

Adult Disability Payment: Consultation

SAMH Response

Introduction

SAMH is Scotland's largest mental health charity. Around since 1923, SAMH currently operates over 60 services in communities across Scotland providing mental health social care support, primary care, addictions and employment services, among others. These services together with our national programme work in See Me, respectme, suicide prevention, sport and physical activity, inform our public affairs work to influence positive social change.

SAMH welcomes the opportunity to respond to this consultation. The introduction of Adult Disability Payment (ADP) represents the most significant expansion of the Scottish Social Security System to date, particularly in regards to adults living with mental health problems. We welcome many of the proposed administrative changes to ADP in comparison to PIP. In particular, we welcome the changes to the assessment process and the proposal that ADP will be awarded on a rolling basis with light touch reviews. These changes among others should significantly improve the experience of applying and receiving ADP compared to PIP.

We recognise that in order to ensure a safe and secure transfer of Personal Independence Payment (PIP) claimants to ADP and to ensure no loss of UK passported benefits the regulatory framework of PIP has broadly been retained. We believe that the proposed independent review of Adult Disability Payment should be used to fundamentally assess all aspects of ADP including adequacy, the 50% rule and points based system. SAMH is a member of the Scottish Campaign on Rights to Social Security (SCoRSS). We believe the SCoRSS Report: Beyond a Safe and Secure Transition - A Long Term Vision for Disability Assistance in Scotland, should be a basis for the review.¹

Key Points:

- SAMH has longstanding concerns about the retention of the 50% rule for ADP. Regulations and guidance to Case Managers must reflect up to date PIP case law in regards to the reliability and safety criteria
- SAMH believes that there should be no three month qualifying period for the benefits. The regulations should be amended accordingly
- The 'past presence' test should be removed
- We welcome the introduction of underlying entitlement for the Daily Living component for people in hospital or residential care settings
- We welcome the introduction of rolling awards. We believe the regulations should be amended to make direct reference to 5-10 year award review periods
- Regulation 39 "Qualifications and Experience Necessary to Carry out Assessments" should be amended to ensure practitioners should have previously been working in the health or social care role within the five years prior to becoming a case manager/specialist advisor.
- Draft regulations should be amended to provide a maximum 42-day period for the agency to undertake a re-determination

¹ SCoRSS [Beyond a Safe and Secure Transition - A Long Term Vision for Disability Assistance in Scotland](#) 2020

- Draft regulations should be amended to prevent repayment of overpayments in cases of official error
- Daily Living Activities and associated descriptors should be amended to include direct reference to psychological distress
- Descriptors for Mobility Activity 1: “Planning and following journeys” should urgently be redrafted to remove the exclusion of psychological distress as a means to gain points in descriptors (c), (d) and (f). The associated PIP descriptors were found unlawful and in contravention of international human rights law
- The proposed independent review of Adult Disability Assistance should use the SCoRSS paper: “Beyond a Safe and Secure Transfer” as a basis

Part 1: Introductory and Interpretation (regulations 1 and 2)

Q 1: Do you agree the regulations reflect this policy intent? YES

Q 2: If you have any further comments please provide them here. NA

Part 2: Disability Assistance for Working Age People Overview (regulation 3)

Q 3: Do you agree the regulations reflect this policy intent? YES

Q 4: If you have any further comments please provide them here. NA

Part 3: Eligibility – Daily Living Component and Mobility Component (regulations 4 – 9)

Q 5: Do you agree the regulations reflect this policy intent? YES

Q 6: If you have any further comments please provide them here.

Please see our response to question 31 on Schedule 1 for detailed comment on the Daily Living and Mobility descriptors.

Determination of ability to carry out activities (regulation 6); Scoring for daily living and mobility activities (regulations 7 and 8); Scoring: further provision (regulation 9)

Q 7: Do you agree the regulations reflect this policy intent? YES

Q 8: If you have any further comments please provide them here.

While the regulations reflect the policy intent – this being to replicate the PIP legal framework – we have a number of longstanding concerns, particularly in relation to the 50% rule.

In regards to regulation 6 “*Determination of ability to carry out activities*”, a claimant’s ability to undertake activities against descriptors will be assessed against their ability to undertake the activity ‘reliably’ in accordance with the following four criteria:

(a) safely; (b) to an acceptable standard; (c) repeatedly; and (d) within a reasonable time period.

SAMH believes that guidance to Case Managers must reflect up to date PIP case law in regards to the four criteria, specifically the 'safely' requirement. For example, the 2017 Upper Tribunal decision - *RJ, GMcL and CS v Secretary of State for Work and Pensions v RJ (PIP): [2017] UKUT 105 (AAC); [2017] AACR 32* – provided clarity on the interpretation of 'safely' including in regards to the need for supervision. This is relevant for many people including people with mental health problems who require supervision to prevent harm when undertaking daily activities. The ruling found that for an activity to be unsafe an activity does not require that the occurrence of harm is “more likely than not”.² Rather there only needs to be a “a real possibility that cannot be ignored of harm occurring”.³ This ruling has resulted in a more expansive understanding of the term “safely” to be used when determining points against descriptors. It is important that this and other relevant case law is adopted in the Scottish system so the interpretation of ADP regulations is in no way more restrictive than those of PIP.

In regards to regulation 9 “*Scoring: Further provision*” SAMH has longstanding concerns about the adoption of the 50% rule as outlined in our response to the Scottish Government’s consultation on Disability Assistance in 2019.⁴ Mental health conditions can fluctuate, both in the short and long term. As such, accurately quantifying the impact of a mental health condition on someone’s functional ability (for example: their ability to prepare a meal or undertake a journey) over time against a strict 50% mathematical criteria is incredibly challenging. Indeed case law (Case No UK/972/2015) has found that in the case of comorbid conditions, mathematical probability theory may be needed to calculate whether someone satisfies the 50% rule.⁵ In the long term, following case transfer, we would like to see the 50% rule and wider points based system for determining entitlement replaced with a broader, more holistic, analysis of the person’s circumstances.

Prior to more fundamental changes to Disability Assistance, clear guidance for case managers, informed by people with lived experience of mental health problems and other disabilities, should be produced. This should include clear and realistic guidance on the interpretation of the 50% rule to prevent people with fluctuating or unpredictable conditions from being unduly penalised.

Part 4: The qualifying period conditions (regulations 10 – 13)

Q 9: Do you agree the regulations reflect this policy intent? YES

Q 10: If you have any further comments please provide them here.

The regulations mirror those of PIP, with applicants only eligible for ADP if they have had limited ability to carry out daily living activities or mobility activities for at least 13 weeks prior to application and an expectation that impairment will last at least 36 weeks following the application. We are concerned that the qualifying period will prevent people with a sudden onset of mental health problems from qualifying for ADP immediately. SAMH believes that there should be no three month qualifying period for the benefits. This view is shared by the

² UK Government [RJ, GMcL and CS v Secretary of State for Work and Pensions v RJ \(PIP\): \[2017\] UKUT 105 \(AAC\) ; \[2017\] AACR 32](#) 2017

³ UK Government [RJ, GMcL and CS v Secretary of State for Work and Pensions v RJ \(PIP\): \[2017\] UKUT 105 \(AAC\) ; \[2017\] AACR 32](#) 2017

⁴ SAMH [Response to: Social Security: A Consultation on Disability Assistance in Scotland](#) 2019

⁵ Tribunals Judiciary [AK v Secretary of State for Work and Pensions Case No UK/972/2015](#)



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DACBEAG.⁶ In line with the recommendations from DACBEAG we agree with the premise that someone should be expected to have the condition for at least nine months, as this is in line with the purpose of Disability Assistance to mitigate the extra costs of disability.

Part 5: Residence and Presence Conditions (regulations 14 – 21)

Q 11: Do you agree the regulations reflect this policy intent? DON'T KNOW

Q 12: If you have any further comments please provide them here.

SAMH agrees with concerns raised by Citizen Advice Scotland and other members of SCoRSS about the 'past presence' test during the 2019 consultation on Disability Assistance and 2020 consultation on The Disability Assistance for Children and Young People (Scotland) Regulations 2020.⁷ We agree with CAS that the test should be removed as it represents an unnecessary barrier to newly resident disabled people in Scotland accessing essential social security support. Due to its arbitrary nature we do not believe a past presence test is in accordance with the principal that social security is a human right.

The past presence test requires an applicant to have been present in the United Kingdom at least 104 weeks out of the previous 156. While we would prefer to see the test removed we do welcome provisions in the draft regulations for exceptions to the test, such as: for people with terminal illness, people awarded refugee status; and where someone can "demonstrate a genuine and sufficient link to Scotland." If the test is retained, clarity in guidance is needed on defining a "genuine and sufficient link to Scotland". This should be defined in broad terms so as not to act as a barrier on disabled people accessing ADP.

Part 6: Entitlement under Special Rules Relating to Age (regulations 22 – 25)

Q 13: Do you agree the regulations reflect this policy intent? NA

Q 14: If you have any further comments please provide them here. NA

Part 7: Entitlement Under Special Rules Related to Terminal illness (regulation 26)

Q 15: Do you agree the regulations reflect this policy intent? NA

Q 16: If you have any further comments please provide them here. NA

Part 8: Payability when person is residing in certain accommodation or is detained in custody (regulations 27 – 32)

Q 17: Do you agree the regulations reflect this policy intent? YES

Q 18: If you have any further comments please provide them here.

In our response to the 2019 Scottish Government consultation on Disability Assistance, we raised concerns about the potential requirement for people to be reassessed for Disability Assistance (now ADP) after breaks in entitlement due to hospital or residential social care

⁶ Scottish Government [Disability and Carers Benefits Expert Advisory Group: Assessments Workstream Duration of awards](#) 2019

⁷ CAS [Scottish Commission on Social Security consultation – The Disability Assistance for Children and Young People \(Scotland\) Regulations 2020 Response from Citizens Advice Scotland](#) 2020

stays of over 28 days.⁸ We welcome that the draft regulations provide for underlying entitlement of the Daily Living component of ADP while the claimant is resident in hospital or residential social care (payable at £0 while resident in a care/hospital setting). As such we also warmly welcome the explicit provision in the draft regulations that the individual will receive a determination without an application following leaving hospital or social care in order to resume full payment of their original Daily Living component of ADP – both for periods of temporary leave from care settings and permanent moves back into the community.

Part 10 – Making of Applications and Payments (regulations 33 –37)

Q 19: Do you agree the regulations reflect this policy intent? YES

Q 20: If you have any further comments please provide them here.

SAMH agrees with the Scottish Government that in order not to create a two tier system, the payment level of ADP should be the same as that of PIP, at least until case transfer from PIP is complete. We believe that the proposed independent review of ADP should fully consider payment levels and the overall adequacy of ADP in mitigating the additional costs incurred due to disability. This will allow future reform, following case transfer, to include increasing the value of ADP to better meet the policy goal of mitigating additional costs of disability if required.

We welcome provisions (6) in draft regulation 35 *“When an application is to be treated as made and beginning of entitlement to assistance”* allowing Scottish Ministers to treat an application as having been made within the “required period” (8 weeks following submission of applicant’s name and date of birth for purposes of making an application) if there is a “good reason” why an application was made outwith the 8-week period. We believe guidance should define a “good reason” broadly including as resulting from the symptoms/effects of the applicant’s medical condition or disability. For example, someone’s mental health condition may make it difficult or impossible for an applicant to complete their application within 8 weeks. We believe people should not lose out on entitlement for this or other medical reasons.

Draft regulation 37: *“Continuing Eligibility”* marks a welcome change from the PIP framework, by removing award periods and introducing rolling entitlement. We know that for people with mental health problems, frequent reassessments and short PIP award periods are often distressing and detrimental to people’s mental health recovery.⁹ We agree with the Scottish Government’s proposals for long term awards with ‘light touch’ reviews between 5 - 10 years. We also strongly welcome the commitment in the Draft Fairer Scotland Duty Summary (included with the consultation) that the possibility of introducing lifetime ADP awards is being reviewed.

We are disappointed that the draft regulations themselves don’t include any reference to review periods of 5-10 years. Other disability organisations including Inclusion Scotland echo these concerns.¹⁰ We believe the draft regulations should be amended to include longer term reviews (5-10 years), so they are a matter of law. If this is not done any future administration could introduce shorter awards without any parliamentary process of scrutiny.

⁸ SAMH [Response to: Social Security: A Consultation on Disability Assistance in Scotland](#) 2019

⁹ SAMH [Personal independence Payment: What’s the Problem?](#) 2016

¹⁰ Inclusion Scotland [Adult Disability Payment Briefing](#) 2021

Part 11: Qualifications and Experience Necessary to Carry out Assessments (regulation 38)

Q 21: Do you agree the regulations reflect this policy intent? YES

Q 22: If you have any further comments please provide them here.

Assessments under PIP did not work for people with mental health problems and are consistently the most significant problem with PIP reported to us by people SAMH support.¹¹ Problems included the intimidating nature of face to face assessments and a lack of understanding from assessors of the impact of mental health problems on peoples functionality.^{12, 13} SAMH was instrumental during the Social Security (Scotland) Bill process in ensuring that 'suitably qualified assessor' provisions were included in the Bill.

We broadly agree with how these provisions are proposed to be delivered through the draft regulations and recognise they reflect guidance to Scottish Ministers from DACBEAG.¹⁴ We particularly welcome provision in the draft regulation 38 (2)(b) that where an assessment for entitlement for ADP involves consideration of the individual's mental health condition the assessor (case manager / specialist advisor) must have health or social care employment experience directly provided to individuals with mental health conditions. We believe this has potential to radically improve both the quality of decisions on entitlement and the overall experience of the assessment process for people with mental health problems.

While we are generally in favour of the draft regulations we believe it should go further in regards to an assessor's professional experience. As drafted, the practitioner making entitlement decisions must have at least two years' health or social care experience. We believe this should be increased to three years. We also believe reference in the regulation should be made to how recently professional experience was gained. We propose that the practitioner should have previously been working in the role within the five years prior to becoming a case manager/specialist advisor. This will ensure the skills and knowledge gained through the particular professional position are still relevant.

Part 12: Determinations of entitlement to Adult Disability Payment without application (regulations 39 – 43)

Q 23: Do you agree the regulations reflect this policy intent? YES

Q 24: If you have any further comments please provide them here.

Part 13 - Periods in respect of a re-determination request

Q 25: Do you agree the regulations reflect this policy intent? YES

Q 26: If you have any further comments please provide them here.

¹¹ SAMH [Personal independence Payment: What's the Problem?](#) 2016

¹² SAMH [Personal independence Payment: What's the Problem?](#) 2016

¹³ Mind and SAMH [Mind and SAMH submission to the Work and Pensions Committee inquiry on PIP and ESA assessments](#) 2017

¹⁴ Scottish Government [Disability and Carers Benefits Expert Advisory Group: Assessments Workstream Suitably Qualified Assessors](#) 2018

SAMH welcomes that there will be a maximum period for the Agency to undertake a redetermination. This is an improvement on the UK system where there is no limit to the time the DWP can take to complete a mandatory reconsideration.¹⁵ In our response to the 2019 Disability Assistance consultation, we called for a 28 day period for the agency to undertake a re-determination, and 6 weeks period for a claimant to request a re-determination.¹⁶ We welcome that the draft regulations provide 6 weeks (42 days) for claimants to request a re-determination. This is an improvement on previous proposals from the Scottish Government for a 31-day request window.

While our preference is still for the Agency to have a 28-day period to undertake a re-determination, if that is not deemed as achievable we believe there should be parity with the time provided to applicants to request a re-determination. As such we believe the draft regulations should be amended to provide a maximum 42-day period for the agency to undertake a re-determination. 56-days as currently proposed in the draft regulations is too long for people to deal with the uncertainty of a re-determination.

Part 14: Provision of vehicles (regulation 45)

Q 27: Do you agree the regulations reflect this policy intent? NA

Q 28: If you have any further comments please provide them here. NA

Part 17 – Liability for Overpayment (regulation 46 and 47)

Q 29: Do you agree the regulations reflect this policy intent? DON'T KNOW

Q 30: If you have any further comments please provide them here.

SAMH has longstanding concerns about recovery of overpayments of benefits, including overpayments due to official error.¹⁷ We are concerned that the regulations as currently drafted allow for overpayments resulting from official errors to be recovered. We believe this should only ever occur in exceptional circumstances and the norm should be that the state absorbs the loss in cases of official error.

Schedule 1 – Adult Disability Assistance Determination

Q 31: If you have any comments on Schedule 1 please provide them here.

Schedule 1 sets out the ADP descriptors used to determine eligibility, these are broadly the same as the current PIP descriptors.¹⁸ As stated earlier in the consultation, SAMH accepts that until case transfer is complete, fundamental reform of ADP moving away from the PIP framework is not possible. As such we understand the rationale for broadly retaining the PIP descriptors in the short term. However, we have longstanding concerns about whether the descriptors enable applicants to fully express the effect of mental health problems on their functional ability, so we recommend minor adjustments to the descriptors as drafted.

¹⁵ Citizens Advice [Challenging a benefit or tax credit decision - asking for a mandatory reconsideration](#) 2019

¹⁶ SAMH [Response to: Social Security: A Consultation on Disability Assistance in Scotland](#) 2019

¹⁷ SAMH [Response to: Social Security: A Consultation on Disability Assistance in Scotland](#) 2019

¹⁸ DWP [Guidance: PIP assessment guide part 2: the assessment criteria](#) September 2020

Indeed one of the biggest problems with PIP is the assessment's inaccurate application of the person's experience and evidence against the descriptors, resulting in incorrect scoring.¹⁹ For example, people with mental health problems have often reported not being awarded points correctly against daily living descriptors such as preparing food, reading and understanding signs or taking nutrition, as the mental health and motivational barriers to undertaking these activities are often not recognised during PIP assessments in an equal way to physical health barriers.²⁰ While we are hopeful improvements to the assessment of ADP in comparison to PIP, such as the use of suitably qualified assessors, may mitigate these problems, they are unlikely to be entirely remedied. We believe that in order to prevent a physical functionality bias in the descriptors and associated points, direct reference to mental health and/or psychological distress should be made throughout the daily living activities and associated descriptors. For example, an 'inability to take nutrition due to psychological distress' descriptor should be added to the taking nutrition daily activity. This would recognise the effect an eating disorder or history of psychosis has on someone's ability to safely reliably take nutrition.

We have a serious and specific concern with Activity 1 of the Mobility Activities: "Planning and following journeys". As drafted the associated descriptors, particularly descriptors (c), (d) and (f) do not reflect up to date case law and are directly discriminatory to people with mental health problems. All three descriptors as drafted include the exclusion "For reasons other than psychological distress", mirroring the UK government's 2017 (now repealed)-amendment of the equivalent PIP descriptors.²¹ The direct exclusion of psychological distress as a means to gain points under these descriptors was found to be unlawful and "blatantly discriminatory", by the High Court in case *RF v SSWP and Others* [2017] EWHC 3375.²² The High Court ruled that the descriptors contravened Articles 1, 8 and 14 of the European Convention on Human Rights (ECHR), as it treated people with mental health problems less favourably than people with physical health problems.²³ The UK government did not appeal the ruling and the descriptors were amended to their previous wording, removing reference to excluding psychological distress.

As a matter of urgency the Scottish Government should amend the drafting of descriptors (c), (d) and (f) for Activity 1 of the Mobility Activities: "Planning and following journeys", to remove the exclusion of psychological distress. If this does not occur, it appears the Scottish Government will be in breach of human rights law and obligations.

Schedule 2 – Members of Her Majesty's Forces: Excluded Persons

Q 32: If you have any comments on Schedule 2 please provide them here. NA

Q 33: If you have any comments about the proposed review of Adult Disability Payment please provide them here.

¹⁹ Mind and SAMH [submission to the Work and Pensions Committee inquiry on PIP and ESA assessments](#) 2017

²⁰ Mind and SAMH [submission to the Work and Pensions Committee inquiry on PIP and ESA assessments](#) 2017

²¹ CPAG [PIP AND PSYCHOLOGICAL DISTRESS](#) 2018

²² CPAG [PIP AND PSYCHOLOGICAL DISTRESS](#) 2018

²³ CPAG [PIP AND PSYCHOLOGICAL DISTRESS](#) 2018



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SAMH welcomes the proposed review of Adult Disability Payment. As a member of the Scottish Campaign on Rights to Social Security (SCoRSS) we fully endorse their publication “Beyond a Safe and Secure Transition” outlining a long term vision for Disability Assistance.²⁴ We believe that vision should provide the basis for the review. Importantly the review should look at all aspects of Disability Assistance, including adequacy, purpose, relationship to wider UK and Scottish social security systems, and retention of a points based systems or alternatives. We believe the review should be independent from government and led by people with experience of disability.

Q 34: If you have any comments about the impact assessments please provide them here. NA

Q 35: If there is anything else you would like to tell us about the regulations, impact assessments or Adult Disability Payment in general, please do so here. NA

²⁴ SCoRSS [Beyond a Safe and Secure Transition](#) 2020