POLICY NOTE

THE CARER'S ALLOWANCE SUPPLEMENT AND YOUNG CARER GRANTS (RESIDENCE REQUIREMENTS AND PROCEDURAL PROVISIONS) (EU EXIT) (SCOTLAND) REGULATIONS 2020

SSI 2020/XXX

The above instrument will, if approved by the Scottish Parliament, be made in exercise of the powers conferred by sections 28(2), 81(8) and 95 of the Social Security (Scotland) Act 2018, section 2(2) of the European Communities Act 1972 and section 13 of the European Union (Withdrawal Agreement) Act 2020.

Regulations made under sections 28(2) and 81(8) of the Social Security (Scotland) Act 2018 attract the affirmative procedure while regulations made under section 95 attract the negative procedure. Applying section 33(3) of the Interpretation and Legislative Reform (Scotland) Act 2010, the combined use of these powers means the instrument is subject to the affirmative procedure. The provisions made in reliance of section 2(2) of the European Communities Act 1972 are regarded as also being subject to the affirmative procedure, applying paragraph 2A of schedule 2 of that Act, along with paragraph 2 of schedule 2. This reflects, in particular, the direct application, in paragraph 18 of schedule 2 of the Regulations, of certain provisions of the 2018 Act.

The Scottish Ministers have informed the Scottish Commission on Social Security ('SCoSS') of their proposals, as required by section 97(2) of the Social Security (Scotland) Act 2018. A response to the report from SCoSS on the proposals has been laid before Parliament as required by section 97(9)(a).

Purpose of the instrument

This instrument amends the Social Security (Scotland) Act 2018 ('the 2018 Act') and the Carer's Assistance (Young Carer Grants) (Scotland) Regulations 2019 to expand the residency criteria for Carer's Allowance Supplement and Young Carer Grant, with the purpose of ensuring qualifying individuals in the European Economic Area (EEA) or Switzerland can receive these forms of devolved social security assistance in compliance with European Union (EU) rules on social security coordination.

The Regulations set out the residency conditions individuals in the EEA or Switzerland must satisfy to be eligible to receive Carer's Allowance Supplement or Young Carer Grant.

The Regulations also make provision for application, re-determination and appeals processes for Carer's Allowance Supplement where individuals are seeking to receive this support from outside of the UK. In doing so they adopt the same approach as in the equivalent provisions for application, re-determination and appeals processes set out in the 2018 Act.

The Regulations also provide for applications for Carer's Allowance Supplement and Young Carer Grant to be made by eligible individuals in the EEA or Switzerland in relation to previous periods of care, completed before the Regulations come into force, going back to the launch of the respective benefits.

Policy objectives

The Carer's Allowance Supplement and Young Carer Grants (Residence Requirements and Procedural Provisions) (EU Exit) (Scotland) Regulations 2020 will allow eligible carers in the EEA and Switzerland to receive Carer's Allowance Supplement or Young Carer Grant in line with EU rules on social security coordination. This will include carers who have received these benefits previously in Scotland and move to an EEA member state or Switzerland, and those who apply for this support for the first time from outside of the UK.

Background

EU rules on social security coordination apply across the EEA (the EU Member States together with Iceland, Norway and Lichtenstein) and Switzerland, and are intended to ensure that people exercising their rights of free movement within the EEA and Switzerland are not adversely affected by the application of different social security systems.

Each Member State is under an obligation to report new benefits introduced or material changes to existing benefits to the Administrative Commission for the Coordination of Social Security Systems, an EU Committee which promotes the proper functioning of the EU rules.

In discussions between the UK Government and the Administrative Commission, on existing devolved forms of assistance, the Administrative Commission's view was that Carer's Allowance Supplement and Young Carer Grant should be classified as social security 'cash sickness benefits' under the EU rules.

This classification means that, in line with the rules, these forms of support should be paid in certain circumstances to people living outside of Scotland in the EEA or Switzerland. As Carer's Allowance Supplement and Young Carer Grant are treated as 'one-off' rather than continuing benefits, with a fresh determination of entitlement being needed in relation to each qualifying period or qualifying date on which a person is outside the UK, we are giving effect here to Article 19 of Council Regulation (EC) No 1408/71 and Article 21 of Regulation (EC) No 883/2004. These deal with claims for non-contributory 'cash sickness' benefits by people residing in an EEA member state other than the one which is competent for the payment of such benefits to them at the point where they claim. This is different to the scenario of a person having an ongoing entitlement to a particular benefit, before leaving the UK, which means that they can continue receiving it in the new state, all other things being equal.

The Carer's Allowance Supplement and Young Carer Grants (Residence Requirements and Procedural Provisions) (EU Exit) (Scotland) Regulations 2020 are made in exercise of a combination of powers under the Social Security (Scotland) Act 2018, and section 2(2) of the European Communities Act 1972. Schedule 1, and regulation 11, are provided for by the enabling provisions of the 2018 Act relating to Carer's Assistance and Carer's Allowance Supplement (sections 28(2) and 81(8) respectively), along with section 13 of the European Union (Withdrawal Agreement) Act 2020. Regulations 4-10, and (other than paragraph 15) schedule 2, which provide for accompanying matters such as application, determination, appeal etc. in relation to Carer's Allowance Supplement are provided for under section 2(2) of the European Communities Act 1972. These accompanying matters are necessary to give effect to EU law.

The EU rules on social security coordination will continue to apply in future to individuals who are in a cross-border situation at the end of 2020, provided those individuals comply with their country of residence's settlement scheme. These individuals are a 'protected cohort' in terms of the Withdrawal Agreement between the UK and EU, and can continue to export benefits from the UK or take advantage of the equal treatment rules when making benefit claims in the UK. Regulation 11(4) and paragraph 5 of schedule 1 of the Regulations look to ensure that the provisions on social security co-ordination in Title III of Part 2 of the Withdrawal Agreement are given effect to where entitlement to Carer's Allowance Supplement or Young Carer Grant arises after 31 December 2020. They also capture the equivalent provisions in the Swiss Citizens' Rights Agreement and the EEA EFTA Separation Agreement. In addition, paragraph 5 of schedule 1 and regulation 11(4) provide for people falling within the UK/Ireland Convention on Social Security. The Convention maintains, for those people, broadly the same arrangements for social security co-ordination if moving between the UK and Ireland after 31 December 2020 as apply at present. The position for UK or EEA nationals moving between the UK and the wider EEA after the end of 2020 is subject to ongoing negotiations between the UK and the EU.

Eligibility

The Regulations expand the residency criteria for Carer's Allowance Supplement and Young Carer Grant so that people can apply for and receive these benefits when they are habitually resident in the EEA or Switzerland, where the United Kingdom is the 'competent state' for payment of cash sickness benefits to them, and they can demonstrate a 'genuine and sufficient link' to Scotland, in addition to meeting the standard eligibility criteria.

An individual's 'competent state' is the state which is responsible for paying benefits to them. The EU rules set out an order of priority which is used to determine which state's legislation applies to the person. Individuals are usually subject to the rule that only one state's legislation should apply at any one time. And the fact that the legislation of a particular state applies generally means that the state is considered to be 'competent' for the payment of benefits. A 'genuine and sufficient link' test has been found in court to be compatible with the EU social security coordination rules. It is not a set of prescribed factors, but can take into account things like whether someone has spent a significant part of their life in the place in question, whether they have worked, own property or have family there.

It is anticipated that only very small numbers of carers outside of the UK will be eligible for either form of support.

Application and determination

The Regulations also make provision for application, re-determination and appeals processes for Carer's Allowance Supplement where individuals are seeking to receive this support from outside of the UK. For carers resident in Scotland, Carer's Allowance Supplement is an automatic payment made using data from the Department for Work and Pensions but this will not be possible for carers outside of the UK so an application process is required.

The Regulations will also ensure that eligible carers can receive all the payments they are entitled to, by providing for applications to be made by people outside of the UK for payments in relation to periods of care completed before the regulations come into force.

These provisions are included for both Carer's Allowance Supplement and Young Carer Grant, going back to the respective launch dates of each form of assistance.

Additional provisions

Carer's Allowance Supplement was created as an interim measure under section 81 of the 2018 Act. These regulations replicate or apply relevant provisions, which apply automatically to benefits created under Chapter 2 of the 2018 Act, to Carer's Allowance Supplement where this is applied for from outside of the UK. This includes duties on Scottish Ministers to inform individuals about possible eligibility for other forms of devolved assistance, and provision for Carer's Allowance Supplement applicants to have appointees to act on their behalf.

Consultation

Existing provisions for Carer's Allowance Supplement and Young Carer Grant have been informed by the Consultation on Social Security in Scotland, carried out in 2016, and the Young Carer Grant consultation in 2018. These regulations are being brought forward to ensure Carer's Allowance Supplement and Young Carer Grant can be paid to eligible carers in the EEA and Switzerland in line with EU rules on social security coordination, and as such will extend existing provision to a wider group of carers. Given the nature and scope of the changes being made through these regulations, informal consultation has been carried out with stakeholders in relation to the delivery of these.

To comply with the requirements of section 97 of the Social Security (Scotland) Act 2018, the policy proposals were also sent to the SCoSS in the form of draft regulations on 31 August 2020. SCoSS submitted their response to these proposals to the Social Security Committee on 25 September 2020. The Scottish Government's response to the recommendations contained in that report is laid before Parliament with this instrument and is available on the Scottish Government's website. As a result of the recommendations provided by SCoSS, changes were made to these Regulations to:

- ensure these were clear that eligible carers applying for past payments for Young Carer Grant would be able to make these applications in any order, or simultaneously, and still receive all the support to which they are entitled, and
- align the timescales for re-determinations relating to applications for Young Carer Grant from outside of the UK with those for applications within Scotland.

Impact assessments

The full range of impact assessments were considered and completed where necessary for the 2018 Act and have been published for both Carer's Allowance Supplement[1] and for the Young Carer Grant Regulations[2].

Building on these, an outline Equalities Impact Assessment (EQIA), Fairer Scotland Duty Impact Assessment and Children's Rights and Wellbeing Impact Assessment (CRWIA) were

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1 Carer's Allowance Supplement equality impact assessment https://www.gov.scot/publications/carers-allowance-supplement-equality-impact-assessment/, Carer's Allowance Supplement Child Rights and Wellbeing impact assessment: https://www.gov.scot/publications/carers-allowance-supplement-child-rights-wellbeing-impact-assessment/
2 Young Carer Grant impact assessments: https://www.gov.scot/publications/young-carer-grant-impact-assessments/

produced in October 2020 and are provided with this instrument. It is anticipated from the analysis in these impact assessments that the extension of these forms of support to eligible carers in the EEA and Switzerland should have a broadly positive impact on those affected.

Financial effects

A Business and Regulatory Impact Assessment (BRIA) was carried out for the 2018 Act, which includes provision for Carer's Allowance Supplement and a separate BRIA was carried out for Young Carer Grant. It is not considered to be necessary for a further BRIA to be carried out for these regulations in light of the scope of the changes being made to Carer's Allowance Supplement and Young Carer Grant.

The Scottish Fiscal Commission (SFC) has a statutory duty to provide independent and official forecasts of Scottish GDP, devolved tax revenues and devolved social security expenditure. Under the Scottish Fiscal Commission Act 2016, the SFC may also produce forecasts on other "fiscal factors", defined as "anything which the Scottish Ministers use to ascertain the amount of resources likely to be available for the purposes of sections 1 to 3 of the Public Finance and Accountability (Scotland) Act 2000". The Protocol for engagement between the Scottish Fiscal Commission and the Scottish Government notes that the SFC may produce forecasts where it considers the policy, or policies, to have a "non-negligible impact on receipts or expenditure".

Having considered the measures in these regulations, the SFC chose not to produce forecasts for them on the basis that they are not expected to change the SFC's forecast for Carer's Allowance Supplement from that published in February 2020. The changes to be made through these regulations are expected to have an immaterial effect on Carer's Allowance Supplement expenditure. The SFC does not routinely produce a forecast of Young Carer Grant expenditure as the expenditure to date has been judged by the SFC to be immaterial.

The right to appeal to the First-tier Tribunal is provided for in schedule 2 of the Carer's Allowance Supplement and Young Carer Grants (Residence Requirements and Procedural Provisions) (EU Exit) (Scotland) Regulations 2020. Legal Assistance will continue to be available to individuals to appeal an entitlement decision to the Upper Tribunal, Court of Appeal or Supreme Court. The Scottish Government does not expect any adverse impact to the Legal Aid budget as a result of the changes being made through these regulations. Current Young Carer Grant recipients are already able to access legal aid to appeal entitlement decisions, and given the very small numbers of additional carers who will become eligible through these regulations, we do not anticipate high numbers of additional re-determination or appeal requests as a result of these regulations.

Scottish Government
Social Security Directorate

11th November 2020