

Consultation Response

Mitigation of the Two-child Cap

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Administrative Justice Law sub-committee welcomes the opportunity to consider and respond to the Scottish Government's consultation: Mitigation of the two-child cap.¹ The sub-committee has the following comments to put forward for consideration.

¹ [Mitigation of the two-child cap - Scottish Government consultations - Citizen Space](#)

Consultation Questions

1. Do you agree or disagree with the Scottish Government's assessment that Social Security Scotland should deliver payments to mitigate the two-child cap in Scotland?

Agree

Please give reasons for your answer below

We agree that, in principle, delivery of such payments is consistent with Scottish Ministers' Policy.

The question whether the Scottish Government should or should not follow any particular course of action will depend on whether this proposal is within the legislative competence of the Parliament.

Social Security Scotland already administers various devolved benefits, including the Scottish Child Payment. Given its existing infrastructure, if it is competent to do so, it is well-positioned to implement the mitigation payments efficiently, minimising administrative duplication and ensuring streamlined access for eligible families.

Universal Credit (UC), introduced in the Welfare Reform and Work Act 2016, replaced means tested benefits and tax credits for working people. The only means tested benefit for working age claimants who need to make a new claim is UC. It is made up of a standard allowance for a single or couple and additional elements for:

- children;
- additional amounts for disabled children;
- rent or certain service charges for unemployed owner occupiers;
- limited capability for work-related activity;
- regular and substantial caring responsibilities for a severely disabled person;
- 85% of registered childcare costs, within limits.

The Child element is payable in respect of children for whom the claimant is responsible and normally living with the claimant, continuing until the 1st September after the child's 16th birthday. The child element is payable for all children born before 6 April 2017 but is not ordinarily payable for a child born after that date if the claimant already has two or more children included in their award. Exceptions to the exclusion are set out in legislation.

We note that the Scottish Ministers aim to remove the two-child cap as a move towards eradication of child poverty in Scotland.

Since July 2024, the United Nations Convention on the Rights of the Child has been incorporated directly into Scots law albeit in a limited way following the enactment of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024² (the Act). Mitigating the two-child cap impacts aligns with Scotland's human rights commitments, including the UN Convention on the Rights of the Child (UNCRC) and the Scottish Government's broader child poverty reduction targets.

Incorporation albeit in a limited form of the Convention³ may evidence Scottish Ministers preference for a rights-based observation of international convention. The Act imposes obligations on Scottish Ministers including at S14(3)(b) – to identify and address any situation where a child's rights are (or are at a significant risk of) not being fulfilled. To the extent that the proposals in relation to mitigation of the two-child cap address a child's rights then they may engage section 14 of the Act. It may be arguable, notwithstanding *R v Secretary of State for Work and Pensions* (2021)⁴, that the two-benefit cap may infringe a child's right. The argument in *R v Secretary of State for Work and Pensions* appears not to have turned on the rights of the child.

Steps to mitigate the two child cap would be consistent with Scottish Ministers expressed policy.

2. Do you agree or disagree that to mitigate the two-child cap the Scottish Government should use the powers at s79 to top-up Universal Credit?

Agree

Please give reasons for your answer below.

The consultation paper deals with the practicability of mitigation of the two-child cap including use of section 79. This strategy supports the Scottish Government's broader commitment to tackling child poverty and upholding human rights obligations, particularly under the UN Convention on the Rights of the Child (UNCRC).

The Social Security (Scotland) Act 2018, provides for the power to provide top up and allows for the Scottish Ministers, by regulations, to provide

² [United Nations Convention on the Rights of the Child \(Incorporation\) \(Scotland\) Act 2024](#)

³ The Act's predecessor Bill, the 2021 Bill, was deemed to be outside of legislative competence on the basis that it would empower the Scottish Parliament to scrutinise legislation of the UK Parliament, and so did not proceed. The Act was not similarly challenged.

⁴ [2021] UKSC 26

financial assistance to an individual who is entitled to a reserved benefit, and appears to the Scottish Ministers to require financial assistance (in addition to any amount received by way of reserved benefit).⁵

Section 79 appears to be sufficient to allow Ministers to legislate to mitigate the two child cap but ultimately the competence of the proposed policy is a matter for the court to decide.

Successful implementation will require cooperation with the Department for Work and Pensions (DWP), particularly in securing data-sharing agreements and system integration, which may present logistical and legal challenges. The Scottish Government must also ensure that this approach is financially sustainable and does not inadvertently create barriers to support for eligible families.

While we recognise these challenges, using section 79 may be a socially responsible way to mitigate the two-child cap's impact and provide essential support to affected families in Scotland.

3. Do you agree or disagree that payments to mitigate the two-child cap should be disregarded as income by the UK Government?

Agree

Please give reasons for your answer below.

Disregard of mitigation payments as income may raise issues which would impact in legislative competence terms should the Scottish Ministers seek to legislate on that issue.

If these payments are counted as income, there is a risk that families could lose out on other means-tested benefits or tax credits, thereby undermining the intended impact of the mitigation policy. Such a situation could create a circular problem, where additional support is effectively offset by reductions elsewhere in the welfare system, limiting the Scottish Government's ability to address child poverty effectively. Exempting these payments from income calculations would ensure that families receive the full benefit of the support provided.

We therefore agree while acknowledging that the question of whether or not to disregard the mitigated income is entirely a matter for the UK government. There is a precedent in respect of the Scottish Child Payment,

⁵ Sections 79 (1)(a-b)

which is also disregarded as both income and capital in calculating entitlement to reserved means-tested benefits.

4. Do you have any information you wish to share about any additional potential impacts of the proposed approach outlined in this consultation?

While the proposal aims to alleviate financial hardship, the policy must consider the long-term sustainability of funding. As the number of eligible families may fluctuate, the Scottish Government must ensure that funding mechanisms are robust, predictable, and resilient to economic pressures or policy shifts at the UK level. Furthermore, we would suggest an increase in public awareness to ensure eligible families understand how to access these payments and to prevent barriers to uptake, such as complex application processes or lack of information. We note from the consultation the Scottish Government's commitment to spend £3 million on designing mitigation payments, and would inquire why this is proposed to be so costly and complex.

There is a risk that without explicit UK Government agreement to disregard these payments as income, some families could experience reductions in other means-tested benefits, thereby limiting the effectiveness of the mitigation policy. It is essential that the Scottish Government actively engages with the UK Government to secure a clear exemption for these payments to avoid unintended financial losses for recipients, we would suggest this is clear and legally binding.



For further information, please contact:

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