

Engender response to the Scottish Government consultation on Adult Disability Payment

March 2021

1. INTRODUCTION

Engender welcomes this opportunity to comment on the Scottish Government’s draft regulations for the new Adult Disability Payment (ADP). We have been engaged on work around gender and social security since the 2010 programme of “welfare reform” and over that period we have sought to highlight the ways in which women and women’s equality, safety, access to resources and human rights are all affected by the design and delivery of social security. In the UK, women are a small majority of disabled people¹ and, as a group, disabled women are amongst the very hardest hit by welfare reform. Over half of the cuts to benefits between 2010 and 2015 fell on disabled people and their families.²

Engender has previously commented on the Scottish Government’s proposals for a Scottish disability payment to replace Personal Independence Payments (PIP) in our response to the 2019 consultation on disability assistance in Scotland.³ We take this opportunity to highlight the concerns we outlined about the ways PIP disadvantages disabled women and how the design of disability assistance – including assessment criteria – fails to take gendered norms into consideration. We do not consider ourselves experts in the detail of the regulations.

In this response we do not provide specific comments on the draft regulations but reiterate the need to more fully consider how ADP can advance equality for disabled women. As a member of the Scottish Campaign for Rights in Social Security (SCORSS), Engender has co-signed the response and long-term vision for disability support drafted by members as well as highlighting individual responses from organisations within SCORSS on the detail of the regulations, including the ALLIANCE, Inclusion Scotland, Child Poverty Action Group and Citizens’ Advice Scotland. This submission addresses additional issues, including gendered considerations around

¹ Papworth Trust (2014) ‘Disability in the United Kingdom 2014: Facts and Figures’.

² Inclusion Scotland (2016) ‘Scottish Parliament Elections 2016: Social Security Manifesto Briefing’.

³ Engender (2019) Engender response to the Scottish Government consultation on disability assistance in Scotland. Available at: <https://www.engender.org.uk/content/publications/Engender-response-to-the-Scottish-Government-consultation-on-disability-assistance-in-Scotland.pdf>.

ADP and the Equality Impact Assessment that Scottish Government has produced as part of the process of developing its proposals.

2. PIP AND GENDER

2.1 General Comments

As we have previously outlined,⁴ Engender's research into PIP and a replacement benefit for disabled women suggests that:

- Not enough research and gender analysis has been done into the application of points-based systems, which makes it difficult for Engender to endorse Scottish Government's proposed approach of 'copying and pasting' PIP's indicator framework into ADP. The limited evidence that does exist suggests that highly gendered experiences such as care are being used as evidence against women's applications while not being expressly acknowledged within the indicators. For example "can dress and undress unaided" is being used to deny women's applications when the person who can be dressed and undressed is a dependent child. Points-based systems should not be replicated without a thorough analysis of what the consequences will be for decision-making, and training for assessors/advisors should include gender, women's health, and inequalities in order to avoid biases in decision-making.
- Proposals to maintain the '28-day rule', where entitlement is suspended for example during a prolonged stay in hospital, risk undermining individual independence and dignity and causing financial hardship, especially where it cuts off passported entitlements such as carer's allowance.
- The option of a face-to-face assessment should always be available for individuals at their request, but the Scottish Government should ensure no-one is reviewed more frequently than under PIP. Scottish Government should explore the implementation of lifetime awards for conditions and impairments in which no change can be expected e.g. cerebral palsy.
- Women should not be penalised for childcare or public transport issues which impact on their ability to attend assessments.
- Changes to disability support must not negatively impact carers' entitlements even in the short term ahead of a more thorough review of carers support in advance of the introduction of Scottish Carer's Assistance.
- The equality impact assessment (EQIA) of ADP must be completed at the earliest opportunity and a gendered analysis of PIP used as part of the evidence gathered in the assessment. This must take place before criteria and processes from PIP are replicated in ADP that may unwittingly disproportionately negatively impact on women.

⁴ Ibid.

- Data collection and analysis, including the production of gender-sensitive sex-disaggregated data, should be built into the system to ensure compliance with the continuous improvement equality and non-discrimination principles.

While we understand the Scottish Government commitment to a ‘safe and secure transition’, it is with some regret that the ADP policy and draft regulations included in this consultation do not consider the specific impacts on disabled women in developing more radical reforms to disability support.

2.2 Changes to Assessment Processes

We welcome the reforms proposed to assessment processes and the introduction of consultations, reducing the need for face-to-face assessments. We also welcome the rolling review approach proposed and encourage the Scottish Government to introduce lifetime awards, although we also believe that this should be accompanied by a right for the recipient to request a review. The proposal to set award review dates at five or ten years, as well as indefinite awards, should be included on the face of the regulations to ensure certainty for people in receipt of ADP and their carers.

We also support concerns raised by other organisations including Inclusion Scotland about maintaining the 50% rule for applications between PIP and ADP and the impacts this may have on people with variable conditions including Chronic Fatigue Syndrome/ME, Multiple Sclerosis, or mental health conditions. There is a need to consider the - in general - poor understanding of women’s health and women’s poorer health outcomes. Advisors and Specialist Advisors should have regard to specific issues around women’s health and the gendered nature of what are understood to be long-term conditions and impairments. ME for example is four times more likely to affect women than men.⁵

Regulation 11 provides that assessments must be carried out by a “suitably qualified” person, defined as a person “employed for a cumulative period of at least two years, in the direct provision to individuals of health care **or** social care services” [our emphasis]. We are unconvinced this is specific enough and recommend that assessors have a basic level of gender competence within training, including understanding issues around contraception, pregnancy, and sex-specific (e.g. endometriosis) and non-sex-specific conditions (e.g. cardiovascular disease), and access to specialist advice such as experts in women’s health. This should be reinforced with opportunities for assessors to access second expert opinions that are built into the reassessment process.

⁵ ME Research UK (2015) ‘ME/CFS in women and men’. Available at: <http://www.mereseearch.org.uk/news/sex-differences-in-mecfs/>.

A more flexible approach to appointments and greater use of telephone appointments is likely to benefit women with caring roles or women with mobility issues that make traveling to in-person appointments or assessments more difficult.

Although we welcome the more person-centred approach set out in the Scottish Government proposals, we do have some concerns about the amount of discretion that is being relied on within the system of consultations and how this may be applied. Moving towards a more 'person-centred' approach, which relies on individual discussions about needs, allows for personal judgements to be made in a way that may apply the gendered biases of individual assessors. This risks causing women harm or being procedurally unfair. We recommend that data is closely monitored to identify and respond to patterns that demonstrate unequal outcomes.

2.3 Descriptors and retaining a points-based system

It is not merely the way in which daily living activities are set out in the regulations, but also the way in which they are assessed, by whom, and the application of discretion or the intensity of review each applicant is subject to that matters.⁶ As we have previously highlighted, the available evidence on PIP awards shows that even where assessment processes are intended to be gender-neutral the subjective assumptions held by assessors about men and women's social roles and capacities is applied to decision-making, and there is evidence that these differential assessments are detrimental to women.⁷

Although it is difficult to evaluate the full breadth of case law because it is not in the public domain, we were able to find examples where women's childcare responsibilities have been used to reject their claims relating to the PIP daily living component:

- In *SB v Secretary of State* [2016] a 24-year old woman was found not to fulfil the 'dressing and undressing' descriptors because she was able to regularly dress and undress her daughter.⁸

⁶ The proposed ADP and PIP both assess eligibility by awarding points given to a descriptor as set out the Regulations at Schedule 1, for example "Preparing food: e. Needs supervision or assistance to either prepare or cook a simple meal". There are two sets of descriptors 'Daily living' and 'Mobility.' Scores are given on the basis of assessment (PIP) or consultation (APD where necessary), supporting evidence supplied and the application. A score between eight and 11 for daily living needs awards the standard rate of the daily living component. An enhanced rate of daily living component is provided for scores of over 12 with mobility awards assessed the same way.

⁷ See the work of J. Gulland, including Gulland, J. (Forthcoming) *Gender, Work and Social Control: A Century of Disability Benefits*, Palgrave MacMillan.

⁸ *SB v Secretary of State* [2016] UKUT 0219 (AAC). Available at: https://assets.publishing.service.gov.uk/media/5786358340f0b66bda00013e/CPIP_3573_2015-00.pdf.

- In SC v SSWP (PIP) [2017] the statement of reasons drafted by the lower tribunal said that the applicant prepared and cooked a main meal for her son daily, whilst her mother would prepare a meal for the two of them.⁹
- In ML v SSWP (PIP) [2017] the fact that the applicant took her child to leisure activities was used as evidence that she could get dressed more than 50% of days.¹⁰

The Scottish Government has made clear that it will largely be maintaining the activities, descriptors and supporting eligibility criteria of PIP in the short term, including the scoring and points as described in Part 2 and Part 3 of Schedule 1 of the draft regulations. We are concerned that this decision has not been informed by a thorough analysis of the impacts of PIP on disabled women. We therefore welcome the commitment to a “substantial independent review of Adult Disability Payment in summer 2023” and encourage as part of this process a detailed examination of existing case law, evidence from disabled women and gender concerns and trends.

It will be essential that training, including gender competence, for assessors addresses biases, stereotypes, and assumptions to ensure that the reality of women’s lives is taken into account. To that end, we do not agree with the proposal in regulation 42 that overpayments as a result of official error should be recoverable.

Additionally, it is crucial that there are accessible and practical forms of challenges available to individuals who feel that decisions have penalised them unfairly. The Agency requires to generate and evaluate good quality sex-disaggregated data on award decisions, at every stage, that allows for an ongoing macro-level analysis of trends that could identify discriminatory patterns. We also note work by SCORSS that has found gaps in the draft regulations that do not reflect current PIP-related case law and strongly urge the Scottish Government to ensure that all established case law is properly reflected in the ADP regulations.

2.4 Supporting criteria

We support the emphasis on using existing supporting evidence and the more generalised approach to corroborating supporting evidence that moves away from requiring detailed corroboration of every single claim presented to the Agency. Additionally, extending the pool of potential professionals and practitioners who may supply evidence is a broadly positive step in reducing the burden on individual applicants. However, we do recommend that evaluation of the demands placed on social care support workers is monitored. Social care staff are undervalued and

⁹ SC v SSWP (PIP) [2017] UKUT 0317 (AAC). Available at: https://assets.publishing.service.gov.uk/media/598ab9ace5274a7377b7a1b3/CPIP_0663_2017-00.pdf.

¹⁰ ML v SSWP (PIP) [2017] UKUT 0171 (AAC). Available at: https://assets.publishing.service.gov.uk/media/5915b45ae5274a4550000059/CPIP_3760_2016-00.pdf.

underpaid specifically because care is considered ‘women’s work.’¹¹ The number of vacancies across the Scottish social care system exacerbates the already considerable demands on individual care workers.¹²

We are concerned that adding the provision of evidence to the Agency to their workload has not been impact-assessed and suggest that the Scottish Government works with providers to ensure that time is allocated in the working day for social care workers to develop any evidence they are asked by service users to provide. The Scottish Government should be clear about what liability or additional burden it is asking of care workers and how they can be supported to ensure this is managed and that they are providing good-quality information to the assessment process that is not tainted with bias.

3. EQUALITY IMPACT ASSESSMENT

As we previously outlined, an Equality Impact Assessment should be done at the earliest stage of policy development so as not to reproduce gender-blind policies and processes which further entrench gender inequality.¹³ The Consultation paper includes a “Draft Equalities Impact Assessment results summary” which includes “key findings”. It is unclear if a full EQIA has been completed or whether this is still to be concluded and whether it is to be revised.

The draft EQIA is worryingly general and does not consider specific changes to the policy or mitigations that may be required to assure the equality of protected groups, including women. The document only reports that the EQIA process “has found that the introduction of Adult Disability Payment will have a positive impact on the people of Scotland, including individuals who fall under the following protected characteristics.”

Equality Impact Assessments should critically engage with gendered issues to ensure that the legislation, policy or programme in question proactively advances equality, as well as non-discrimination against those with protected characteristics. This should go beyond introduction and delivery and critically engage with the design of the policy. In doing so the analysis should inform the content of the regulations and not respond to them. Given that so few changes to the detail of the ADP design in comparison to PIP have been made, it is unclear how gender concerns and analysis have informed

¹¹ E. Thompson (2020) Gender and Inclusive Growth. Engender and Close the Gap. Available at: https://www.engender.org.uk/content/publications/1591173199_Gender--Inclusive-Growth---Makinginclusive-growth-work-for-women-in-Scotland.pdf.

¹² Commonweal Policy (2020) The predictable crisis: why COVID-19 has hit Scotland’s Care homes so hard. Available at: <https://commonweal.scot/sites/default/files/2020-05/Predictable%20Crisis.pdf>.

¹³ Engender (2019) Engender response to the Scottish Government consultation on disability assistance in Scotland. Available at: <https://www.engender.org.uk/content/publications/Engender-response-to-the-Scottish-Government-consultation-on-disability-assistance-in-Scotland.pdf>.

decision-making. This includes the decision not to pursue more radical reform at this stage, rather than simply make small changes to PIP.

Because PIP has not yet been the subject of significant comprehensive and well-gendered longitudinal research it is even more vital that the Scottish Government proactively considers how to compensate for information or analysis gaps.

While some relevant gender-sensitive evidence and sex-disaggregated data has clearly been gathered, it is insufficient to enable a robust analysis. We see no evidence that data gaps have been identified consistently and there is no evidence presented that work to fill them has been undertaken. For example, although data gaps in the number of disabled people who are pregnant or mothers are acknowledged there is no information provided as to how these can or will be remedied.

We note and are pleased that the section on maternity and pregnancy acknowledges the evidence we presented to the Scottish Government on the impacts of mothers' caring roles and gendered assumptions about capacity of providing care for others. The measure proposed to mitigate the impact of such assumptions is equalities training, with which we do not disagree. However, such training must be meaningful and effective and provided to anybody involved in the application process and there is insufficient detail provided to enable us to conclude that this is planned. Additionally, it is insufficient to rely solely on training to eliminate the risks that are inherent in applying the proposed assessment criteria and we are disappointed that a further review of case law or engagement with disabled women does not appear to be forthcoming.

In addition to other gaps, the EQIA does not engage with impacts for carers or care workers who are likely to be women.

Within the 'sex' section of the EQIA, although some available research is outlined, there is no assessment of where ADP could itself reduce gendered discrimination and inequality. While we again welcome the reference to equalities training, other measures and decisions about descriptors themselves, data or assessments and assessors are not raised. Some of the evidence included is not analysed at all. No negative or neutral consequences are observed at all, not even regarding the decision to prioritise 'safe and secure transition' in replicating the PIP descriptors largely unchanged.

4. IMPROVING DATA

The Scottish Government and Social Security Scotland are bound by the principles of equality and non-discrimination by the Social Security (Scotland) Act 2018, as well as the Public Sector Equality Duty. As a result, collecting data about experiences and

outcomes for disabled women will be key to the continuous improvement of disability assistance entitlements. We welcome the Scottish Government's efforts to integrate equalities data monitoring and analysis into devolved social security payment applications to ADP.

We remain unclear whether ADP applications will collect data on the applicant or the recipient of the payment where these are different people. It is vital that we have equality data, throughout the process, concerning the person who is the subject of the assessment process. We therefore strongly urge the application process to gather data on the person in receipt of the ADP. This data should inform a continuous process of evaluation ahead of the 2023 review.

5. CONCLUSION

While the 'safe and secure' transition is an approach which will ensure management moves from DWP to ADP faster, there is a risk that it denies a more fulsome and thorough review of how disability assistance can meet the distinct needs of disabled women. We think there is a considerable likelihood that an opportunity for gender mainstreaming is being lost, and that the new entitlement will entrench or widen inequalities for disabled women. In particular, we are concerned that replicating the existing PIP application criteria and points system represents a missed opportunity to do better than a much-criticised UK programme. We are also concerned that these risks and trade-offs between women's rights and the pace of delivery are not considered adequately within the EQIA process.

We support the proposals for a comprehensive independent review of ADP in 2023 and strongly suggest that work to research and monitor gendered trends in disability assistance is undertaken between now and the reporting of that review.

FOR FURTHER INFORMATION

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ABOUT US

Engender is a membership organisation working on feminist agendas in Scotland and Europe, to increase women's power and influence and to make visible the impact of sexism on women, men and society. We provide support to individuals, organisations and institutions who seek to achieve gender equality and justice.