoSS that in practice this review will take place as soon as possible).

Regulation 13 provides that a transferring individual will continue to receive ADP on the same payment pattern (four-weekly or weekly) as that for their DLA award.

Regulation 14 clarifies that any change of circumstances notified to either the DWP or Social Security Scotland should be treated as relevant to the review, as long as it has not already been taken into account in a review of a DLA award.

Regulation 15 specifies that, where the post-transfer review results in a higher award, the effective date for the increase is the date of transfer. This means the increased payment would be backdated.

Regulation 16 specifies that, where the post-transfer review results in a lower award or termination of entitlement, the effective date is the date of the review determination. This means that payments made in the interim would not be treated as overpayments.

Regulation 17 deletes definitions of civil partnership and living as if civil partners from the part of the Child Disability Payment Regulations dealing with residence and presence conditions.

Regulation 18 deletes several other definitions from the ADP Regulations and corrects a previous omission of reference to the descriptors for mobility activities.

Annex 3 - Scrutiny timeline

16 December 2021	SCoSS meeting with Social Security to discuss the scrutiny checklist – timelines, lead colleagues etc.
22 December 2021	Informal working draft Regulations shared with SCoSS by Social Security.
26 January 2022	SCoSS Board attended by Social Security officials in ADP discussion.
10 February 2022	SCoSS Meeting with Social Security and SGLG.
10 February 2022	Draft Regulations formally referred to SCoSS by the Minister for Social Security and Local Government.
25 February 2022	External stakeholder views received from: Child Poverty Action Group, Citizens Advice Scotland, Enable Scotland, Inclusion Scotland, MS Society Scotland, National Autistic Society, National Association of Welfare Rights Advisors Scotland, Scottish Association for Mental Health, Scottish Commission for People with Learning Disabilities, Scottish Independent Advocacy Alliance and Scottish Refugee Council.
17 March 2022	SCoSS draft recommendations and observations released to Scottish Government officials.
23 March 2022	SCoSS report signed off and laid.