The Committee will meet at 9.15 am in the Mary Fairfax Somerville Room (CR2).

1. **Subordinate legislation:** The Committee will consider the following negative instrument—
   
   The Universal Credit (Claims and Payments) (Scotland) Regulations 2017 (SSI 2017/227)

2. **Social Security (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—
   
   John Dickie, Director, Child Poverty Action Group in Scotland (CPAG);

   Peter Kelly, Director, The Poverty Alliance;

   Dr Jim McCormick, Associate Director Scotland, Joseph Rowntree Foundation;

   Jessica Burns, Regional Tribunal Judge, Social Security and Child Support;

   and then from—

   Jatin Haria, Executive Director, Coalition for Racial Equality and Rights (CRER);

   Chris Oswald, Head of Policy, Equality and Human Rights Commission;

   Emma Ritch, Executive Director, Engender;

   Judith Robertson, Chair, Scottish Human Rights Commission.

3. **Social Security (Scotland) Bill (in private):** The Committee will review the
evidence heard earlier in the meeting.

Simon Watkins
Clerk to the Social Security Committee
Room TG.01
The Scottish Parliament
Edinburgh
Tel: 0131 348 5228
Email: SocialSecurityCommittee@parliament.scot
The papers for this meeting are as follows—

**Agenda Item 1**

Note by the Clerk SC/S5/17/17/1

**Agenda Item 2**

SPICe briefing SC/S5/17/17/2

Written submissions - panel 1 SC/S5/17/17/3

Written submissions - panel 2 SC/S5/17/17/4
1. The Committee took evidence on the Universal Credit (Claims and Payments) (Scotland) Regulations 2017 (SSI 2017/227) at its meeting on 7 September from the Child Poverty Action Group, COSLA, Renfrewshire Council and the Scottish Federation of Housing Associations.

2. The Delegated Powers and Law Reform Committee has since reported on the instrument. Its report is attached.

3. The report raises an issue as to whether the use of the term “twice monthly” for payments in the instrument is clear.

4. The Social Security Committee had held off undertaking any follow-up action until the DPLR Committee had reported. Given that the Committee’s time is currently absorbed by consideration of the Social Security Bill, it is suggested that the best way to complete its consideration of the instrument would be to invite the Scottish Government to respond to the issues raised in the evidence session.

**Recommendation**

5. It is recommended that the Committee request a response from the Scottish Government to the issues raised during its evidence session on the Universal Credit (Claims and Payments) (Scotland) Regulations 2017 (SSI 2017/227).

Simon Watkins
Clerk
Social Security Committee
Delegated Powers and Law Reform Committee
Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Subordinate Legislation considered on 12 September 2017
Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—
   (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
   (ii) [deleted]
   (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
(c) general questions relating to powers to make subordinate legislation;
(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;
(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;
(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.
(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.

[Links and contact information]


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Scottish National Party

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Scottish Labour

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Graham Simpson
Scottish Conservative and Unionist Party

David Torrance
Scottish National Party
Introduction

1. At its meeting on 12 September 2017, the Committee agreed to draw to the attention of the Parliament the following instrument.

   Universal Credit (Claims and Payments) (Scotland) Regulations 2017 (SSI 2017/227)

2. The Committee's recommendations and conclusions in relation to this instrument are set out in the following chapters of this report.

3. The Committee determined that it did not need to draw the Parliament's attention to the instruments set out by the relevant lead committee at the end of this report.
Points raised: Instruments subject to negative procedure

Universal Credit (Claims and Payments) (Scotland) Regulations 2017 (SSI 2017/227) (Social Security)

Purpose

4. These Regulations provide for two flexibilities in the operation of the claims and payments system for universal credit in relation to Scotland. Firstly, they provide the option for persons to request payments of Universal Credit twice-monthly rather than monthly, in arrears. Secondly, they provide the option for tenants to request that any Universal Credit housing costs element for rent or a service charge would be paid direct to social and private sector landlords.

5. Regulations 2 and 3 refer in various places to the entitlement of a person to request “twice-monthly” payments in arrears of universal credit. In terms of regulation 2(2), the Secretary of State must agree to such a request unless it is considered to be unreasonable to implement.

6. The Scottish Government has confirmed in its written response to the Committee that the policy intention is that, in place of the single monthly payment, a person entitled to universal credit should be able to choose to receive two payments during each month, roughly equally spaced apart (see Annex A). However, it is not intended that a person will have an entitlement to receive payments on set dates in a month. Accordingly, it is intended that the implementation of the payment dates would be a matter for the Secretary of State.

7. The Committee noted that “twice-monthly” is not an expression which is defined in the Regulations, or in the Social Security Administration Act 1992 under which the instrument is made.

8. The Committee also noted that, in relation to the current payment of universal credit monthly in arrears, regulation 47(2) of the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (S.I. 2013/380) makes provision for the specified payment date. Universal credit is paid within 7 days of the last day of the ‘assessment period’ (which is defined by other Regulations), but if it is not possible to pay universal credit within the 7 days, it is to be paid as soon as reasonably practicable thereafter.

9. The Committee considered that the Regulations could more clearly implement that policy intention in relation to the payment dates, given that in terms of regulation 2(1) a person has an entitlement to request “twice-monthly” payments. That expression does not specify either the payment dates within a month, that the payments should be roughly equally spaced apart, how they may be calculated, or who may determine the dates.
10. Accordingly, the Committee draws the Regulations to the attention of the Parliament on reporting ground (h) as the meaning of the Regulations could be clearer in a particular respect.
No points raised

Economy, Jobs and Fair Work

Renewables Obligations (Scotland) Amendment Order 2017 [draft]

Justice

Scottish Tribunals (Eligibility for Appointment) amendment Regulations 2017 (SSI 2017/274)

Limitation (Childhood Abuse) (Scotland) Act 2017 (Commencement) Regulations 2017 (SSI 2017/279)

Local Government and Communities

Homeless Persons (Unsuitable Accommodation) (Scotland) Amendment Order (SSI 2017/273)
Annex A

Universal Credit (Claims and Payments) (Scotland) Regulations 2017 (SSI 2017/227)

On 30 August 2017, the Scottish Government was asked:

Regulations 2 and 3 refer in various places to the entitlement of a person to request “twice-monthly” payments in arrears of universal credit. “Twice-monthly” does not appear to be defined in this instrument, or in the Social Security Administration Act 1992 under which the instrument is made (although schedule 1 of the Interpretation Act 1978 defines “month” as calendar month.)

(a) Please clarify, in respect of the entitlement of a person conferred by regulation 2(1) to request payments “twice-monthly”, whether the Scottish Government’s policy intention is that a person may request payments on 2 fixed days in the month (for example, on the 1st and 15th); or any dates in a month separated by 2 weeks (for example, the 2nd and 16th); or any 2 dates at all in a month?

(b) In respect that “twice-monthly” does not specify two particular payment dates in a month, or specify a period or minimum period required between two payment dates in a month, would it be clearer if further definition was added? Otherwise please explain why the provision is considered to be appropriate to implement the policy intention, as clarified?

Regulation 3(1) provides that every person entitled to request twice-monthly payments must be advised that he or she can so request, and be given information about the implications of that choice. Regulation 5(1) makes a comparable provision, in relation to a request for direct payments under regulation 4(1).

(a) So far as those provisions specify obligations to advise and to provide information, who is to implement the obligations?

(b) Would it be clearer if the person requiring to implement the obligations was specified? Otherwise please explain why the provisions are considered to be sufficiently clear.

The Scottish Government responded as follows:

The Regulations referred to are made by the Scottish Ministers under powers devolved by sections 29 and 30 of the Scotland Act 2016, which empower them to introduce flexibilities in relation to delivery of Universal Credit (UC). The Secretary of State retains responsibility for delivery of that social security benefit. The operation of the Regulations falls to be understood in that context.

As set out in regulation 2(1), the default position for delivery of UC is a monthly payment, in arrears. That is provided for by the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (SI 2013/380). Those Regulations do not define what “monthly” means, but the meaning is plainly that of the Interpretation Act 1978, a calendar month. It can be contrasted with the provision in the same Regulations for payment of Personal Independence Payment, for which the default position is a payment four-weekly, in arrears.

The policy of the Scottish Government is that in place of the single monthly payment, a person entitled to UC should be able to choose to receive two payments during each
month, roughly equally spaced apart. Practical difficulties would emerge if the Secretary of State had to make payments on set dates in a month (not least that months vary on length and because of weekends) and the Scottish Ministers are content to leave implementation of payments to the Secretary of State, rather than to make detailed requirements as to timing.

In practice, the Secretary of State will operate requests similarly to how he operates his existing discretion to arrange for payments to be made other than monthly.

The information that the Regulations require to be provided about the Scottish UC flexibilities will be given by the Secretary of State. How the Secretary of State arranges for that information to be given is left for him to determine in terms of the Regulations, though it will be included in administrative discussions between the two Governments around delivery of the UC flexibilities.

The Scottish Government considers this to be clear in context, as the persons to whom the information is to be given are either persons who have applied to the Secretary of State for UC, or who are being paid UC by him. Also, only the Secretary of State would hold the data needed to determine the subset of persons to whom no information need be supplied, as set out in regulation 3(2). Nobody else could therefore arrange to provide the information.

The wording of the Regulations would allow the Secretary of State to agree with someone else for them to provide the required information.

Although the Scottish Ministers will be separately publicising the existence of the flexibilities that the Regulations create, it is not currently intended that they will provide the information that the Regulations require to be given.
1. Introduction and Summary

This paper provides background information to support the Committee’s oral evidence sessions on the Social Security (Scotland) Bill ("the bill"). Further background information is available in SPICe briefing SB 17-57 The Social Security (Scotland) Bill, and the summary of the Call for Views (Paper SC/S5/17/16/5, from page 41 of the papers for the Committee’s meeting on 14 September).

Six witnesses responded to the Committee’s Call for Views on the bill. The individual responses are also included in the papers for this meeting. All covered significantly more ground than the issues highlighted in this paper. Members may wish to refer to the individual submissions for alternative or additional issues to raise with witnesses.

Whilst the Joseph Rowntree Foundation did not respond to the call for views, they submitted a response to the Scottish Government’s social security consultation in October 2016. Dr Jim McCormick is also the Scottish member of the Social Security Advisory Committee (SSAC) and chairs the Scottish Government’s Disability and Carers Benefits Expert Advisory Group.

Judge Jessica Burns is the Scottish Regional Judge of the First-tier Tribunal (Social Entitlement Chamber). This role involves hearing appeals about reserved benefits (including those to be devolved).

Possible areas for discussion with the first panel of witnesses include:

- the balance between primary and secondary legislation in the proposed Scottish social security system
- appropriate scrutiny of regulations made under powers in the bill
- the proposed re-determination process and how it compares to the current mandatory reconsideration system for reserved benefits
- the proposal for short-term assistance to be given to people who are challenging decisions that reduce their devolved assistance.

Possible areas for discussion with the second panel of witnesses include:

- suggestions for additional principles for the Scottish social security system
- enforceability of rights in the social security charter
- whether the bill as drafted provides sufficient protection for groups with protected characteristics.

The following sections of this paper give further information on these areas, drawing primarily on witness submissions in response to the Call for Views.
2. Balance between primary and secondary legislation

The SPICe bill briefing sets out the background to the Scottish Government’s approach to social security legislation. Broadly, this leaves the majority of entitlement conditions for devolved benefits to be set out in regulations. See also the summary of Call for Views responses in Paper SC/S5/17/16/5 (pages 42 – 44).

The Poverty Alliance and CPAG were amongst the majority of respondents who argued that more detail should be on the face of the bill. Referring to the lack of detail in the bill, the Poverty Alliance said that despite the intention of a rights-based approach, “there are actually very few rights for claimants enshrined in the bill.” CPAG’s view is that “it would be better to put more detail in primary legislation, and where significant changes are proposed, bring forward further primary legislation.”

It should be noted that a smaller number of respondents to the Call for Views valued the flexibility that the Scottish Government will have to change the rules quickly by amending regulations, as opposed to bringing forward new primary legislation.

CPAG were also concerned that:

“Where the bill does not provide for Scottish Ministers to set out in regulations further detail around specific rules, then there is a risk more will be put in guidance – which is a further reduction in rights – because provisions need to be in law for a right of appeal.”

One example of anexisting commitment which the Scottish Government has not placed on the face of the bill is annual uprating of devolved disability benefits. The SPICe bill briefing gives more information on uprating, and responses to the Call for Views are summarised in Paper SC/S5/17/16/5 (page 65).

Both the Poverty Alliance and CPAG argued for provision for uprating of assistance to be placed on the face of the bill, whilst JRF have previously argued for:

“transparency in how payments are to be uprated annually, taking into the cost of essentials. Poverty is about meeting needs, so the value of payments needs to keep pace with the cost of essentials which take up a larger proportion of low-income household budgets…”

3. Scrutiny arrangements for regulations

The SPICe bill briefing gives information on how regulations under the bill might be scrutinised. The Minister for Social Security has specifically requested the Committee’s views on the appropriate arrangements for scrutiny, in a letter to the Committee dated 22 June 2017. The opinions of Call for Views respondents are summarised in Paper SC/S5/17/16/5 (page 43).

CPAG argued that:

“statutory scrutiny is of particular relevance given the Scottish Government’s approach to legislating on social security is to leave the detail to regulations and guidance.”

CPAG also mentioned the importance of independent scrutiny. This is picked up on by the Poverty Alliance as their major concern. They argued that “it is essential that

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1 See the motion as agreed to at col 100 Official Report 9 June 2016
scrutiny is carried out by a body fully independent of government who are able to point to areas where improvements could be made.”

The Poverty Alliance also suggested a potential role for the Poverty and Inequality Commission, alongside a Scottish equivalent of SSAC. Whilst the JRF have not commented on scrutiny arrangements, Dr McCormick’s other roles are extremely relevant to both reserved and potential devolved scrutiny arrangements. CPAG are also represented on both SSAC and the Disability and Carers Benefits Expert Advisory Group.

4. Redeterminations and appeals

The Scottish Government’s proposal is that before being able to appeal to an independent tribunal, an applicant must first request a “re-determination”. An appeal right will rise if a re-determination is not carried out within a specified time (to be set by regulations), but the applicant must still make a separate appeal. A more detailed description of the provisions in the bill about re-determinations and appeals is in the SPICe bill briefing. An analysis of responses to the Call for Views is in Paper SC/S5/17/16/5 (pages 48 – 49).

Alongside other respondents to the Call for Views, the Poverty Alliance was “concerned that the process outlined in the bill mirrors the current UK Government process of Mandatory Reconsideration [(MR)].” They and CPAG both argued that if the decision is not changed, a re-determination request should automatically be passed to the tribunal, without requiring further action from the applicant. Both organisations also argued that all decisions must be issued in writing, to ensure that applicants are able to exercise their right to challenge decisions effectively.

The Poverty Alliance (along with two other respondents) wanted to see an appeal time limit of 90 days. They also argued that there should be more detailed provisions in the bill about what constitutes “good reason” for a late appeal.

CPAG felt that provisions in the bill “may require a tribunal to make a complete re-determination (if not simply upholding the decision under appeal).” Currently tribunals do not have to consider aspects of an award which both parties agree are correct. CPAG argued that this approach could require additional resources to determine appeals. CPAG have published a separate briefing paper giving their detailed views on re-determinations and appeals.

Judge Burns has sat as a tribunal judge since before the introduction of the MR process. When deciding appeals, tribunals must consider whether matters not raised by an appeal nonetheless require investigation. As such, she may also be able to comment on the arguments made by the other witnesses, set out above.

5. Short-term assistance

The Scottish Government proposes that those previously entitled to devolved assistance whose award is later reduced or removed should be able to keep their previous level of benefit, if they challenge the decision. The SPICe bill briefing gives more detailed information on the proposals for short-term assistance. Analysis of the responses to the Call for Views is in Paper SC/S5/17/16/5 (pages 59 – 61).

Given the confusion amongst respondents, it is worth noting that there is no current proposal to pay such assistance to those awaiting a decision on, or challenging the refusal of, an initial application. The Scottish Government has not suggested that it
will give short-term assistance to those whose reserved benefits have stopped or reduced. This might be a particular issue if an attempt was made to mitigate the effects of sanctions in reserved benefits, due to the wording of the Scotland Act 2016.

CPAG were the only organisation responding to the Call for Views to argue that entitlement to short-term assistance should not depend on the applicant having challenged a decision to reduce their benefit. They suggested that short-term assistance should instead be paid for a set time to anyone whose assistance has reduced, whether they appeal or not. They argued that this would allow access to “premiums” in reserved benefits to continue.

Whilst some respondents to the Call for Views were concerned that short-term assistance should not be recovered from applicants, a few respondents felt that if it was not, this would create an incentive to pursue hopeless appeals. As Argyll and Bute Council put it:

“this could provide an incentive for everyone to challenge all such decisions irrespective of the merits of their case simply in order to retain previous higher levels of assistance for a longer period.”

Given Judge Burns’ role, she may have a view on the likelihood of this becoming an issue in practice, and also on the wider proposals for short-term assistance.

6. The principles of the Scottish social security system

The bill sets out seven principles for Scottish social security. The SPICe bill briefing has more detailed information about the principles. The summary of the call for views covers this area in Paper SC/S5/17/16/5 (pages 44 – 46).

Almost all respondents to the Call for Views who commented welcomed the inclusion of the principles, but generally felt they could be strengthened. Many, including the witnesses, gave suggestions for additional or amended principles. One of the most often mentioned was that “social security has a role to play in the eradication of poverty in Scotland.” Similarly, the JRF’s first recommendation for the purpose of a Scottish social security system was that it should aim to “prevent poverty – particularly when deep or long-term – and end destitution.”

One of the principles is that social security is a human right. The SHRC’s written submission discussed in some depth what is required for a “rights based approach”, and argued that the bill “needs to be strengthened in a number of areas” in order to achieve this. Briefly, these relate to: reference to international human rights law, enforceability of the charter, accountability and independent scrutiny. They suggested a number of changes to the wording of the principles.

The SHRC also discussed how other provisions of the bill could better reflect a human rights approach. For example, there is no right to advice or advocacy, nor any duty to monitor the adequacy of payments. Govan Law Centre’s submission also expressed concern that the bill as a whole doesn’t always reflect the principles. The need for a right to advice and/or advocacy was a common theme in the Call for Views.

Another of the principles refers to “dignity and respect.” The EHRC submission refers the Committee to research it recently published on this issue, commissioned from
the University of Ulster. (The Committee heard from one of the authors, Gráinne McKeever, on 14 September, when the report was included in the meeting papers).

7. The charter

The bill requires a charter to be produced, in consultation with those in receipt of certain social security benefits. It must be reviewed every five years. The SPICe bill briefing gives more detail of the charter proposals. The summary of the Call for Views covers this area in Paper SC/S5/17/16/5 (pages 46-47).

A common concern throughout the Call for Views was the status and enforceability of the charter. This was also raised by the EHRC, Engender and the SHRC. For example the EHRC would:

“encourage the Government to view the Charter as being an enforceable statement of rights and responsibilities which would enable claimants a right to a remedy should errors occur.”

8. Protected characteristics and the principles and charter

An Equality Impact Assessment (EQIA) was published with the bill. CRER and Engender consider that this could be improved. For example, CRER consider that the EQIA should be: “revised to detail the specific impact that is anticipated for each of the protected characteristics.”

As mentioned, many submissions suggested additional principles for Scottish social security. Along with reference to poverty, the most commonly mentioned addition was in relation to gender and other protected characteristics. CRER, Engender and SHRC proposed a principle focused on equality and/or non-discrimination.

One of the ways of ensuring that policies do not inadvertently discriminate is through monitoring their effects and collecting relevant data. CRER and Engender discussed how the bill could be strengthened in this area. For example CRER proposed requiring: an equality impact assessment of the charter, that the charter review includes a requirement to consult those with protected characteristics, and that the annual report on the charter includes equality monitoring data for all stages of the social security process.

The importance of co-production of the charter (and the wider system) was a theme in many submissions, with suggestions made for specific inclusion of a wide range of groups. For example, Engender referred to the need to “include the voices of women, including disabled women and BME women who are more likely to face poverty.”

Camilla Kidner and Jon Shaw
SPICe Research
14 September 2017

Note: Committee briefing papers are provided by SPICe for the use of Scottish Parliament committees and clerking staff. They provide focused information or respond to specific questions or areas of interest to committees and are not intended to offer comprehensive coverage of a subject area.

The Scottish Parliament, Edinburgh, EH99 1SP www.parliament.scot
Social Security Committee Call for Evidence - Social Security (Scotland) Bill

CPAG welcomes the opportunity to respond to the Social Security Committee’s call for evidence on the Social Security (Scotland) Bill. A well-functioning social security system is a key pillar for the prevention and eradication of poverty.

1 Putting rules about new benefits into Regulations – our views.

1.1 The Social Security (Scotland) Bill is fundamental to the shape and direction of the new Scottish social security system. This is a critical opportunity to get the system right and invest in the support needed to enable everyone to participate fully in society, ensure the newly devolved benefits are structured simply to minimise delays and errors, and support the realisation of a rights-based approach.

1.2 CPAG has warmly welcomed the Scottish Government’s commitments to use new powers to further a rights-based approach to social security that respects individual dignity and which takes a different approach to that of recent UK ‘welfare reform.’ We have also welcomed specific policy announcements on best start grants, carer’s allowance and universal credit flexibilities. The challenge now is to translate these commitments into the legislation required to underpin a well-functioning rights-based social security system. It is in this context that we highlight below where we believe the Bill needs to be strengthened. We look forward to working constructively with the Scottish Government and Parliament to ensure the Bill delivers a legislative framework in line with the policy ambitions and commitments made to date.

1.3 CPAG is concerned that the broad scope of the Bill does not achieve the correct balance between primary and secondary legislation, creating challenges for people to fully achieve their rights. Many of those rights that would be realised through the implementation of the Bill’s provisions could be changed or removed with insufficient consultation if put into regulations or guidance. It would be better to put more detail in primary legislation, and where significant changes are proposed, bring forward further primary legislation.

1.4 The broad framework of the Bill also provides for too wide a scope for government to introduce fundamental changes by regulation alone with a reduction in the ability of parliament to hold future governments to account.

1.5 It is difficult to scrutinise the proposals in the Bill because the policies for each individual benefit are not fully developed. Offering illustrative regulations at this stage will give a more concrete sense of the current government’s policy intention. However, this does not address the concern that the framework approach would allow a future government to bring forward regulations with a fundamentally different approach to social security.

1.6 The primary powers do not sufficiently constrain what regulations can contain, so there will be limited opportunity to hold government to account should regulations overstep the policy intention of the Bill.

1.7 No legislation which is presented ahead of fully-formed policy can anticipate every eventuality. Where the Bill does not provide for Scottish Ministers to set out in regulations further detail around specific rules, then there is a risk more will be put into guidance – which is a further reduction in rights – because provisions need to be in law for a right of appeal.
1.8 The Scottish Government’s stated policy intention of separating the legislative framework underpinning the system from regulations about specific benefits is to make the legislation accessible. It is CPAG’s view that separating the two out is not fundamental to making legislation accessible nor in itself does it make social security legislation accessible. Crucially, an online legislation consolidation service to provide up to date revised and consolidated versions of Acts and Regulations is needed.

1.9 The Scottish Government’s policy memorandum sets out that the deliberate choice to put detailed rules in secondary legislation is to enable changes to be made more promptly to reflect changes in economic and social conditions. However CPAG believes that certainty of income is also of great importance for people on low incomes, and changes which may be made with minimal notice could be problematic.

1.10 More detail in the schedules is required as the drafting on some of the types of assistance is too broad. For example, the proposed disability assistance will cover DLA, PIP and attendance allowance. As the Bill is currently drafted, a future administration could bring in an entirely new form of disability assistance through regulations, without the full and extensive consultation which would be essential for a new disability benefit in primary legislation.

1.11 On the administrative side, there needs to be more detail in the primary legislation relating to applications, payments and decision making. As the Bill stands, in some key areas, not only is there no primary legislation, there will be no regulations either, with practice being governed by non-statutory guidance without accompanying rights of appeal.

2 A principles-based social security system: our views on the proposed principles and approach.

2.1 We support the approach taken by the Scottish Government with a view to embedding the principles in legislation. This approach could be strengthened by ensuring the principles set out in the Bill apply to the wider Scottish social security system including discretionary housing payments and the delivery of other benefits such as the Scottish Welfare Fund and Council Tax Reduction scheme.

2.2 The principle of social security as an investment in the people of Scotland and the recognition that social security is a human right are very welcome. It is absolutely vital that those principles and early improvements are clearly reflected in the legislation as a whole, including the rules for each benefit and any guidance produced.

2.3 The principle that ‘The Scottish Government has a role in making sure that people are given the social security assistance they are eligible for’ should be strengthened so that the Scottish Government has a “duty to ensure” ‘people are given the social security assistance they are eligible for’.

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2 E.g. Council Tax Reduction (Scotland) Regulations 2012 have been updated by at least six sets of later regulations but there has been no consolidation of these changes.
2.4 The principle that ‘The Scottish social security system is efficient and delivers value for money’ must recognise the user’s experience of the Scottish social security system and take into account the costs of poverty associated with inadequate social security, and the need not to reduce people’s rights.

2.5 The recognition that ‘social security is itself a human right’ should make explicit reference to Article 9 of the International Covenant on Economic, Social and Cultural Rights so as to clearly enshrine the right in law.

3 The social security charter: our views.
3.1 CPAG supports the idea of a charter as it provides a useful way to ensure the stated principles are well publicised and understood by members of the public.

3.2 It is essential there is a clear and practical purpose to the charter and it must be enforceable. When the charter sets out the expectations on individuals, there must also be clear avenues for people to take if they feel that their experience of the system does not meet the standards set out within the charter.

3.3 We welcome the proposal to develop the charter with the people of Scotland and would support it covering the following areas:

- An overarching statement which politicians, officials and agency staff are obliged to comply with in development of policy and delivery of services
- A description of what members of the public can expect from the social security system.
- Information on avenues of redress available to individuals, whether through internal complaints processes, ombudsman, tribunal or judicial review.
- Information for individuals on where further support is available if principles are not being adhered to.

3.4 Although the charter itself will be reviewed by the Scottish Government, and reported to Parliament every five years, there is no provision in the Bill as drafted for Parliamentary approval. Given the importance of the charter to making the principles meaningful, CPAG believes Parliament’s role should be strengthened.

3.5 While the annual reporting to Parliament will pick up on aspects of the charter, it should also set out what improvements will be made by Scottish Ministers over the coming year and not just be a retrospective report. Developing clear benchmarks and targets for improvement based on a set of indicators would strengthen this reporting process.

3.6 There should be a duty to devise, implement and regularly review a strategy on reducing under-claiming of Scottish social security assistance. This should include specific targets for each type of assistance and a global target for the system. In particular there should be a review of under-claiming rates of all types of assistance with an early focus on disability assistance (because there has been no UK review since 2004/05).

3.7 Reporting on the Scottish social security system should recognise the crucial role social security can play in preventing and reducing poverty and progress on this could be measured against the Scottish Government’s National Outcomes – particularly the commitment to tackle significant inequalities in Scottish society.
4 The rules for social security: our comments.

4.1 In general, rights should be upheld throughout the rules for the Scottish social security system. There should be no reduction in rights compared to the current system. As introduced there are examples in the Bill where there is a reduction in rights e.g. loss of appeal rights against recovery of overpayments.

4.2 All agency decisions and notifications must be communicated in writing and the Bill should be amended (Part 2, Chapter 3, sections 22, 25, 26, 31) to make this a legal duty as it is in the current system. Verbal notification is not sufficient on its own. If someone is informed by telephone or in person, they will have no written record of vital information needed to challenge a decision. For example, if someone is not completely clear about the date of the decision, they may miss the deadline for redetermination or appeal.

**Application for assistance**

4.3 There should be a right to appeal about whether an application is validly made. The absence of a right of appeal in this context has been ruled incompatible with the right to a fair hearing under the Human Rights Act. Without appeal rights on the validity of applications, there is no redress for official mistakes that could cause delay and loss of money for individuals. The current system provides such a right of appeal. The Bill does not.

4.4 There should be provision created for a third person to act on behalf of a person who is unable to act for themselves. In UK rules, a third person can be ‘appointed’ by the Secretary of State, and is referred to as an ‘appointee’. It is a commonly used arrangement but is currently absent from the Bill.

4.5 Section 20 (3) provides that a person cannot apply twice for a particular type of assistance for the same period or event. This creates a high risk of unforeseen consequences. There may be circumstances in which people are prevented from making a fresh application but cannot realise their entitlement any other way. For example, it could mean carers losing out who have to apply twice because of delays in awarding disability assistance. There is no similar prohibition in the current UK legislation which relies on common law to avoid adjudicating unnecessarily on duplicate claims.

**Withdrawal of application**

4.6 The Bill gives people a right to withdraw an application before it has been decided but not once they have an award. It can be important to be able to do this. For example, a couple on universal credit can claim extra amounts of universal credit where one of them gets carer’s allowance and the other has a health condition. A couple who are both carers (e.g. parents of a disabled child) could lose as much as £150 a month in universal credit if they make the wrong choice of which of them claims carer’s assistance.

**Re-determination by the Scottish Ministers**

4.7 CPAG supports a re-determination process, as long as this does not mean having to make a second application to appeal if the award is unchanged, and as long as it is done without undue delay. This is the best way to resolve issues early, to avoid people having to go to the time and effort of an appeal, and to give the agency the best chance to continually improve the system.

4.8 CPAG welcomes the Scottish Government’s commitment to advance the right to a fair hearing within the re-determination process, for example through the introduction of a time limit for the agency to undertake a re-determination.

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4.9 However, in the most important respect – the requirement to make two separate applications to reach the appeal stage (which is the key barrier to reaching an independent hearing) – the re-determination process is the same as mandatory reconsideration. CPAG’s separate paper on Redeterminations and Appeals explores this in more detail.

4.10 CPAG recommends an improvement to this proposed re-determination process, which would retain a re-determination in every case but require just one application to reach an independent appeal. This would mean people would not have to make another application if there was no change at the internal re-determination stage but would have the option to withdraw at that point if they chose. This would be a real improvement for some of our most vulnerable citizens.

4.11 Timescales for challenging a decision should be sufficiently long to ensure individuals are able to seek advice and gather evidence – for example if there is a long wait for an appointment with an advice provider.

4.12 The Bill should make sure that the agency cannot act as gatekeeper for appeals, for example, by refusing a late request for re-determination thus denying an independent appeal. Such an approach has been held to be unlawful in UK benefits for requests made within 13 months. The Bill should not create lesser rights in the Scottish social security system.

4.13 For appeals, as the Bill is currently drafted, the time limit of 31 days, while in keeping with tax credits, is out of step with other benefits, which all have a one-calendar-month time limit. It will be simpler and clearer to communicate if the deadline is aligned at one month. To ensure the best outcomes, the agency should work closely with the advice sector to make sure people receive the advice and support they need.

First-tier Tribunal power to determine entitlement.

4.14 The First-tier Tribunal should be able to consider those issues raised by the appeal and not be required to consider other issues. Section 29 of the Bill, as drafted, may require a tribunal to make a complete re-determination (if not simply upholding the decision under appeal). Commonly, disability benefit appeals focus just on mobility difficulties, or just on daily living needs, and tribunals can choose to deal with just those particular aspects of the award that are at issue in the appeal. If they had to deal with all aspects, practically this could mean longer hearings, more resource required by the Tribunals Service, more stressful hearings for people and more time and money spent on gathering evidence to bolster aspects of an award that are not in dispute.

Obligation to provide information on request.

4.15 This section means that if someone is asked to provide information such as a payslip or medical test result and simply cannot, they could automatically be refused benefit. While this may be an unintended consequence of drafting, it is a reduction in rights compared to the current system. This section should be amended to create a fairer provision for individuals. For example it could provide for Ministers to make a determination based on the evidence which they already have.

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Duty to notify change of circumstances

4.16 Section 31 says that people must be told that it may be an offence if they fail to notify a change in circumstances. Currently UK benefit notices tell people two things: that they might have to pay money back if they do not report a change; and that it could be benefit fraud if they deliberately do not report a change. Just focusing on fraud, as this section does, highlights a problem with the way the rules are structured in the Bill. We say more about this in paragraph 4.21 below. It also ignores the more common situation where not reporting a change simply results in having to pay money back.

Determination without application.

4.17 Section 35 is intended to empower decision makers to do two very different things. Most obviously it provides for awards to be made without the need for an application. Less obviously, it also provides for every other situation when an ongoing award might need to be altered, other than in circumstances where someone specifically asks for a re-determination within the deadline set out in section 23. Commonly, awards need to be changed because of a change of circumstances, or because an official error or new information comes to light. There may be a request from an individual or the decision maker may act on their own initiative. As drafted, people do not have the rights they should have (and do have under the current system). For example, they should have a right of appeal if they tell the agency about a change in circumstances but the agency does not re-determine the award.

Liability

4.18 The policy intention is to recover overpayments from people when clearly caused by individual error. However, there is nothing in the Bill to this effect, meaning there is no power to make regulations. Leaving this to guidance means people have no right of appeal about whether an overpayment should be recovered as they do under the current system. This will lead to injustice and unnecessary hardship. The Bill should be amended to ensure a right of appeal to the First-tier Tribunal on decisions about recovery.

4.19 The consideration for debtors’ circumstances only takes financial circumstances into account. Section 37 (2) should be extended to ensure Ministers must have regard to wider circumstances, such as mental health and disability. All relevant circumstances should be taken into account.

4.20 As drafted, the Bill makes no provision for regulations on how overpayments would be recovered. Leaving decisions to individual negotiation and discretion, for example, on how much money can be deducted from an ongoing award, risks disadvantaging those who are less able to put forward their case. Vulnerable people would be better protected by maximum deductions being set out in law.

Offences and Investigations

4.21 The policy intention recognising the distinction between fraud and unintentional error is not realised in the wording of the Bill. As drafted, innocent failure to notify could be an offence. This is because section 40 makes it an offence to fail to report changes not only when a person knows it might affect entitlement, but also when they ‘ought to have known’, and in either case whether it is dishonest or not. It should simply not be an offence if a person does not actually know that the change might affect their benefit. In the current system, this would not be an offence. It is easy to imagine circumstances where vulnerable people could be caught by this provision. It is vital to ensure there is a distinction between innocent and deliberate error in primary legislation and not leave it to the discretion of agency staff.

5 The schedules for devolved benefits: our thoughts.

5.1 Although the Scottish Government has been clear that it intends the Bill to be a framework, CPAG believes that more detail in primary legislation is required to ensure rights are protected. Where the Scottish Government has developed its policy in relation to devolved forms of assistance, there should be more detail in the schedules e.g. on Best Start Grant. Where policy is not yet developed, primary legislation should be brought forward in due course.

5.2 In light of this, we are concerned about the ‘generality of enabling power unaffected’ provision in each schedule. This is an example of enabling powers being too wide, allowing fundamental changes to eligibility or assistance to be made by regulations alone. The safe transfer of benefits to the new Scottish social security system is vital, but this need not be accompanied by the ability to make fundamental changes without sufficient scrutiny.

5.3 A specific example of where significant changes can be brought about through regulations alone is in Schedule 1 on carer’s assistance where paragraph 7 provides for the introduction of means-testing of carer’s assistance through regulations alone. This should be removed from the schedule.

5.5 Schedule 4 on disability assistance appears to give Ministers the power to decide, without the individual’s consent, to make payments to a third party who they believe will use them to benefit the individual (paragraph 11). It is not clear what the purpose of this provision is. If intended to provide for appointees (who are otherwise missing from the Bill) then this is too broad and not in keeping with principles of dignity and respect.

6 Short-term assistance: our views on the proposal.

6.1 The policy intention of short-term assistance is to ensure people are not discouraged from challenging a decision by having to manage for a period on a reduced income. Cases from CPAG’s Early Warning System do show that income crisis affects people challenging employment and support allowance cases. For carers’ and disability benefits, on the other hand, cases show that sudden drops in income when benefit stops, and the consequent loss of passporting entitlements, are problems for people whether they are challenging a decision or not.

6.2 We support measures that reduce income crisis. However, we are concerned that there may be significant unintended consequences with short-term assistance as presented in the Bill. In particular, people could actually be put off from challenging a decision because of fear of debt unless there are guarantees that this assistance would not be repayable if they lost the appeal. Potentially debts could be large given open-ended assistance throughout the process.

6.3 A way to improve upon the proposed short-term assistance would be to provide an automatic run-on of carers’ or disability assistance whenever an award ends or is reduced, regardless of whether the decision is challenged. This would give people time to adjust. It would also allow premiums and passports to continue — because it would be a continued entitlement to the same benefit. In its proposed form, short-term assistance would not be able to do this without a complex set of consequential changes to other benefits and help across the UK. Time-limited run-ons of benefit already exists in the current system e.g. in carer’s allowance after the person receiving care dies.
7 Power to ‘top-up’ reserved benefits: our views.

7.1 We believe use of powers to top up ‘reserved’ benefits could make significant changes to the lives of children and families living in poverty.

7.2 The Bill provides a real opportunity to, in the first instance, legislate for a ‘top up’ to child benefit. Modelling suggests that in itself a £5 per week top up would lift 30,000 children out of poverty, making a significant and well evidenced contribution toward achieving the targets set by the Scottish Government’s Child Poverty (Scotland) Bill.7

8 Increasing carer’s allowance – temporary provision: our thoughts.

8.1 CPAG welcomes the supplement to carer’s allowance.

8.2 The Fiscal Framework requires that any new benefit must not result in people’s entitlement to UK benefits being automatically reduced.8 It is essential that the Scottish Government and UK Government agree that the supplement will not mean reductions in other benefits or tax credits and that they put arrangements in place to ensure this.

8.3 For example, carers commonly receive means-tested income support. The supplement would need to be paid on top otherwise, carers could lose not just the value of the supplement but also access to full passported benefits such as housing benefit.

8.4 Although the temporary supplement is linked to the level of jobseeker’s allowance, there is no commitment elsewhere in the Bill to uprate carer’s assistance once the temporary provision ceases.

9 Discretionary housing payments (DHPs): our views.

9.1 DHPs are a vital way to support families who may be struggling to meet their housing costs for a variety of reasons including lower local housing allowance rates, the benefit cap, the two-child limit, and changes brought about through the introduction of universal credit.

9.2 Increased demand may mean the current DHP budget will not be sufficient and may need reviewed. For example, recent figures from the DWP show a 397% increase in the number of people in Scotland affected by the reduced benefit cap since its introduction in November 2016.9

9.3 We believe the administration of DHPs could be improved in the following ways:

- Designing the applications process around the needs of the most vulnerable individuals – it should be as simple and straightforward as possible.
- Offering every applicant housing and income maximisation information and advice.
- Ensuring staff and systems processing DHP applications are up to date with recent developments e.g. the roll-out of universal credit.

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7 CPAG Briefing Note: Using the SG Powers to Top Up Child Benefit http://www.cpag.org.uk/content/using-scottish-governments-top-powers-detailed-briefing
DHPs are generally an interim measure and sometimes only paid for a short period of time. Awards should be longer where circumstances are not likely to improve in the short-term.

9.4 We are pleased that the Bill makes it clear that DHPs must not be given as a loan.

9.5 We are very concerned that the Bill does not place a duty on local authorities to provide DHPs. There must remain a Scotland-wide system, with no possibility that a piecemeal approach could develop across the country or that some local authorities could choose not to operate the scheme at all. DHPs are not just a vital response to welfare reforms, but are also a long-standing way of supporting people with housing costs who find themselves in difficult circumstances.

10 Other comments on the Bill.

Cash alternatives

10.1 Other than in carefully defined and restricted circumstances, all social security benefits should be delivered in cash rather than in kind. Any other approach is contrary to the principles of dignity and respect.

10.3 The government’s policy intent is to explore with stakeholders what alternatives to cash may be offered but always as a choice. We think the Bill introduces more flexibility than is needed to deliver this aim and removes the right that should be fundamental in the system, the right to assistance in the form of cash.

10.4 As the Bill is currently drafted, it gives a future government the power to remove entitlement to cash benefits entirely through secondary legislation alone. This is not in keeping with a rights-based approach to social security.

10.5 A better approach is to provide that people are entitled to a cash payment which can then be paid to someone else to provide the alternative service. In UK law, an example is offering people the choice of a Motability car instead of cash DLA or PIP mobility payment. This is done by awarding benefit in the usual way while offering the person the choice to have their benefit paid to Motability.

10.6 There is already a provision in schedules to the Social Security (Scotland) Bill which would allow secondary legislation to provide for the Motability scheme or other choices. That is the ‘Meeting liabilities’ paragraphs (Schedule 4, Paragraph 10). This is framed in a similar fashion to the equivalent current legislation and would permit regulations similar to the Motability provision in regulation 44 Social Security (Claims and Payments) Regulations 1987.

10.7 We suggest that the provisions in paragraph (1) of clauses 11 to 18, are deleted ‘(which may or may not take the form of money)’ and insert “financial” before assistance.

Uprating

10.8 The Bill makes no provision for uprating of rates of assistance. There must be a statutory duty to increase the level of assistance annually at least in line with inflation. This is the case in the current benefit system for carers’ and disability benefits. Before there was a statutory duty in UK law, benefits were uprated at irregular intervals and some declined considerably in value. While the value of benefits has

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fallen in recent years largely as a result of the switch to using the lower CPI measure of inflation, this is felt even more acutely in those benefits where there is no statutory duty to uprate.

10.9 There should also be a commitment to regularly review the level of assistance to ensure that these are adequate to meet needs.

Independent advice and scrutiny
10.10 The Bill has no provision for a statutory scrutiny or standards body. CPAG believes there must be statutory scrutiny and standards provided for in the Bill. Both are vital to help government put into practice the principles in the Bill.

10.11 Independent scrutiny supports and complements the role of parliamentary committees. Bringing a wide range of perspectives, such a body can offer ‘expert, non-politically aligned analysis’. The role must be statutory, rather than an informal advisory role, to ensure that scrutiny is fully embedded in the policy and regulation-making processes. Beyond a statutory role, a scrutiny body could also make its own independent contribution to examining how systems and processes could better realise Scottish social security principles.

10.12 Statutory scrutiny is of particular consequence given the Scottish Government’s approach to legislating on social security is to leave the detail to regulations and guidance. Statutory oversight of standards is important given that the delivery agency is setting up completely new processes. Quality of decision making and interactions, no less than legal underpinnings is what determines the success of a social security system.

10.13 Independent scrutiny and standards oversight should be set up in time to consider the first set of regulations following the enactment of this Bill.

10.14 Even with statutory scrutiny in place in Scotland, there will remain a scrutiny gap in relation to interactions with UK benefits. This should also be addressed.

August 2017.

For more information, please contact Jenny Duncan, CPAG Scotland’s Policy and Parliamentary Officer: jduncan@cpagscotland.org.uk

Social security systems based on dignity and respect, Simpson, McKeever and Gray, EHRC 2017
Social security committee: Social Security (Scotland) Bill

1. Introduction

1.1 The Poverty Alliance is the national anti-poverty network in Scotland, established in 1992. We are an independent organisation with over 240 members drawn from the voluntary and public sectors, trade unions, researchers, faith groups and individuals with direct experience of poverty. Our aim is to work with others to enable communities and individuals to tackle poverty. We have a number of key policy areas that provide the focus for our activities; these are addressing low incomes, supporting services to address poverty, enhancing the participation of people with direct experience of poverty in policy development processes, and addressing attitudes to poverty.

2. The Bill

2.1 The Poverty Alliance welcomes the publication of the Social Security (Scotland) Bill, and we believe that this is an opportunity to consider how we think about social security in Scotland. The Poverty Alliance has facilitated conversations around this topic since the Smith Commission began and our activists have repeatedly raised concerns regarding the current delivery of benefits in Scotland. These range from how we access benefits to the level of benefits paid, but the one consistent message that has come across has been about the way people feel judged when accessing the system. It is based on these conversations that the Poverty Alliance has welcomed the decision to include principles in legislation about respect for individuals and recognising that social security is an investment in us all.

2.2 Currently, one in five people in Scotland are living in poverty; this is just over one million people. We believe that alongside paid employment, social security is an important tool for tackling poverty and hope that the new system in Scotland will help lift families out of poverty. For people who need it, it is important that the new social security system is robust and that we get it right. The Poverty Alliance therefore has some concerns regarding the fact that so much of this system will be established in regulations, rather than primary legislation. The decisions made will affect millions of lives in Scotland and they must therefore be subject to parliamentary scrutiny and debate to ensure that they are right from the start. We want a commitment for a review after three years and a requirement for Ministers to bring forward primary legislation in areas that will initially be covered by regulation, specifically related to entitlement criteria.

2.3 While much of the discussion around this bill has been focused on the idea of social security as a right and the importance of taking a rights based approach there are actually few rights for claimants enshrined in the bill, and few duties placed on Ministers to enshrine and protect rights.
2.4 There has also been little consideration given as to the purpose of this bill. We believe that there should be a statement of purpose which describes that the purpose of the bill is to contribute to the eradication of poverty in Scotland and be a real safety net for people.

3. Principles

3.1 We broadly welcome the principles laid out in the bill, in particular those which recognise social security as an investment in society, and for respect for the dignity of individuals to be at the heart of the social security system. However, we do believe that Part 1 Section 1D could be strengthened to ensure that Ministers have a duty to ensure that individuals receive their full social security entitlements, rather than simply a role to play.

3.2 In order to ensure consistency of language, we would support amending Part 1 Section 1F to reflect the rights rather than the needs of the individual.

3.3 For the Poverty Alliance, many of the recommendations we made around which powers should be devolved to Scotland were based on which powers could be effectively used to tackle poverty. We therefore would support adding an extra principle to the effect of the below:

“Social security has a role to play in the eradication of poverty in Scotland”.

3.4 Social security was designed to be a safety net, but we believe it should go further than this to help lift people out of poverty. In recent years it has done the opposite of what it was designed to do and low levels of benefits have trapped people in poverty.

3.5 The new powers coming to Scotland mean that we can start to address the adequacy of benefits, and therefore the inclusion of this principle is vital if we are to make progress in the fight against poverty.

3.6 Given that BME children are twice as likely to be in poverty as their peers, as are almost half of all children living in in lone parent households headed by women1, we believe that there needs to be a recognition of this in the bill, and a specific principle to address it. We would therefore support CRER’s recommendation of a further principle to the effect of:

“Equality is to be embedded within the Scottish social security system to ensure individuals do not face unlawful discrimination when accessing the system.”

4. The Charter

4.1 Poverty Alliance members were consulted in the run up to the publication of this bill on the idea of a charter and were generally supportive, but there were some concerns raised about how meaningful this would be. We believe this could be strengthened by adding an additional subsection under Part 1 Section 2 which states:

“the charter should set out how people can exercise their rights in order to claim their entitlements”.

In order to fulfil, the above it is essential that Ministers make the charter as publicly available as possible and therefore we believe Part 1 Section 4 should be strengthened to say that Ministers

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must make the charter publicly available in all areas where people seek money advice or claim social security benefits, in addition to any other means Ministers deem appropriate.

4.2 The Poverty Alliance would support changing the review period for the charter to every three years. We believe that this is an adequate amount of time for the charter to become fully embedded, without allowing potential issues to run on for too long unchecked.

5. **Annual report**

5.1 We believe that the annual reports should be made as publicly available as possible and would therefore support strengthening Part 1 Section 6 1b to reflect this.

5.2 As with the charter, we believe that this should be made publicly available in all areas where people claim social security benefits or seek money related advice, in addition to any other areas as deemed appropriate by Ministers.

5.3 The Poverty Alliance would also like to see the annual reports contain information about how the principles set out in Section 1 Part 1 are being upheld, and the contribution that social security has made towards tackling poverty in Scotland.

6. **The benefits**

6.1 The Poverty Alliance is concerned at 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. The Poverty Alliance has repeatedly called for cash by the default option for payments, as anything else can potentially stigmatise claimants. If claimants choose for payments to be made in the form of goods then this should be an opt-in system and the legislation should be amended to reflect this. This is a position taken after years of consultation with activists and people with direct experience of poverty, who have highlighted numerous instances of receiving poor quality goods, and the stigma they have felt when claiming and spending vouchers or other non-cash benefits. People value choice and providing cash benefits empowers them and treats them with the dignity and respect they deserve.

6.2 While any increase in benefit levels is welcome, simply raising Carer’s Allowance to bring it into line with Jobseeker’s Allowance does not go far enough in recognising the value of the work that carers do. Unpaid carers make a significant contribution to our economy and our society, and for many this will continue to leave them feeling unappreciated.

6.3 It is important that we support carers so that they are able to continue to work or study where possible. This means ensuring that entitlement to carer’s allowance is as broad as possible, and that it is seen as part of a wider package of support available for carers. This should be developed alongside people with direct experience of caring.

7. **Determining entitlement**

7.1 One of the criticisms of the current system is the overcomplicated application process. We would therefore welcome a commitment on the face of the bill to ensuring that there are numerous ways that people can apply for benefits and that Ministers will not be unreasonable in the evidence they require. The Poverty Alliance strongly believes that the private sector should have no role in
the new social security system, and the people we have worked with have been explicit in saying that all assessments must be carried out by a not for profit agency. This bill should therefore be amended to rule out the use of private sector contractors in social security in Scotland.

7.2 It is important that the new system does not replicate the old system in terms of being digital by default. Our community activists have been very clear that there must be a range of ways to apply for benefits in the new system including online, by phone, in writing and face to face.

7.3 The Poverty Alliance has concerns about entitlement criteria being set in regulations. We believe that this would potentially allow any future governments to change or remove entitlement very quickly. These criteria should therefore be on the face of the bill.

7.4 Under section 22, there should be a time limit in place for Ministers notifying individuals of their entitlement. We believe that this should be within ten business days so that people are aware of their financial situation as quickly as possible. It is also important that people are given the reasons for their decision in writing in order to enable them to understand the decision and enable them to seek a re-determination if appropriate. The letter must also advise the individual of their right to appeal.

8.  Re-determination

8.4 We are concerned that the process outlined in the bill mirrors the current UK Government process of Mandatory Reconsideration. Not only is this of questionable legality but we believe it is an additional barrier to justice.

8.5 We would support making appeals an automatic process to ensure that anyone who receives a negative decision is automatically sent for appeal unless they opt out. This is more in fitting with a rights based approach to social security, and would also help ensure that the correct decisions are made first time.

9.  Time for appeal

9.1 The Poverty Alliance believes the timescales under this section are too inflexible and do not take into account all the factors that may lead to someone being unable to make an appeal within 31 days. We would therefore support extending the time for appeal to 90 days.

9.2 We are concerned that section 28(3) leaves too much to the discretion of Ministers and the term ‘good reason’ should be more clearly defined at this stage.

10.  Obligation to provide information on request

10.1 Ministers must take into account that it may not be possible for people to collate all the information requested in a short space of time. This is particularly true for medical evidence and it is important that people are not penalised as a result of GP surgeries failing to provide evidence in a timely manner.

11.  Recovery of assistance given in error
11.1 The Poverty Alliance strongly believes that individuals should not have to pay for the mistakes made by Ministers. If an error was made in the decision making process, as long as the correct information was provided by the applicant, then it should not be up to the individual to find a way of paying this money back.

11.2 It is also important that any money that is recollected as a result of misinformation is not collected in a way that causes financial hardship to the individual, and we welcome the section on consideration for debtor’s circumstances.

11.3 In keeping with the principle of an efficient social security system which delivers value for money there should be a threshold for disregard where overpayments below a certain amount are not recovered. This would ensure that Minister’s do not spend more money recovering the debt, and potentially causing financial hardship, than the amount that is owed.

12. Offences and investigations

12.1 The Poverty Alliance is concerned that the punishments for the offences listed in sections 39, 40 and 41 are unduly punitive. We do not believe imprisonment is an appropriate response for someone who has failed to notify Ministers of a change in circumstances. This will often be women, who may not notify Ministers as a result of an abusive relationship. The reasons people may mislead Ministers about their circumstances are complex and we should focus instead on addressing these reasons rather than imprisoning people. Sending people to prison, especially women, can have a devastating impact on the people around them, particularly if they have children. We would therefore suggest that the government revisits this section.

12.2 We are also concerned that this is a policy mismatch with the Scottish Government commitment to reducing the female imprisonment rate. We know that prisons are not the answer to a social problem.

12.3 It is also important to recognise that this limits judicial discretion. There are many other sanctions that could be applied rather than just a fine or imprisonment so it does not make sense that they are the only two options available to judges in these cases.

12.4 If the purpose of this section is to ensure that those committing large scale fraud receive a prison sentence, then a level should be set out in the bill e.g. in cases where more than £100,000 has been claimed fraudulently a prison sentence of up to X months may apply.

13. Top up of reserved benefits

13.1 We would support the strengthening of this section to show a commitment to addressing the adequacy of benefits. The Poverty Alliance strongly supports using the new top up powers and has campaigned for a universal child benefit top up of £5 per week. A recent poll carried out by Survation for the Poverty Alliance found that almost two-thirds of the Scottish public support this proposal. We would also question whether it is possible to have dignity and respect without adequacy.

14. Carer’s Allowance
14.1 The Poverty Alliance would support a two tier approach to Carer’s Allowance. One level which would be universal and apply to all those who qualify for carer’s benefit, and the second would apply only to those on the lowest incomes.

14.2 It is not enough to bring Carer’s Allowance into line with Jobseeker’s Allowance. This undervalues the contribution carers make to our society every day. It is also important to note that the benefit freeze means Job Seekers Allowance is currently frozen at UK level and so there needs to be an additional commitment to the uprating of Carer’s Allowance.

15. **Discretionary Housing Payments**

15.1 We believe that this bill should require local authorities to have a discretionary housing payment scheme, and that there should be a commitment from the Scottish Government to ensuring this is adequately resourced.

16. **What’s missing?**

16.1 The bill is missing any recognition of the role that social security plays in tackling poverty and inequality in Scotland. We believe that this must be one of the principles in the bill.

16.2 The Poverty Alliance is concerned at the lack of information provided in the bill about how new powers will be used, particularly around creating new benefits in devolved areas and the topping up of reserved benefits. These powers could be powerful tools in the fight against poverty but there is little information as to how the government plan on using them.

16.3 As we have already mentioned, we are extremely disappointed that the bill does not rule out the use of private sector contractors in the delivery of social security in Scotland. This is something that has been highlighted by our activists repeatedly throughout the consultation process on social security, and particularly by those with disabilities. We do not believe using private sector companies is in line with the principles outlined in part 1 of the bill.

16.4 The Poverty Alliance believes there should be a more overt recognition of the role of experience panels in the design and delivery of social security in Scotland. We believe that people with lived experience are the experts and it is important that their expertise is recognised.

16.5 The Poverty Alliance is extremely disappointed that there is no commitment to the uprating of benefits on the face of the bill. The freeze on working age benefits by the UK Government will de-value the incomes of 700,000 families in Scotland\(^2\) and it is important that people in receipt of benefits delivered by the new Scottish Social Security Agency do not find themselves in a situation where the cost of living is rising but their incomes are not.

16.6 We had previously welcomed the creation of the Jobs Grant by the Scottish Government and were therefore disappointed to see that more details of this were not included on the face of the bill. This grant would be a significant help to those looking for work, and we would hope to see the Government progress this as soon as possible.

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\(^2\) Sheffield Hallam (2016) The impact on Scotland of the new Welfare Reforms
16.7 It is essential that there is independent scrutiny of the delivery of the new system. The Poverty Alliance has previously suggested that this could be a new Scottish Social Security Advisory Committee, but consideration could also be given as to whether there is an additional role for the Poverty and Inequality Commission. These two could work in parallel similar to what had previously existed at UK level. It is essential that scrutiny is carried out by a body fully independent of government who are able to point to areas where improvements could be made, and work with the experience panels where appropriate.

16.8 There must be a complaints process, and it is disappointing that this is not referred to in the bill, given its link to the ability of people to fulfil their rights. You cannot build a system on the principles of dignity and respect without including somewhere for people to turn when the system has not treated them in the way they had hoped.

Schedules

17. Carer’s Assistance regulations

17.1 The Poverty Alliance is concerned that linking the eligibility criteria for Carer’s Allowance to someone else’s eligibility for disability benefits may leave people unable to access the benefits that they are entitled to. This is particularly worrying without knowing what the assessment process for disability benefits will look like.

18. Disability Assistance Regulations

18.1 It is important that the regulations around disability benefits are developed alongside people with disabilities and the organisations that represent them. The activists that we work with have been highlighting, for many years now, issues surrounding disability benefits. These include the qualifying criteria, the assessment process, and the level of benefits paid.

18.2 People must be able to apply for these benefits, and all benefits, in a variety of ways including paper forms, online, on the phone and in person.

19. Conclusion

19.1 This is an important step forward in developing Scotland’s social security system, and we hope it will mark the beginning of a new approach to benefits and the people who rely on them. Now is our opportunity to create a system that takes a radically different approach to welfare and that makes a real, positive difference to the lives of millions of people living in Scotland. Social security is not, and should not be, a theoretical, distant concept. It is something that affects the lives of individuals every day, it is something that affects each of us – either directly or indirectly at some point of our lives, and it is something that we cannot afford to get wrong. We therefore believe that parliamentary scrutiny is vital, and that regulations should be brought into primary legislation once the system has been firmly established.

19.2 This is arguably one of the most important pieces of legislation to be passed since the Scottish Parliament’s creation, and it is imperative that the system created is able to grow and adapt as devolution changes and further powers are potentially devolved. The system needs to be able to
react to protect people from poverty, but also be proactive in order to ensure that people are not trapped in poverty as a result of an inadequate social security system.

19.3 We welcome the fact that much of the debate around this bill has been around the principles of dignity and respect, and the need to take a rights based approach. However, we must not forget the purpose of the social security system, and why we have this bill in the first place. It is for this reason that we need that additional principle recognising the role that social security has in eradicating poverty in Scotland.

19.4 Linked to the principles of dignity and respect, is the principle of adequacy. Adequacy of benefits has been raised repeatedly by the community activists we work with, and we would question whether it is possible to fulfil the principles of dignity and respect, without also addressing benefit levels. For too many people in Scotland today, low benefit levels are trapping them in poverty. This need to change and the Scottish Government should make the full use of their new powers to ensure that no-one is trapped in poverty as a result of an inadequate social security system.

19.5 Given that benefit fraud accounts for only 0.7 per cent of benefit expenditure there is a disproportionate focus in the bill on offences and investigations. The sanctions listed in the bill are also unduly punitive and at odds with the Scottish Government’s policy on women and the justice system.

19.6 Like many of our colleagues across the third sector, we are concerned not only by some of the things contained in the bill but also what is not. It is now widely recognised that what works best is a joined up, holistic approach to social security and therefore the legislation should not be made in piecemeal, disjointed fashion. We need to be able to see the links between different benefits and how they interact with each other. Both between devolved benefits but also how devolved benefits will interact with reserved benefits.

19.7 This is a bill that will be recorded in history as having a significant impact on social security and its delivery in Scotland. It should therefore be developed in the most inclusive way possible – with people who rely on social security and the organisations that represent them. It should be a system built genuinely on trust, not just rhetoric. It should be a system that supports people to achieve their ambitions, not traps them in poverty. It should be a system that recognises the value in each of us, and the value of tackling poverty to all of us. We believe that the existence of poverty is a result of political will, so let this be a real step towards its eradication.

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3 UK Government (2014)
Racial Equality and the Social Security (Scotland) Bill: Evidence Submission from the Coalition for Racial Equality and Rights

The Coalition for Racial Equality and Rights (CRER) is a Scottish strategic anti-racism organisation which works to eliminate racial discrimination and promote racial justice across Scotland. Our primary concern in relation to the Social Security (Scotland) Bill is its implications on racial equality and its potential effect on Black and minority ethnic (BME) individuals. As such, we are grateful for the opportunity to submit evidence to the Social Security Committee to provide an overview of some key points for consideration.

Racial Equality and Poverty

When considering social security in Scotland, it is important to note that BME groups are twice as likely to be in poverty as their white peers,\(^1\) and yet have a lower-rate of benefit take-up, whether due to lack of awareness of entitlement, particular stigma, or other factors\(^2\). BME groups are susceptible to and affected by poverty in particular ways in Scotland – it is not an equal playing field, and policies and initiatives to tackle poverty must recognise this.

The Scottish Government’s Race Equality Framework for Scotland 2016-2030\(^3\), contains a key goal that states that the government will: “Ensure robust policy responses that support race equality in relation to income and poverty.”

To meet this goal, the Scottish Government committed to:

- “Ensure that our response and approach to Social Justice considers measures to tackle poverty across all ethnicities…”
- “Work to fill the gaps in current knowledge on how and to what extent minority ethnic people are accessing the benefits they are entitled to…”
- “Implement the powers that are being devolved as a result of the Scotland Bill 2015-16 in a way that makes full use of those powers to tackle poverty across all ethnicities”
- “Make all possible efforts to assess, understand, and, where we can, mitigate the impact of any UK policies outwith our control which have a financial impact on minority ethnic people with low incomes…”

Given these commitments, CRER believes the Social Security (Scotland) Bill could do more to promote equality, eradicate poverty, and ensure BME groups are not further disadvantaged. In particular, we believe the Bill fails to adequately address the new powers the Scottish Government holds to top-up benefits and create new benefits, which, if enacted properly, could serve to lift BME groups out of poverty.

Equality Impact Assessment

Before we detail our specific concerns relating to the draft Bill, CRER would like to highlight issues pertaining to the Bill’s Equality Impact Assessment\(^4\). Overall, many of the points raised in the assessment (e.g. reduction of stigma and complexity in the system) pertain to all individuals, rather than just equality groups. While the anticipated changes and focus on rights is welcome, they do not detail the particular effect this Bill will have on specific equality groups. This should be challenged, and the assessment should be revised to detail the specific impact that is anticipated for each of the protected characteristics. There is a Scotland-wide issue with inadequate impact assessments from

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public bodies, and we ask the Scottish Government to lead the way in providing a robust assessment for a piece of legislation that will affect more than a million Scots.

We note that the current assessment states that the devolution of benefits is an opportunity to promote fairness and equality. However, fairness and equality are not synonymous – an emphasis on fairness is not a commitment to equality (in Scotland, equality is inextricably tied to the Equality Act 2010 and the protected characteristics). As such, CRER believes equality should be embedded in the proposed system principles. Our proposal for this is further detailed in our response to Question 2.

The assessment also notes that there was strong consensus from consulted groups that the Scottish Government should, “work closely with people with direct experience of the present system, including those with protected characteristics.” We would go further and state that those with relevant protected characteristics should be especially consulted, given the disparate rates of poverty among some groups and particular challenges associated with the social security system for these groups. With this in mind, CRER has suggested amendments that require Ministers to consult with persons who share a relevant protected characteristic in the development and review of the charter. These are detailed in our response to Question 3.

Finally, we ask how this assessment – and the lack of data particular to equality groups – will influence the Scottish Government’s Equality Evidence Strategy. The only policy which is effective is that which is based on evidence, so we would anticipate that the lack of equality specific data in this assessment would urge the Scottish Government to consider means to collect this data – especially in relation to the new system and devolved benefits going forward – to ensure discrimination is eliminated and equality is promoted, and that intersectional matters can be fully considered (e.g. for BME women, who face particular disadvantage due to their gender and race, but for whom specific data is sorely lacking).

**Question 1 – Regulations**

CRER is concerned by the Scottish Government’s intent to establish significant proportions of the social security system in regulations rather than primary legislation. We believe the Scottish Parliament should have greater involvement in and oversight of the development of the new agency and the benefits that will be delivered. This Bill will have a significant impact on the lives of people affected by poverty; parliamentary scrutiny is necessary to ensure that the approach taken is the right one. CRER therefore supports the call for a review of the regulations after three years, and a requirement for Ministers to bring forward additional primary legislation in areas that will initially be addressed by regulation.

**Question 2 – Principles**

While CRER welcomes the principles and the emphasis on human rights, we note the absence of an equality-focused principle. Human rights, dignity, and fairness cannot be achieved fully without equality. As poverty is more likely to affect certain equality groups (e.g. BME groups, women, disabled people), equality should be a principle that is embedded throughout the Bill, regulations, and the system itself. While all forthcoming pieces of legislation are subject to the provisions of the Equality Act 2010, we know that Equality Impact Assessments (including, in our opinion, the assessment for this Bill) are often inadequate and fail to ensure equality is truly embedded in legislation.

Given this, we call for the addition for an equality-focused principle such as, “**Equality of outcome for groups facing discrimination, inequality, and disadvantage is to be embedded in the Scottish social security system.**”

Furthermore, given the principles’ emphasis on rights, we are supportive of calls to amend Part 1 Section 1F to reflect the ‘rights’ rather than the ‘needs’ of the individual. We also believe the language of Part 1 Section 1D could

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be strengthened to state that Ministers have a ‘duty to ensure’ (not just a ‘role in ensuring’) that individuals receive their full social security entitlements, given the fact that BME groups are less likely to claim the benefits to which they are entitled.

CRER is also supportive of the additional principle proposed by the Poverty Alliance which states, “Social security has a role to play in the eradication of poverty in Scotland,” as this emphasises and clarifies the important role social security plays in lifting people out of poverty.

Finally, we would also like to see more detail on the face of the Bill regarding a requirement for the social security system to reflect these principles. We would be supportive of an obligation for secondary legislation to explicitly state how it adheres to the principles.

Question 3 – Charter (and Annual Report)

CRER welcomes the development of a charter and the commitment to consult those individuals in receipt of the listed benefits in the preparation of this charter. However, we feel the inclusion of equality groups most likely to face poverty – e.g. women, BME groups, and disabled people – would further benefit the charter and ensure that particular barriers and challenges that face these groups are brought into consideration. As such, we call for the amendment of Part 1 Section 3 to include: “(h) persons who share a relevant protected characteristic under the Equality Act 2010.”

Further to this aim, we also believe that the charter should undergo a robust Equality Impact Assessment prior to its publication.

We note the duty on Ministers to report annually on progress made against the commitments in the charter. Equality must be central to this reporting process and progress reports must detail the equality implications of the new system and any inequalities faced by groups with protected characteristics. We know from previous pieces of legislation that if equality is not embedded from the beginning, it is relegated to an afterthought or simply forgotten. (This further supports our call to place equality as one of the system principles.)

To help ensure equality reporting is robust, we ask that a similar amendment be made to Part 1 Section 5, which states that Ministers must consult such persons as they consider appropriate, including individuals who have received assistance through the Scottish social security system, to include “persons who share a relevant protected characteristic under the Equality Act 2010.”

CRER also believes further specification is needed in Part 1 Section 6 to detail what must be included in the annual report. In addition to being supportive of calls for the report to contain information about how the principles set out in Part 1 Section 1 are being upheld, we believe the report should also include equality monitoring data, where it exists, for each stage of the social security process to ensure equality groups are not being discriminated against. Where this data is not held, there should be a commitment and a published plan to collect and publish this data in the future.

As with the charter itself, the annual report should be publicly available. We support the Poverty Alliance in calls to amend Part 1 Section 4 to ensure the charter is readily available in all areas where people seek money advice or claim social security benefits, in addition to other means Ministers find appropriate. CRER also believes the timescale for reviewing the charter should be changed from five years to three years.

Question 4 - Proposed Rules

CRER is supportive of the concerns raised in relation to the proposed rules. We join other organisation in calls for:
• A commitment in primary legislation to ensure that there are several ways to apply for benefits and that Ministers will not be unreasonable in the evidence required.
• A time limit of ten business days imposed on Ministers for notifying individuals of their entitlement.
• The detailing of entitlement criteria in primary legislation rather than regulations, which will inhibit the ability of future governments to change or remove entitlements very quickly and lead to the erosion of access to benefits for those who need them.
• The revision of the 31 day timescale for seeking an appeal to 90 days, given the factors that could affect an individual’s ability to appeal in time.
• Re-consideration of the obligation to provide information on request which ensures that individuals who cannot provide information within the timescales given due to factors outwith their control (e.g. difficulty sourcing information from a GP surgery) are not wrongly penalised for delays.
• Re-consideration of the punishments for offences which carry the potential for imprisonment, as individuals should not be imprisoned for failure to notify Ministers of a change in circumstances, as these reasons may be complex and deeply personal (e.g. the result of an abusive relationship). There must be differentiation between individuals who find themselves in exceptional circumstances resulting in a failure to notify for good-faith reasons, and those who knowingly commit large-scale fraud.

Question 7 - Top-Up and Creation of New Benefits

CRER supports the call of the Poverty Alliance to strengthen this section to address the adequacy of benefits. If benefits provided are not adequate, they will not lift people out of poverty, but, rather, will keep them living in poverty. Adequacy of benefits – and the ability to top-up benefits to ensure this is the case – is essential to the realisation of dignity. This is particularly important for BME groups who are twice as likely to be living in poverty as white Scottish groups.

Question 8 – Carers Allowance

CRER notes that, alongside evidence suggesting that BME groups under-claim benefits, there is a particular barrier to BME individuals accessing Carers Allowance. Self-identification as a carer can be problematic in some BME groups, as many individuals may see their caring role subsumed within their family role or duties. Significant efforts will be needed to ensure this group is able to access Carers Allowance at a rate proportionate to the population.

Additional Concerns

CRER notes several places in which the Bill could be strengthened:
• Firstly, as expressed previously, we are concerned that equality is not referenced in the principles. Given the disparate effects of poverty, there must be a particular commitment in the Bill to ensure that groups are not disadvantaged and that the new devolved powers improve the situation for all groups, particularly those who face the most inequality.
• The Bill should detail how new powers will be used, particularly in the creation of new benefits and the topping-up of reserved benefits. The lack of detail and initiative here is in contrast to the commitment given in the Race Equality Framework, in which the Scottish Government committed to using these new powers to tackle poverty for BME groups.
• There must be independent scrutiny of the delivery of the new system. BME individuals who have experienced discrimination at the hands of other Scottish Government and DWP agencies have asserted their belief that this scrutiny is essential to ensure they do not face additional inequality. Whether this scrutiny is conducted by a new bespoke statutory body or the Poverty and Inequality Commission, it is essential that this body be wholly independent of the government and that there is representation in this group from those with expertise in racial equality.
There must be detail about a formal complaints procedure enshrined on the face of the Bill, especially as we know anecdotally that BME groups may feel some decisions were affected by racism and discrimination. There must be a means to address concerns in instances in which individuals have not been treated fairly.

We are concerned that the Bill leaves open the potential for individuals to receive benefits “which may or may not take the form of money”. This is reminiscent of the distribution of payment cards to asylum seekers, which resulted in many significant problems including the inability to travel to appointments, difficulty buying appropriate and healthy food, and the feeling of shame and anxiety when using the card. We believe individuals must always be given a choice on this matter, as they are best placed to determine how to spend their money.

We are also supportive of the call from the Scottish Independent Advocacy Alliance to include in the Bill a legal right to independent advocacy and advice for anyone accessing social security in Scotland.

The Jobs Grant announced by the Scottish Government which intends to help unemployed young people aged 16-24 would be particularly useful to BME young people who, despite high qualifications, are disproportionately under- and unemployed. As such, we are disappointed to not see details of this on the face of the Bill. (However, consideration needs to be given to extending the age range to reflect that fact that BME young people are more likely than their white peers to attend further and higher education.)

Conclusion

CRER asks the Committee to keep these issues in mind during its inquiry into the Social Security (Scotland) Bill, as we believe an equalities approach will be needed to fully address the issues raised. Racial equality must be given appropriate consideration.

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Equality and Human Rights Commission Consultation Response to the Social Security (Scotland) Bill 2017

Creating a fairer Britain
Equality and Human Rights Commission
Response to the Social Security (Scotland) Bill 2017.

23 August 2017

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The Equality and Human Rights Commission is the National Equality Body (NEB) for Scotland, England and Wales. We work to eliminate discrimination and promote equality across the nine protected grounds set out in the Equality Act 2010: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

We are an “A Status” National Human Rights Institution (NHRI) and share our mandate to promote and protect human rights in Scotland with the Scottish Human Rights Commission (SHRC).

Question 1: Decision by regulation, not legislation

Given the criticality of social security the EHRC would prefer that Parliament is given the opportunity to review and comment on decisions made about it prior to their implementation. This is particularly important in the early stages where regulations will make a reality of the commitments in the Bill. We note that a wide number of decisions affecting benefits eligibility and payment will be the subject of regulations rather than primary legislation including carer allowances, winter fuel payments, disability and early years assistance amounts others. Where possible we believe that the accountability that Parliamentary debate brings should be encouraged.

Question 2: Principles

The EHRC has recently published independent research from Ulster University which looks at the operation of dignity and respect in other jurisdictions social security systems (Social security systems based on dignity and respect). The research makes a number of recommendations which are germane to this consultation and we would encourage the Committee to look at this research as a yard stick by which the Governments commitments to dignity and respect could be measured. For example the research looks at issues of adequacy (assistance), engagement, and the administration of the system through the lens of Scotland’s human rights obligations.

In regard to other principles that the Bill could incorporate we would encourage the Government to consider the role of independent scrutiny on the face of the Bill and set out plans for this. We also support the Scottish Human Rights Commission’s call for the principles to incorporate the “progressive realisation” of human rights in the delivery of social security as a balancing mechanism for the principle of efficiency and value for money.
**Question 3: A social security charter?**

We welcome the establishment of a charter which supports the delivery of the new social security powers. In particular we agree that the creation of a Charter, co-produced with those who are in receipt or could be in receipt of benefits, is a critical step to making a reality of commitments towards engagement and involvement.

Whilst we welcome a clear statement of what is required from claimants and how they can engage and comply with the new systems requirements we would also encourage the development of clear statements about how staff will relate to claimants beyond the day to day administration of benefits. In particular we would support clear statements about the relationship between the claimant and the state and how the system will operationalise an enabling approach aimed at income maximisation within the context of a rights based system.

At this point the status of the Charter is unclear. The EHRC would encourage the Government to view the Charter as being an enforceable statement of rights and responsibilities which would enable claimants a right to remedy should errors occur. This is a matter which would need to be addressed within the body of the current Bill. We would also encourage the Government to place a time limit for review of the Charter within the body of the Bill to enable Parliament to consider if the resulting Act is operating in the way in which was envisaged – for example is it in keeping with the principles set out on the face of the Bill?

**Question 4: Rules**

In this section we concentrate on the dispute resolution elements of the Bill. Firstly we welcome the commitment of the Scottish Government moving to a rights based approach within the new system. However the detail of how any rights based system that is introduced will work is not set out in the Bill and presumably again this is a matter which will be dealt with by regulation. As above (Q1) we have concerns about this approach and would encourage the Government to seek Parliamentary oversight of this matter. For example clause 8 could be strengthened to include the principle of a right to social security.

Looking specifically at the issues of time limits for appeals we consider that 31 days may not be sufficient time for some people, particularly those with, or who share, a protected characteristic to put forward a defence. This concern particularly relates to people who have communication issues and may require a signer or interpreter, who may not be available within the prescribed time period. The 31 days limit is also dependant on the availability of documentation in a form that is useable by the claimant (for example in
braille) to be fair.
On the issue of debt recovery where an overpayment has been made, whatever steps which are taken to recovery debt must be proportionate to the total income on the household so as not to push the household into destitution or further debt. Ceilings will need to be introduced to limit the extent of recovery. We are also concerned that the time limit for recovery – 5 years – seems an overly long period for an error which was not the fault of the claimant. As above, circumstances within the claimants household may have significantly changed within 5 years and the whilst the principle of recovery is one that we support it should not be used as a blanket measure when proportionality could be a better and more reasonable test.

**Question 5: Specific benefits**
The EHRC is not going to comment on these matters as there are specialist agencies who are better placed to do so.

**Question 6: Short-term assistance**
The EHRC welcomes the introduction of short term assistance to ensure that claimants who are appealing are not left destitute during the process. This is an important and welcome change from the current UK Government system of sanctions. In itself it signals a significant shift in the relationship between the state and claimants and also the rationale for social security itself. However we note that whilst claimants have one opportunity to appeal the social security agency appears to have two, which somewhat dilutes the notions of fairness established elsewhere.

**Questions 7 - 9**
At this point we do not have any comments on the more detailed aspects of the Bill.
Response to the Scottish Parliament Social Security Committee:
Social Security (Scotland) Bill

Engender welcomes the opportunity to respond to the Committee’s call for views. Over the last two years, we have worked with our partners at Scottish Women’s Aid, Close the Gap, the Scottish Refugee Council and Carers Scotland to highlight the link between women’s inequality and the existing UK social security system. In our work, we have attempted to shed light on the factors that render women twice as a dependent on social security as men:

- Women provide approximately 60 percent of unpaid care, and are twice as likely as men to give up paid work to care.  
- On average, women in Scotland earn £182.90 per week less than men, and account for 75 percent of the part-time workforce. 
- Women make up two-thirds of workers earning below the Living Wage. 
- Inaccessible and unaffordable childcare is a barrier to women being able to work, study and access vocational training. 
- In households where men are primary ‘breadwinners’, women ‘may not get equal access to earnings. In some low-income households, parents, but especially mothers, forego their own consumption to meet the demands of their children’. 
- Economic dependency is particularly acute in households where women experience domestic violence. ‘Mothers experiencing domestic violence are more likely to become lone parents, less likely to be earning independently, and more likely to report their families getting into financial difficulties’. 
- All of these factors are exacerbated for women who face multiple inequalities across society, including disabled women, Black and minority ethnic (BME) women and refugee women.

During the drafting of our response, several documents were cross-referenced, including our submission to the initial consultation on social security by the Scottish Government, the Equality Impact Assessment of the Bill, as well as the Scottish Government’s Analysis of Written Responses to the Consultation on Social Security in Scotland.

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5 Bradshaw, J. et al.
Social Security (Scotland) Bill
Summary of Engender’s Response to the Social Security Committee

1. It is unclear whether the proposals in the Bill will reduce women’s poverty and inequality in Scotland. However, amendments can be made to strengthen the proposed legislation to ensure that the policies and practices of the social security system in Scotland tackle women’s poverty and inequality.

2. Social security policies should be subject to public and parliamentary debate and scrutiny (see paragraphs 1-4).

3. Introduce a purpose statement and strengthen existing principles, including adding the principles of equality and non-discrimination on the face of the Bill (see paragraphs 5-9).

4. A right to independent advice and advocacy should be embedded in the Bill (see paragraph 34).

5. Procedural fairness requirements must be incorporated into the Bill, which includes the right to a decision in writing (see paragraph 18).

6. Independent scrutiny of the social security system is essential (e.g., an independent statutory body providing impartial advice on social security matters) (see paragraph 33).

7. The charter should be subject to an Equality Impact Assessment; specifically require ongoing engagement with protected groups; be reviewed at regular, specified intervals; and provide a mechanism for redress (see paragraphs 12-16).

8. The reconsideration and appeals process too closely mimics existing DWP practice. A single application should be required for reconsideration and appeal (see paragraph 19).

9. The default payment for each type of assistance should be in cash, not in kind, and assistance provided by the Scottish Government should keep pace with the cost of living (see paragraphs 37 and 38).

10. Overpayments caused by official error should not be recovered, and imprisonment under 12 months conflicts with Scottish Government commitments to reduce short-term sentences. Alternatives to custody must be considered (see paragraphs 20-23).

11. Carers Allowance must be uprated and must not include restrictions on education and employment opportunities for carers (see paragraphs 25-27).

12. Eligibility for Early Years Assistance must not exacerbate power imbalances within households. Instead, payment structures should contribute to women’s financial independence (see paragraphs 28 and 29).

13. The Equality Impact Assessment (EQIA) of the Bill is inadequate, failing to consider how policies might have an impact on a particular group. The EQIA should be revised (see paragraphs 9 and 39).
Question 1: Rules in regulations.

1. Fundamental elements of the future social security system in Scotland are not sufficiently detailed in the Bill. The absence of specific rules relating to, for example, decision-making standards and new programs, make it difficult to review and provide a fulsome assessment of the design and operation of the future social security system.

2. It is cause for concern that the development of the social security system will rely so heavily on secondary legislation, as the regulatory process is not subject to the same debate and scrutiny as the legislative process. We believe that rules (e.g., eligibility criteria) should be on the face of the Bill.

3. Building a social security system that responds to the needs of women in Scotland requires input from women in Scotland. To follow-through on the commitment to ‘design the social security system with the people of Scotland’, we recommend the Scottish Government reconsider its reliance on the use of secondary legislation to develop the social security system.

4. Precedent exists for the details of social security programs to be in legislation. Canada is one example where rules, such as eligibility criteria, are prescribed in primary legislation.

Question 2: Principles.

5. We welcome the principles in the Bill, in particular those which recognise social security as a human right and an investment in society. However, amendments could be brought forward to strengthen the principles which will act as the foundation to the social security system.

6. International covenants provide an obligation for states ‘to guarantee that the right to social security is enjoyed without discrimination and equally between men and women’. Equality and non-discrimination should be included as principles on the face of the Bill (see Annex A).

7. Social security aims to provide people with the means to live a safe, fulfilling and dignified life, to reduce inequalities, and to build a more equal society. The social security system should seek to achieve equality, and by virtue of there being a disproportionate number of women relying on social security for their safety and well-being, it should seek to achieve a more gender-equal society.

8. Over the past year, the UK has witnessed the kinds of policies that are developed when women do not figure into policy development. A prime example is the UK ‘family cap’ and ‘rape clause’. Building equality and non-discrimination into the principles of the social security system in Scotland, and ensuring gender is considered from policy development to practice, would be one measure to protect women and foster women’s equality in Scotland.

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9. The Equality Impact Assessment (EQIA) of the Bill stands as another example of why equality and non-discrimination should be included on the face of the Bill. The EQIA fails to consider how the proposed social security policies might impact particular groups. While the EQIA references women, it does so in broad strokes, such as acknowledging that women make up the majority of carers in Scotland and the majority of people in receipt of the Best Start Grant. The EQIA does not investigate how the proposals would impact women specifically, nor does it examine how the proposals will impact young women, disabled women, and BME women, who are all more likely to experience poverty.

10. The Bill refers to social security as a human right, but shortly thereafter states that the social security system is to be efficient and deliver value for money. These principles would appear to be at odds with one another, raising questions about the interplay between the principles (e.g., would efficiency and value for money trump the right to social security? Or vice-versa?).

11. The Bill does not set out the overarching aim of the social security system. As such, it is not clear what objective the principles support. Including a purpose would help define and guide the policies and practices of the system. Similarly to other organisations, we would expect reference to be made to addressing inequality and poverty in the statement of purpose.

Question 3: Charter.

12. Engender supports the Scottish Government’s intention to use the charter to translate the principles of the social security system into a ‘format that can be easily understood’. At this time, however, there are a number of outstanding questions, including:

- What type of document will it be? Will it be legally binding?
- What redress mechanisms, if any, would be in place if and/or when there is a failure to comply with the charter?
- How will the Scottish Government ensure the charter is accessible to all?

13. We support the proposal that a review of the charter include the voices of those with lived experience of social security. However, we believe that the consultation process should include the voices of women, including disabled women and BME women who are more likely to face poverty (see Annex A). Further, third-sector organisations which provide support and assistance to those who receive social security should also be consulted.

14. The Bill proposes that the charter would be reviewed ‘from time to time’. A clear timeline for review should be included in the Bill. We recommend every three years.

15. Along with Close the Gap, we recommend that reference in the charter be made to the requirements of the public sector equality duty to ensure it takes a proactive approach to tackling gender inequality. The mainstreaming duty provides an ideal framework for the

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consideration of gender in the design and delivery of policy. Gender mainstreaming is a requirement of the public sector equality duty. It is essential that the development of the charter considers the implications of social security policy on women’s equality.

16. The charter should include a mechanism via which claimants could contest a breach of rights. In the absence of a redress mechanism, the charter could only have limited value.

Question 4: Proposed rules (e.g., applications, decision-making)

17. The Bill does not specify timeframes for decision. Anecdotally, Engender is aware of women waiting up to 42 weeks for a first social security payment. Women are more likely to be living in poverty than men, and there is a particularly high risk of poverty among BME women, disabled women, and refugee and asylum-seeking women.10 A system based on principles such as dignity and respect requires a timely decision on an application for social security, and alternate routes to a decision if timeframes are not respected.

18. It is not clear that the Bill meets procedural fairness requirements, including the right of an applicant to know the case against them, the right to be heard, and the right to reasons for decision in writing. Procedural fairness requirements should be incorporated into the Bill.

19. In the social security consultation conducted by the Scottish Government, respondents advised that the existing redetermination process under the DWP (i.e., Mandatory Reconsideration) was:

- not always based on a fair appraisal of all evidence;
- hindered the process of challenging decisions; and
- caused hardship, uncertainty and poverty due to lengthy reconsideration.

The Bill proposes a similar process to the existing Mandatory Reconsideration and appeals scheme, and concerns have been raised that the proposed system would replicate existing barriers to justice. The process should be amended to provide that one application is required for reconsideration and appeal. If an application for redetermination is denied, the application would automatically move to the appeals stage. Instead of opting-in for the appeal stage (i.e., filling out a second application), the applicant would need to opt-out.

20. The Bill provides that an individual would be liable to repay the Scottish Government in cases where a social security payment(s) was made in error. Repayments should not be sought where fault is due to inaction, delay or mistaken assessment by officials. Women in receipt of social security should not be held accountable for errors made by government officials. This position is supported by those who responded to the social security consultation by the

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Scottish Government. A further rationale for this view is that it would foster a culture within the social security agency of ‘getting decisions right the first time’.

21. Although fraud within the social security system is grossly exaggerated by the UK Government, and skewed by media, several pages of the Bill are dedicated to offences and investigations. It is disappointing to see an emphasis on fraud within the Bill, as it does not reflect the approximately 0.7 percent of social security spending that is linked to fraud.

22. The Scottish Government has committed to reducing its female imprisonment rate, which is one of the highest in Northern Europe. In 2016, the Scottish Government wrote ‘The Scottish Government has a stated commitment to reducing the use of short-term custodial sentences, with the aim of using prison primarily for those individuals who have committed serious offences and those cases involving issues of public safety’. This statement was based on evidence that short-term sentences do not lead to reduced reoffending. Proposing that punishments for summary convictions include imprisonment under 12 months conflicts with Scottish Government commitments to reduce imprisonment rates, increase the use of alternatives to custody, and reduce the number of short-term sentences.

23. In the Justice Vision for Scotland, released in July 2017, the Scottish Government acknowledged that it understands the ‘associations between poverty, victimisation and imprisonment’. However, introducing imprisonment as a form of punishment for summary convictions appears to conflict with this understanding. Imprisoning women has significant ramifications, including the loss of tenancy, loss of employment, and in many cases the loss of custody of children. These consequences last long after a woman has left prison, often leaving her living in poverty as she attempts to rebuild her life.

Question 5: Schedules in the Bill.

24. It is difficult to provide substantive comments on the schedules, as the detail included in the schedules are a framework rather than a full picture of what each type of assistance will look like. That said, we have set out a few of the concerns we have with the existing framework for the carers and early years assistance.

25. The proposed schedule related to carers allowance suggests that a person providing care could only access social assistance if the person to whom she provided care was in receipt of a disability benefit. In other words, the proposal would exclude all carers who provide care to a person not in receipt of a disability benefit. Linking eligibility for Carers Allowance to

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15 Scottish Government. (2016). *Consultation on Proposals to Strengthen the Presumption Against Short Periods of Imprisonment*. Most recently, the Chief Inspector of Prisons in Scotland called for the presumption against short-term sentences to increase to 12 months.
someone else’s eligibility for disability allowance may leave people unable to access their rightful entitlement. This is particularly concerning in the absence of information about the assessment process for disability allowance.

26. The schedule for carers allowance also proposes making education and employment part of the eligibility criteria. Engender continues to call for the abolishment of restrictions on education and employment for carers allowance. Many women carers would welcome the ability to undertake more and better paid work, as it would increase their independent income, self-esteem and social life, and enable them to maintain or develop skills in the workplace ahead of the possible need to return to work after their ‘carer journey’. Further, restricted access to education for carers undermines women’s equality of opportunity and future earning potential.

27. In addition, the inclusion of education and employment in the schedule for carers allowance does not reflect the findings of the Scottish Government’s consultation on social security. In the analysis, the Scottish Government found that ‘Respondents felt that carers should be encouraged to pursue personal goals and develop skills they would need to return to the labour market when their caring role ended’.  

28. The proposed schedule for early years assistance includes the possibility that a partner could apply for the assistance. We strongly advocate for a social security system that recognises and addresses the imbalance of power in a many Scottish households. Income and other resources are often not shared or controlled equally, which is a significant factor in women’s economic inequality. Eligibility criteria and payment structures must support women’s financial independence. At this time, it is not clear that the early years assistance schedule would foster women’s financial autonomy.

29. While the early years assistance program must include eligibility for those who are responsible for a child (e.g., kindship carers), this criteria should not come at the cost of women’s financial independence.

The Bill proposes that carers allowance should be increased as soon as possible to the level of jobseeker’s allowance (from £62.10 to £73.10 a week).

30. Engender welcomes the increase to the weekly payment. That said, the increased rate represents a payment of £2 per hour for a minimum of 35 hours per week. During one of Engender’s focus groups on the subject of caring, carers informed us that they did not feel that the increased rate treated them with dignity or respect.  

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17 Engender and Carers Scotland focus groups: October 2015 and October 2016.
19 Engender and Carers Scotland focus groups: October 2015 and October 2016.
31. Unpaid carers, around 60 percent of whom are women, save Scotland an estimated £10.8bn per year, which amounts to over a third of the national budget. Women are four times as likely to give up paid work due to multiple caring responsibilities, and are more likely to be in low-paid, part-time employment than male carers. The responsibility of care has significant ramifications on women’s access to employment, career development and progress, access to training and higher education, as well as on physical and mental health.

32. We continue to call on the Scottish Government to develop a staggered plan to uprate Carers Allowance to recognise carers’ contributions to the social and economic well-being of Scotland. This call was supported by respondents to the social security consultation.

**Question 10: Additional concerns**

33. Independent scrutiny of the social security system is required, particularly if the Scottish Government continues to pursue its plan to rely on secondary legislation for the implementation of social security programs. An independent statutory body could provide impartial advice on social security matters, including reviewing and scrutinising draft guidance.

34. Independent advice and advocacy services should be available to women interacting with the social security system in Scotland. Women have repeatedly highlighted the complexity of the social security system and the challenges in navigating the system to secure their rights and entitlements. A right to independent advice and advocacy should be embedded in the Bill, and resources allocated to sustainably support these services.

35. The Bill is silent on whether the assistance provided by the Scottish Government will keep pace with the cost of living. As such, it is not possible to comment on the adequacy of the system. Devolved programs should be increased in line with the Retail Price Index. Failing to do so would hinder the Scottish Government’s capacity to tackle women’s poverty and inequality, and would undermine gender equality.

36. Along with the Coalition of Racial Equality and Rights, we call on the Scottish Government to collect equality monitoring data at each stage of the social security process to ensure equality groups are not being discriminated against (see Annex A). Data disaggregated by gender and other equality characteristics should be collected, analysed, reported on, and made publicly available.

37. The Bill proposes to offer assistance in cash or in kind. An element of treating women with dignity and respect is allowing them to make their own choices. The provision of assistance in cash would give women the flexibility to decide where the money should be spent, which may include childcare, rent, transportation, food, or heating costs. Removing choice from

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20 Engender. (2016). ‘Security Women’s Futures: Using Scotland’s new social security powers to close the gender equality gap’.
21 Engender. (2016). ‘Security Women’s Futures: Using Scotland’s new social security powers to close the gender equality gap’.
those in receipt of social security does not conform to one of the proposed principles of the social security system, namely respect for the dignity of individuals.

38. During the consultation on social security, the Scottish Government asked ‘Should the social security agency in Scotland be responsible for providing benefits in cash only or offer a choice of goods and cash?’. The majority of respondents stated they favoured cash only or cash as the default option for the following reasons: 1) allows people choice and flexibility; 2) encourages greater independence; and 3) is in line with the principles of dignity and respect. Engender calls for a cash payment to be the default option for each type of assistance, and that only individuals in receipt of social security could decide to receive an in-kind payment as an alternative to a cash payment.

39. Similarly to other equalities organisations, we call on the Scottish Government to revise its EQIA to examine how its proposed social security policies and practices would impact particular groups, including women.

40. The three universal credit flexibilities are not listed in the Bill, raising questions as to whether or not the flexibilities will be subject to, for example, the principles of the social security system.

Conclusion

41. Scotland has the unique opportunity of building a social security system from the ground up. It is our firm belief that it is possible to develop a social security system in Scotland that responds and meets the needs of women. We believe that amendments could improve and strengthen the proposed legislation, which would in turn contribute to women’s safety and well-being.

42. We look forward to working with the Social Security Committee on its study of the Bill, and to ensuring that the social security system stands as pillar towards achieving women’s equality in Scotland.

For Further Information

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Mobile: 07889 805787

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ANNEX A: EQUALITY AMENDMENTS

Engender has a number of amendments we would like to see brought forward in the Bill, but there are a few specific equality amendments we would like to see in the proposed legislation:

Part 1, section 1, include as a stand-alone principle on the face of the Bill:

Equality of outcome for groups facing discrimination, inequality, and disadvantage is to be embedded in the Scottish social security system.

Part 1, section 3, subsection 3, add after (g):

(h) persons who share a protected characteristic under the Equality Act 2010.

Part 1, section 5, add at the end of subsection 3:

and persons who share a protected characteristic under the Equality Act 2010.
The Scottish Human Rights Commission was established by The Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the national human rights institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

Executive summary

1. The Scottish Human Rights Commission (the Commission) welcomes the opportunity to contribute to the Social Security Committee Stage 1 consideration of the Social Security (Scotland) Bill (the Bill).

2. The Commission welcomes the direction of travel the Scottish Government is taking. In particular, the recognition on the face of the Bill that social security is a human right, essential to the realisation of other human rights and the Scottish Government’s aspiration to take a human rights based approach to the design and implementation of the new Scottish social security system are positive developments.

3. Notwithstanding the positive policy aims, the Commission considers that the Bill must be strengthened in a number of areas if the Scottish Government is to realise its ambition of taking a human rights based approach to social security. In brief, those are:
   - The Bill should enshrine the right to social security, as defined in international human rights law, in Scots law.
   - The status of the Scottish social security charter, and the role of the Scottish social security principles, should be clarified. The charter should be directly enforceable.
   - The accountability mechanisms provided for in the Bill must be greatly improved. Reporting should be directly linked to the specific content of the right to social security as defined in international human rights law. People with direct experience of the system should be included in the development of accountability processes.
   - The Bill should establish an independent scrutiny body with sufficiently broad powers to allow it carry out its mandate.
The human right to social security

4. There is a wide body of human rights law and standards on social security. The right is strongly affirmed in international law. Social security was recognised as a human right in the Universal Declaration of Human Rights of 1948\(^1\) and features in a number of regional and international human rights instruments, notably the International Covenant on Economic, Social and Cultural Rights, the European Social Charter, the EU Charter of Fundamental Rights and the International Labour Organisation Conventions.\(^2\) Social security, although not protected as a standalone right under the European Convention on Human Rights (ECHR), does fall within its scope and the European Court of Human Rights has developed a body of case law addressing social security issues.\(^3\)

5. Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which was ratified by the United Kingdom in 1976, protects the right to social security. Through its General Comment 19, the UN Committee on Economic, Social and Cultural Rights (the CESCR Committee) has provided detailed guidance regarding the State’s obligations to respect, protect and fulfil the right to social security.\(^4\) CESCR General Comment 19 explains what is required in relation to availability, social risks and contingencies, adequacy and accessibility of social security. The CESCR Committee breaks down the concept of accessibility into five further elements: coverage, eligibility, affordability, participation and information, and physical access. Non-discrimination is key to the realisation of the right to social security.

6. The CESCR Committee recognises that not all countries are in the same position to fully realise all economic, social and cultural rights at the same pace. The principle of ‘progressive realisation’ acknowledges that the full realisation of certain rights will take time to achieve and will be subject to resource constraints. However, progressive realisation also entails a general prohibition of deliberate retrogression, and any deliberately retrogressive measures must be duly justified, having considered all other reasonable alternatives.

7. Article 2 of ICESCR creates a duty on all parties to:

“take steps...to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

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\(^1\) Universal Declaration of Human Rights 1948, Articles 22 and 25.
\(^2\) For a full commentary of the right to social security in international human rights law, see the Commission’s response to the Scottish Government’s consultation on a New Future for Social Security in Scotland, October 2016. Available [here](#).
\(^4\) General Comment 19 of the UN Committee on Economic, Social and Cultural and Rights, 2007. Available [here](#).
8. Even during times of severe resource constraints, when available resources are demonstrably inadequate, the obligation remains for States parties to demonstrate that every effort has been made to use all resources that are at its disposal in an effort to satisfy minimum essential levels.

9. CESCR General Comment 19 specifically addresses the content of framework legislation to implement the right to social security. Such legislation might include the following aspects:
   - Targets or goals to be attained and the time frame for their achievement;
   - The means by which the purpose could be achieved;
   - The intended collaboration with civil society, the private sector and international organisations;
   - Institutional responsibility for the process;
   - National mechanisms for its monitoring; and
   - Remedies and recourse procedures.

**A human rights based approach**

10. The Scottish Government has set out its ambition to take a rights based approach to social security and the Commission welcomes this ambition. The Commission believes there are a number of areas in the Bill that would have to be strengthened before the Scottish Government could truly be said to be taking a human rights based approach to social security.

11. Taking a human rights based approach to conceiving, drafting, implementing and monitoring policy is about using international human rights standards to ensure that people’s human rights are put at the very centre of policies. A human rights based approach empowers people to know and claim their rights and increase the ability of organisations and public bodies to fulfil their human rights obligations. It also creates solid accountability so people can seek remedies when their rights are violated.

12. The Commission uses the PANEL principles as a way of breaking down what a human rights based approach means in practice. PANEL stands for Participation, Accountability, Non-Discrimination and Equality, Empowerment and Legality. The table below sets out what we mean by each term.

<table>
<thead>
<tr>
<th>Participation</th>
<th>People should be involved in decisions that affect their rights.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accountability</td>
<td>There should be monitoring of how people’s rights are being affected, as well as effective remedies for when things go wrong.</td>
</tr>
<tr>
<td>Non-Discrimination and Equality</td>
<td>Nobody should be treated unfairly because of their age, gender, ethnicity, disability, religion or belief, sexual orientation or any other personal characteristic. People who face the biggest barriers to realising their rights should be prioritised when it comes to taking action.</td>
</tr>
</tbody>
</table>
Empowerment | Everyone should understand their rights, and be fully supported to take part in developing policy and practices that affect their lives.

Legality | Approaches should be grounded in the legal rights that are set out in domestic and international law.

13. Throughout our consideration of the Bill’s provisions, we have framed our analysis around the PANEL principles, together with the core content of the human right to social security.

**Clause 1 – The Scottish social security principles**

14. The Commission welcomes the Scottish Government’s recognition that social security as a human right should be clearly reflected in the social security principles. Nevertheless, the Commission considers the Scottish social security principles should be strengthened to explicitly ground them in human rights standards. The principles already go some way to reflecting PANEL; however, key changes are needed in order that the Scottish Government fully delivers on its ambition to take a human rights based approach to social security. Our suggested changes are set out in the table below.

<table>
<thead>
<tr>
<th>Principle as set out in the Bill</th>
<th>Proposed revised principle</th>
<th>Commentary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Social security is an investment in the people of Scotland.</td>
<td>Social security is an investment in the people of Scotland, provided without discrimination.</td>
<td>Non-discrimination is an integral part of the right to social security and to an overall human rights based approach. As such, it should be explicitly referenced in the principles. CESC General Comment 19 states that everyone has the right to social security, and this must be enjoyed without discrimination. The Committee is clear that special attention should be paid to individuals and groups who traditionally face difficulties in exercising the right.</td>
</tr>
<tr>
<td><strong>Social security is itself a human right and essential to the realisation of other human rights.</strong></td>
<td><strong>Social security, as protected by Article 9 of the International Covenant on Economic, Social and Cultural Rights, is itself a human right and is essential to the realisation of other human rights.</strong></td>
<td><strong>As set out above, social security is recognised as a human right in a range of regional and international treaties. Detailed guidance has been developed by a number of bodies on the right to social security. In our view, the International Covenant on Economic, Social and Cultural Rights provides the clearest and most accessible analysis of the right to social security. Our proposed change grounds the social security principles in law, strengthening them and increasing certainty.</strong></td>
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</tr>
<tr>
<td><strong>Respect for the dignity of individuals is to be at the heart of the Scottish social security system.</strong></td>
<td><strong>No change.</strong></td>
<td><strong>No change.</strong></td>
</tr>
<tr>
<td><strong>The Scottish Ministers have a role in ensuring individuals are given what they are eligible to be given under the Scottish social security system.</strong></td>
<td><strong>The Scottish Ministers have a role in both empowering individuals to enable them to access their entitlements and ensuring individuals are given what they are eligible to be given under the Scottish social security system.</strong></td>
<td><strong>The Commission welcomes the inclusion of this principle and the Scottish Government’s recognition that the State has a role in helping to maximise people’s incomes and encouraging the take-up of benefits. This principle should also be rooted in empowerment, as this is key to individuals knowing and claiming what they are entitled to. Our suggested changes make this more explicit and again ground the language in human rights standards.</strong></td>
</tr>
<tr>
<td><strong>The Scottish social security system is to be designed with the people of Scotland on the</strong></td>
<td><strong>No change.</strong></td>
<td><strong>No change.</strong></td>
</tr>
<tr>
<td>Opportunities are to be sought to continuously improve the Scottish social security system in ways which put the needs of those who require assistance first.</td>
<td>The Scottish social security system will be rights based and designed, implemented and monitored for continuous improvement with the people of Scotland.</td>
<td>Participation and accountability are essential to the realisation of the right to social security. Accountability is one of the central pillars of a human rights based approach. Independent and effective mechanisms to monitor the administration of programmes are essential. As such, the Commission believes that explicit reference to monitoring should be included within this principle. The Commission also considers that there should be clear reference to involving the people of Scotland in the monitoring and improvement of the social security system.</td>
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</tr>
<tr>
<td>The Scottish social security is to be efficient and deliver value for money.</td>
<td>The Scottish social security system will make maximum use of available resources in order to progressively realise the right to social security, and will be delivered in a person-centred way.</td>
<td>The Commission considers that the concept of progressive realisation should feature in the Scottish social security principles (see paragraph 6 above). The Commission recognises that the Scottish social security system will entail significant expenditure; however, the principle, as currently drafted, appears to sit at odds with the other principles as it focusses solely on cost and efficiency. Re-framing this principle with a reference to progressive realisation acknowledges resource constraints but places an emphasis on striving to improve the social security system to achieve the full</td>
</tr>
</tbody>
</table>
The realisation of the right to social security for everyone in Scotland. The Commission also considers that referencing person-centred delivery is essential to ensure the needs of the individual are not overshadowed by costs and efficiency considerations.

15. The Commission welcomes the concept of a set of Scottish social security principles and believes their value lies in both re-framing the way social security is viewed in Scottish public life and in underpinning the Scottish social security charter. That said, it should be noted that the principles are not standalone rights, and they cannot be directly enforced by individuals. As such, although they are to be welcomed, they cannot substitute for strong accountability and monitoring mechanisms and they must be clearly reflected in provisions throughout the Bill.

**Clauses 2 – 5 – The Scottish social security charter**

16. The Commission welcomes the duty placed on the Scottish Ministers to consult people in receipt of the devolved benefits in the preparation of the Scottish social security charter (the Charter). To further strengthen the participatory process, the Commission considers that the Scottish Ministers should be obliged to identify and consult with people who are not currently in receipt of social security payments, but who may be eligible to receive them. There are a variety of reasons why a person may not engage with the social security system, and it is vital that experience is captured in the Charter’s design. The Scottish Ministers should also be required to consult with groups or individuals who share a protected characteristic under the Equality Act 2010, in furtherance of the need to deliver social security without discrimination.

17. Clause 2 of the Bill states that the Charter is to set out what should be expected from the Scottish Ministers when developing social security policy and when exercising their functions in the social security system. The Charter will also set out what is required from individuals who apply for, and receive, assistance. The Commission considers that the Charter should specifically set out what is expected from staff at the new social security agency. Throughout the consultation process, it was acknowledged that a rights-based culture within the agency would be vital to the practical realisation of the Scottish Government’s vision and principles for social security in Scotland. The Charter should therefore reflect both the rights of, and duties placed on, staff.

18. The stated policy aim behind the Charter is to ‘make the principles meaningful by translating them from statements of aspiration into more focussed aims.’ The policy memorandum goes on to state
that ‘taking this approach will enable the principles to be embedded in a way that is open to monitoring, reporting and scrutiny’.  

19. The Bill lacks clarity on the status of the Charter and, specifically, whether it will be directly enforceable. During the consultation process, the Charter was referred to by Ministers and civil servants as a contract; however, a key aspect of a contract is remedy in the event of breach. Integral to the right to social security are accountability and remedy. While the Bill does set out re-determination and appeal procedures in relation to individual decisions, the Commission considers that the Bill should clarify the status of the Charter and whether it will include any mechanisms for review when an individual or organisation feels that the Charter is not being adhered to. The Commission appreciates the Charter is yet to be drafted, and agrees that the drafting process should be participatory and inclusive. That said, the Charter’s accountability mechanisms and clarification of its status should be dealt with in primary legislation if the Charter is to carry any weight.

20. CESCR General Comment 19 sets out the core elements that make up the right to social security and the Commission believes that the Charter must be fully reflective of the right to social security in the whole. The first element is availability, which means that a social security system, whether that be made up of a single scheme or a variety of different schemes, should be available and established under domestic law. Importantly, a social security system must be sustainable, to ensure the right to social security can be realised in future generations. The social security system must provide for coverage of the nine principal branches of social security: health care; sickness; old age; unemployment; employment injury; family and child support; maternity; disability; and survivors and orphans.

21. The next core element is adequacy. This means that benefits must be adequate in amount and duration in order that everyone may realise his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care, protected under articles 10, 11 and 12 of ICESCR. In delivering the right to social security, States must pay particular respect to the principle of non-discrimination. Adequacy should be monitored regularly to ensure that people are able to afford the goods and services they need.

22. Another key element to the right to social security is accessibility. This is broken down into 5 sub-categories: coverage; eligibility; affordability; participation and information; and physical access. A brief explanation of these terms is set out below.

**Coverage** – All people should be covered by the social security system, especially people belonging to the most disadvantaged and marginalised groups, without discrimination.

**Eligibility** – Any conditions attached to the receipt of benefits must be reasonable, proportionate and transparent. Withdrawals, reductions or suspension of benefits should only be on reasonable grounds and should be subject to due process and provided for in national law.

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5 Social Security (Scotland) Bill, Policy Memorandum, at para. 57.
**Affordability** – Any required contributions should be stipulated in advance and must be affordable for all.

**Participation and information** – Beneficiaries of social security schemes must be able to participate in administration of the scheme. This extends to ensuring the right of individuals and organisations to seek, receive and impart information on entitlements in a clear and transparent manner.

**Physical access** – Benefits should be provided in a timely manner and people must have physical access to services to access benefits and information. Particular attention should be paid to disabled people, migrants and people living in remote areas.

**Accountability**

23. Ultimately, the Commission considers that the processes set out in the Bill must be significantly strengthened and be complemented by an independent scrutiny mechanism for true accountability to be established. Without a strong accountability or scrutiny mechanism, the Commission is clear that a human rights based approach to social security cannot be fully delivered.

24. As currently drafted, the social security principles specifically refer to the need to ensure continuous improvement, and clause 6 requires the Scottish Ministers to lay an annual report before Parliament setting out the ‘performance of the Scottish social security system in that year’. We set out below what a rights based approach to social security would require in terms of accountability.

25. ICESCR General Comment 19 notes that:

> “States parties are obliged to monitor effectively the realisation of the right to social security and should establish the necessary mechanisms or institutions for such a purpose.”

The CESCR Committee goes on to state that, to assist in the monitoring process, right to social security indicators should be identified. Indicators should address the different elements of social security. A clear example of this would be the requirement to monitor adequacy of benefits. Indicators should be disaggregated on the prohibited grounds of discrimination – in this case by means of protected characteristic under the Equality Act 2010 – and should cover all people living in Scotland. Having developed appropriate indicators, States should set national benchmarks and targets for improvement.

26. The Commission does not propose that the Scottish Government should set down detailed indicators at this stage. However, the obligation to develop indicators grounded in the core elements of the right to social security, and monitor against them, would significantly strengthen the process envisaged in Clause 6.

27. Given the importance of participation of people with direct experience of the social security system placed in other areas of the Bill, the Commission believes that rights-holders should have a role in the scrutiny of the performance of the social security system. The Commission considers the requirement to include those with direct experience of the Scottish social security system in the reporting process should be set down in primary legislation.
Independent review and scrutiny

28. The Commission notes that the Bill does not contain provisions on independent review and scrutiny, although this was an area consulted on by the Scottish Government in the summer of 2016. As stated above, CESCR General Comment 19 is clear that States must monitor the realisation of the right to social security and should establish necessary mechanisms and institutions for that purpose.

29. Implementing an effective new Scottish social security system does not end with the operationalisation of the system. It is critical that the system seeks to use a variety of methods, both internal and external, to ensure it continues to improve and deliver as intended. To deliver on this element of the right to social security, the Commission is clear that a statutory independent review mechanism should be established.

30. While independent scrutiny bodies can take different shapes, the Commission recommends that an independent scrutiny body should comply with the principles below. The following list is not exhaustive:
   - Independence – external oversight which secures and maintains public trust in the social security system. Financial and operational independence is important.
   - Statutory creation – the scrutiny body should function on the basis of statute and report to Parliament directly.
   - Broad mandate – the scrutiny body should be provided with sufficient and effective powers to enable it to carry out its mandate.
   - Public accountability – this includes publishing its findings in annual and other thematic reports as well as collecting, disaggregating and widely publishing data.

Part 2 – Chapter 1 - Assistance to be given according to determination of entitlement

31. The Scottish Government’s stated policy objective of Chapter 1 of Part 2 of the Bill is to ‘move the Scottish Government’s rights-based approach to social security onto a legislative base which establishes the right to assistance as the source from which all other rights and entitlements will flow and make clear how the Scottish social security system will respond to people’s rights, including their fundamental right to social security.’

32. The Commission welcomes the policy intention; however, as currently drafted, the Commission does not consider the Bill delivers this policy aim. Clause 8 is to be the source of the right to social security in Scottish legislation, therefore it should explicitly refer to the right to social security, as defined by international human rights law. CESCR General Comment 19 states that ‘the incorporation in the domestic legal order of international instruments recognising the right to social security can significantly enhance the scope and effectiveness of remedial measures and should be encouraged’.  

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7 Policy Memorandum, at para. 79.
8 General Comment 19 of the UN Committee on Economic, Social and Cultural Rights, 2007. Para. 79.
33. The Commission believes that a clause entitled ‘The right to social security’ should feature within the Bill. The clause would clearly establish that everyone has the right to social security, as protected by relevant human rights law. ‘Relevant human rights law’ would be defined with reference to key regional and international human rights instruments such as the International Covenant on Economic, Social and Cultural Rights and the European Social Charter. The Commission has recently launched a series of workshops and reports aimed at broadening understanding and support for economic and social rights in Scotland and would be happy to work with the Scottish Government around the incorporation of the right to social security into Scots law.

Part 2 - Chapter 2 – Types of assistance to be given

34. The Commission acknowledges that the Bill is intended to establish a social security framework, and that a balance must be struck between the use of primary and secondary legislation. That said, the Commission notes that Chapter 2 of the Bill is lacking in specific detail. The Commission therefore questions whether the right balance has been struck to allow for appropriate public scrutiny. The Commission is clear that Chapter 2 and regulations made under these provisions should reflect the detailed content of the human right to social security.

35. For example, a key feature of the right, also dealt with above, is adequacy, meaning that benefits must be adequate in amount and duration to allow everyone to realise their rights to family protection and assistance, an adequate standard of living and adequate access to health care under Articles 10, 11 and 12 of ICESCR. The Commission notes that the Bill is silent on the topic of ‘Uprating’ and believes that duties to consistently monitor and ensure payments remain adequate should be considered.

36. Social security must also be accessible. CESCR General Comment 19 breaks the concept of accessibility into 5 areas: coverage; eligibility; affordability; participation and information; and physical access. Of particular relevance to Chapter 2 of the Bill is eligibility. Attaching conditions onto certain benefits is acceptable; however, those conditions must be reasonable, proportionate and transparent. The withdrawal, reduction or suspension of any benefit should be based on grounds that are reasonable, subject to clear due process, and set out in national law. These concepts should be given serious consideration in the scrutiny of Chapter 2 and when the Scottish Government makes regulation around the specific form individual benefits should take.

Part 2 - Chapter 3 – Determining entitlement

Advice and advocacy

37. The Commission notes that the Bill does not provide for specific rights to advice and advocacy to help people navigate the social security system. The Commission believes that introducing such provisions would significantly strengthen the Bill’s delivery of the key components of the right to social security, particularly given the practical challenges that could arise when both reserved and devolved benefits operate in Scotland. CESCR General Comment 19 is clear that a social security system should be established under national law and should ‘ensure the right of individuals and
organisations to seek, receive and impart information on all social security entitlements in a clear and transparent manner.” Further, General Comment 19 provides that States have an obligation to take positive measures to assist individuals and communities to enjoy the right to social security. This specifically links to the 4th social security principle set down in the Bill.

38. The Commission considers that, in addition to adding specific rights to advice and advocacy, reference to those rights should be required when communicating decisions around individual entitlements. For example, clause 22 deals with notices of determination and details the information the Scottish Ministers must include in their decision. In addition to including the reasons for the determination and informing a person of their right to request re-determination, information about the right to access advice and advocacy should also be required. The same points are relevant to clauses 25 and 26. The Commission considers that access to independent advice and advocacy is particularly important at the re-determination and appeals stage.

**Re-determinations and appeals**

39. The Commission acknowledges concerns around the operation of the current mandatory reconsideration process; particularly, that individuals must make two applications – one to request a reconsideration and another to appeal to the Tribunal – and that there is no time limit within which the Department of Work and Pensions must process a mandatory reconsideration.

40. The right to a fair hearing in the determination of one’s civil rights and obligations is protected by Article 6(1) of the ECHR. Although there has been debate on the topic in the past, the general rule is that Article 6(1) does apply in the field of social insurance and assistance. An assessment under Article 6 requires consideration of whether, as a whole, the process is fair. As such, there is no one prescriptive review and appeals procedure and a number of different processes have been found to be Article 6 compliant when assessed in the whole.

41. The Commission welcomes the introduction of the automatic right to appeal to the First-tier Tribunal if the re-determination is not made timeously under clause 26. The Commission is also encouraged that the Bill provides for short-term assistance while an appeal is on-going, the aim of which is to guard against individuals being left with little or no income while a re-determination or appeal process takes place. That said, the Commission considers the process as set out in the Bill could be strengthened further by reducing the burden on individuals to make a second application if the re-determination does not find in their favour, while still allowing the organisation to reconsider its own decision.

42. In a rights-centred organisation, as it is hoped the new Scottish social security agency will be, re-determinations should be viewed as genuine opportunities to practise good governance and learn from mistakes. Organisations should welcome scrutiny of their decisions, and the findings of re-determinations and appeals should feature in the organisation’s monitoring and improvement.

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10 *Salesi v Italy*, 26 February 1993
mechanisms. The Commission considers there could be merit in including duties on the Scottish Ministers to ensure the findings of re-determinations and appeals are fed back into the system, to encourage continuous learning. This could be a factor reported on in the annual report, envisaged under clause 6 of the Bill, and it is key to ensuring the principle aimed at continuous improvement is realised.

**Time limits for re-determinations and appeals**

43. On re-determinations and appeals more generally, the Commission notes that, as presently drafted, the Bill places clear time restrictions on individuals, with the detail on time limits applicable to Ministers being dealt with by way of regulation. The Commission considers that the same level of scrutiny must be given to time limits impacting on all parties and that the Bill should either bind both the individual and the State with time limits, or reserve consideration of these for regulation.

**Clauses 30 – 35 – Obtaining information to make determination**

44. The Commission appreciates that there will be circumstances where further information is needed before a determination can be made, and that changes in circumstances will occur which impact on a person’s eligibility for a particular payment. The provisions in the Bill currently place all of the onus on individuals to provide updated information, without any reference to the support or assistance they may require to do so. The Commission considers that clauses 30-32 should be explicitly linked to a right to advice and advocacy as set out above. This is particularly important given the significant consequences of failing to provide relevant information or notify of a change of circumstances.

45. The Commission welcomes, in principle, the power to make determinations on the basis of on-going entitlement and considers this could cut down on unnecessary applications and assessments.

**Part 2 - Chapter 4 – Recovery of assistance given in error**

46. The Commission appreciates the need for responsible management of expenditure; however, this must be balanced with the need to avoid unrealistic and unmanageable debts being placed on individuals which, in turn, impacts on the realisation of their rights. As such, the Commission welcomes the duty placed on Scottish Ministers to have regard to the financial circumstances of the person who owes money. Clause 37(2) does, however, state that the duty to have regard to financial circumstances applies in ‘so far as those circumstances are known to the Ministers’. The Commission believes this qualification should be tightened to place a duty on Ministers to make all reasonable efforts to ascertain an individual’s financial circumstances, and there would be merit in setting down the circumstances in which recovery will not be sought. For example, the Commission questions whether it would be appropriate to recover money under a certain amount, where the administrative costs of recovery could be greater than the amount owed. The Commission also questions whether a 5 year prescription period, as set down in clause 38, may be too long a period, considering the circumstances where the State has paid money in error. The policy memorandum states that the Scottish Government’s focus is primarily on recovery where it is clear that the liability
has been incurred as a result of an error on the part of the individual;\footnote{Policy Memorandum, at para. 258.} however, the Commission considers this could be more clearly reflected in the Bill.

47. Finally, given clause 37 allows for discretion in taking the decision of whether to recover assistance paid in error and the financial consequences that could have for an individual, the Commission believes that including a right to request a review of that decision should be set down in the Bill.

**Part 2 - Chapter 5 - Offences and investigations**

48. The Commission acknowledges that fair and robust procedures to deal with fraud are necessary to ensure the social security system can deliver for those who need assistance. The approach to fraud should, however, be proportionate and should recognise that fraudulently claimed benefits account for a very small percentage (1.2%) of the current social security budget.\footnote{https://www.gov.uk/government/statistics/fraud-and-error-in-the-benefit-system-financial-year-201617-preliminary-estimates} The Commission welcomes the policy intention of not criminalising genuine errors made by individuals and believes a link should be made to our suggested provisions around advice and advocacy if the policy intention is to be realised.

49. The Commission notes that offences of trying to obtain assistance by deceit will only be established in the presence of intent. Similarly, the offence of failure to notify will only occur if a person ‘knew or ought to have known’ that a change in circumstance may result in lesser entitlement to assistance. We consider these provisions could be strengthened by clearly identifying factors that must be examined in determining whether an individual ought to have known about a requirement to notify, or whether they intended to defraud. Further, the Commission considers that flexibilities should be built into the system around how the individual can notify the agency about a change in circumstance. Given the onus placed on individuals to provide information, and the consequences of committing an offence of failure to notify, the Commission believes that a right to advice and advocacy is all the more important.

50. Finally, the Commission notes that the policy memorandum sets out that the agency will operate on a presumption of innocence and will fully consider the facts and any mitigating circumstances before passing a report to the Procurator Fiscal.\footnote{Policy Memorandum, at paras. 283 – 285.} The Commission considers these factors to be particularly important and believes they should be explicit in the Bill and the code of practice on investigations under clauses 43 and 44 of the Bill.

Scottish Human Rights Commission

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