Written Evidence: Social Security (Scotland) Bill

Our voices ■ Our choices

1 Background

1.1 Inclusion Scotland is a network of disabled peoples' organisations and individual disabled people. Our main aim is to draw attention to the physical, social, economic, cultural and attitudinal barriers that affect disabled people’s everyday lives and to encourage a wider understanding of those issues throughout Scotland.

1.2 Inclusion Scotland and its membership have been involved in work surrounding Scottish social security issues since the time of the Smith Commission onwards. We consulted widely with disabled people last year on the “Future of Social Security” and, within the limited time available, have done our best to gather their views on the Bill currently before the Committee.

2 General Comments

2.1 Inclusion Scotland welcomes the publication of the Social Security (Scotland) Bill and believes that it provides an opportunity to consider what the purpose of the new Scottish social security system should be.

2.2 Based on New Policy Institute estimates approximately 48% of all those currently living in poverty are disabled people and their families. Therefore we believe that, as well as the Principles set out in the Bill, the over-arching purpose of Scottish social security benefits should be to relieve poverty and to contribute to all people living in Scotland having an adequate income.

2.3 Inclusion Scotland also welcomes the Scottish Government’s commitment to a human rights based approach to social security. This will mark a clear departure from UK policies of recent years which have focussed on the affordability of benefits over the ability of benefit recipients to maintain a decent standard of living which enables them to meet basic costs (e.g. food, fuel, housing) and participate fully in society.

2.4 That said we are concerned that the Social Security Bill seeks to establish many of the rules on entitlement in regulations rather than in primary legislation. One of the strengths of regulations is that they are relatively simple to change in the event that they are found not to be working as intended. However that ability to easily change regulations is also one of their biggest drawbacks in terms of the rights of disabled people and other claimants.

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1 Disability and Poverty, Aug. 2016, New Policy Institute for JRF
http://www.npi.org.uk/files/3414/7087/2429/Disability_and_poverty_MAIN_REPORT_FINAL.pdf
2.5 For example, as it stands, the entitlement criteria for disability benefits are not set out on the face of the Bill. The disabled people we consulted on this were very concerned that this would provide this, or a future Government, with the ability to reduce the scope of entitlement via a change in regulations.

2.6 This fear is based on the fact that the UK Government recently made changes to the scope of entitlement to the Personal Independence Payment (PIP) mobility component via changes to regulations. In doing so they denied entitlement to over 150,000 disabled people with mental health issues and/or learning difficulties who the courts had already ruled to be entitled. In contrast such a change would not have been possible to entitlement to Disability Living Allowance (DLA) because the entitlement criteria for that benefit are set out in primary legislation.

2.7 Inclusion Scotland appreciates that a balance has to be struck between what is contained in primary legislation and what is perhaps better left to regulations. Nevertheless in the current Bill that balance seems to be weighted in favour of Ministerial power over claimants’ rights. We believe that this could at least be partially resolved by the Schedule relating to disability benefits being amended to set out clear entitlement criteria.

2.8 Inclusion Scotland welcomes Ministerial commitments to use the Super-Affirmative Procedure when introducing new Social Security Regulations. Nevertheless even using this procedure regulations will be subject to far less scrutiny and consultation than is the case with primary legislation. This may result in unintended consequences which could potentially be disastrous for disabled people and other claimants.

2.9 Given that so much of the legislation will be set out in regulations Inclusion Scotland continues to believe that both secondary legislation and how the social security system is performing should be subject to external independent scrutiny and review. This could be accomplished via the establishment of a Scottish Social Security Advisory Committee which would be available to provide expert advice to Ministers and Parliament.

3 Principles

3.1 Inclusion Scotland welcomes the set of Principles set out in the Bill particularly those in regards to Social Security being an investment in the people of Scotland and that dignity and respect for individuals will be at the heart of the new Scottish system. However in common with the SHRC, EHRC, CPAG, the Poverty Alliance and others we believe that some of the Principles should be strengthened to ensure that Human Rights are embedded and enshrined in Scottish Social Security legislation.

3.2 Disabled people tell us that they are not treated with “dignity and respect” within the current UK benefits system. They are instead regularly subjected to indignity and total disrespect – being treated as fraudulently trying to obtain benefits to which they are in fact genuinely entitled and subjected to a never ending series of “assessments”.

3.3 Britain, lacking a written constitution also lacks a definition of what is meant by dignity and respect. The UK Human Rights Act supposedly guarantees the right to dignity and respect but the European Convention on Human Rights (ECHR) on which it is based is silent on
the issue of social security. The European Court of Human Rights has therefore proven reluctant to interfere in national governments’ decisions in this area.

3.4 Conversely Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that to maintain dignity an adequate standard of living must go beyond physical necessities for survival to include goods, services, activities and housing in keeping with cultural norms. Articles 19 and 28 of the UN Convention on the Rights of Persons with Disabilities (UNCRPD) add that disabled people should receive assistance with disability-related expenses and independent living. The European Charter also sets much more specific standards for benefits.

3.5 Therefore we would suggest that either the Scottish Government incorporates the UNCRPD and/or the ICESCR into Scottish legislation or it amends the current Bill to include a clear definition of the rights conveyed by the “dignity of individuals” being “at the heart of the Scottish social security system”.

3.6 In line with the above we believe that there needs to be a statutory requirement (either in the Principles or elsewhere) that benefits will be uprated annually. There is a requirement in UK legislation that DLA, PIP, Attendance Allowance, Carers Allowance, Industrial Injuries Disablement Benefit and Severe Disablement Allowance are uprated annually. Therefore a failure to include a similar requirement in Scottish social security legislation would be a retrograde step providing Scottish disabled people and carers with fewer rights than their UK equivalents.

3.7 Disabled people we spoke to also believe that Principle 4 (“The Scottish Government has a role in making sure that people are given the social security assistance they are eligible for”) is too weak. They believe that the Scottish Government should instead have a duty to make sure that people receive all the Scottish social security benefits they are eligible for and a role in ensuring that they are made aware of other reserved benefits that they may be entitled to.

3.8 Disabled people also want to see rights to advocacy support in accessing benefits, independent advice and accessible information on Social Security built into Social Security legislation.

3.9 Without advocacy support many learning disabled people, mental health service users, and others, are currently unable to access and negotiate their way through the benefits system. Without a right to independent advice on entitlement people cannot exercise whatever rights they may have on paper. Finally if accessible formats are not used to convey information on benefits entitlement, and decisions, disabled people remain unaware of their rights. These are all well-known issues which currently prevent disabled people from receiving benefits to which they would otherwise be entitled and it is imperative that the new Scottish system addresses them.

3.10 Inclusion Scotland welcomes Principle 5 (“The Scottish social security system will be designed with the people of Scotland, and based on evidence”) but would point out that consultation and involvement are not the same as co-production. For the Scottish social security system to work for disabled people they, and their representative organisations,
must be at the heart of policy, planning and decision-making rather than relegated to a rubber-stamping role.

4 The Social Security Charter

4.1 When we engaged with disabled people last year they were generally supportive of a Social Security Charter which would set out their rights to benefits in a simple, easily understandable, way. However it appears that the Charter planned will not be about rights but instead set service standards for the delivery of social security which cannot be relied on by individuals.

4.2 As such disabled people at our recent engagement event on the Bill were dismissive of the Charter. One person summed up the general mood by asking, “What is the point of the Charter if it can't be upheld?” Others deplored the Charter’s lack of teeth and asked who would monitor whether the Charter was effective or not? Disabled people were insistent that the Charter should either contain enforceable rights or should tell people how to go about enforcing their rights if the Social Security Agency failed to deliver on them.

4.3 Inclusion Scotland would agree with the Poverty Alliance that an additional sub-section should be added to Part 1 Section 2 which states that “the Charter should set out how people can exercise their rights in order to claim their entitlements”. We would also add “and to uphold their human rights (for example their right to be treated with dignity and respect)”.

5 Cash or Kind Benefits?

5.1 Inclusion Scotland are extremely concerned over the repeated use of the phrase “which may or may not take the form of money” contained next to each of the benefits listed under Chapter 2. Having fought and won the battle to see cash entitlement being the default position of support from the Scottish Welfare Fund we are extremely disappointed in having to revisit this issue for all of the devolved benefits.

5.2 At present all of the devolved disability benefits (PIP, DLA and Attendance Allowance) are paid solely in the form of money. It is true that many recipients of the Higher/Enhanced Rate of the Mobility component of DLA/PIP choose to use their benefits to lease Motability vehicles but at no point do they relinquish their underlying entitlement to a cash payment.

5.3 When we consulted on “in kind” support last year, and again very recently, disabled people were vehement in rejecting any notion that their entitlement to cash benefits could be taken away by the Scottish Government. A disabled person at our recent event on the Bill summed up the opposition to this proposal -

“This would be a terrible idea and take away the independence of disabled people. It is a form of control and taking away the individual’s decision on what to do with the money they receive”.

5.4 Payment in kind results in stigma and reduces individual choice, thereby also reducing accessibility for some disabled people for whom one-size-fits-all products may not be
suitable. As such it not only fails to uphold but instead negates the right to dignity and respect due to claimants. We therefore oppose this aspect of the Bill and will be seeking an amendment guaranteeing that disability benefits will continue in the form of solely monetary assistance. In regards to other benefits it must be for claimants to choose whether they prefer in-kind support to a cash entitlement and it should never be a “Hobson’s choice” imposed on them by Government.

6  **Time limits**

6.1 We have already set out why we believe entitlement criteria need to be set in statute rather than regulations. However there are other aspects of entitlement which we also believe need to be addressed. Thus where time limits for claimants responding to determinations or to supply information are addressed similar time-limits have not been set out for Ministers. Inclusion Scotland are therefore seeking time limits for making determinations and re-determinations to be set out on the face of the Bill. We believe this is essential as regulations can more easily be amended to increase such time limits thus reducing claimants’ rights and future service standards.

6.2 We also believe that the one month time limit for seeking a redetermination/appeal should be amended to 3 months. This is because it is already extremely difficult for some disabled people (for example learning disabled people, BSL users, mental health service users, etc.) to get advocacy support and welfare rights advice in place in such a short time period. Many CABs and Local Authority welfare rights teams now have appointments systems where a wait of two weeks is not uncommon and the provision of advocacy support is patchy at best.

7  **Re-determination**

7.1 Inclusion Scotland are concerned that the process of re-determination set out in the Bill, whilst a significant improvement on Mandatory Reconsideration, retains some of its negative features. The current system of Mandatory Reconsideration is badly discredited as it leads to long delays and acts as a barrier to obtaining a fair hearing.

7.2 Recently evidence has emerged that the DWP has set a target that 80% of Mandatory Reconsiderations for ESA should result in the original DWP decision being upheld. This means that they are not an objective re-evaluation of the claimant’s entitlement as decision-makers hands are being fettered by the imposition of an arbitrary target.

7.3 Disabled people we engaged with recently, whilst supportive of time limits being applied and that benefits would continue in payment for those already in receipt, were opposed to a two stage system of first re-determination and then appeal. Instead they believed that claimants should only have to fill in a single form saying that they wished to appeal. Thus if a re-determination upheld the original decision their case would then automatically go forward to an appeal hearing.

7.4 Before Mandatory Reconsiderations were introduced the DWP had a system of automatic review of the vast majority of cases which had been appealed. This ensured that the decision (determination) was looked at again, usually by another official other than the
original decision-maker. This allowed DWP to identify failures and address them thus reducing, over time, the number of cases that had to go to a full tribunal appeal hearing.

7.5 We believe that this system of reviewing/re-determining decisions had merit and should be applied in Scotland. This would allow the new Social Security Agency to review and correct their own errors whilst protecting claimants’ rights to a fair and impartial appeal hearing should the error fail to be corrected.

8 Recovery of Assistance

8.1 Disabled people do not believe that claimants should be penalised by being made to repay assistance incorrectly paid to them due to official error (mistakes made by Social Security Agency staff).

8.2 Although reassurance was offered by officials that Scottish Government did not intend to seek recovery of such over-payments other than in “exceptional circumstances” this is not what is stated in the Bill. Instead the Bill states (at Chapter 4, Para 36):

36. Liability (1) An individual is liable to pay the Scottish Ministers the value of any assistance that was given to the individual as a result of a mistaken decision under section 33(1).

8.3 This is clear and unambiguous language and gives Ministers the power to recover any and all overpayments. Thus commitments provided by Ministers or even within the Bill’s Policy Memorandum are irrelevant as a court would be obliged to apply the law as stated in the primary legislation. If Ministers do not intend to seek recovery of such over-payments then they do not need this power and this paragraph should be amended to make it clear that over-payments due to official error will not be recovered.

9 Assessments – use of private sector

9.1 Inclusion Scotland believes that the Bill should be amended to state that private contractors will have no role in the assessment of disabled people’s entitlement to disability assistance. Whilst we accept that the Minister is sincere in her commitment not to use the private sector we wish to ensure that a future change in Government policy, or portfolios, does not result in this commitment being easily reneged on.

10 Schedule 4 – Disability Assistance

10.1 Inclusion Scotland are concerned that Schedule 4, Chapter 2, paragraph 6 states that eligibility for disability assistance could be dependent on the individual being in receipt of another type of assistance. The policy intent behind this proposal is not explained so it is difficult to identify why it is needed (currently entitlement to DLA, PIP and Attendance Allowance does not depend on entitlement to any other form of assistance). If this provision relates only to the Scottish version of Severe Disablement Allowance this should be stated, otherwise we would oppose its inclusion in the Schedule.