

# **Social Security (Scotland) Bill: response to the Social Security Committee's consultation document**

## **Professor Paul Spicker**

1. This response makes points in relation to six issues in the Bill, covered in four of the consultation questions:

- The reference in the principles to “efficiency” should refer instead to “cost-effectiveness” - the terms are not equivalent.
- The two stage-process of review and denial of direct access to appeal is undesirable, and arguably unlawful.
- The provision for recovery of overpayments, regardless of the reason for overpayment, whether the claimant could have known there was an overpayment, or whether the claimant could have expected to make provision to repay, is oppressive.
- Much has been left to subsequent regulations. In a framework bill, it should be considered how those regulations will be scrutinised and reviewed in future.
- There is insufficient protection for the rights of claimants in the event that the Agency mistakes the law.
- Short-term assistance should be more generally available than envisaged, and should be extended to cover problems with reserved benefits.
- The Bill needs to specify that benefits are inalienable.

More issues might be raised, but the Committee has specifically requested responses to be made in four pages.

### **Question 2: Principles**

2. It is unclear what the legal force of the statement of principles will be. The statutory character of the principles seems to imply that if the agency acts in breach of these principles, it may be considered to be acting beyond its competence. In most cases, this would have no additional legal effect: for example, human rights (which are included) or the procedures of natural justice (which are overlooked) are justiciable with or without reference to them in this Bill.

3. In one case, however, there is a potential for misinterpretation. The last principle in the list refers to “efficiency”. Allocative efficiency is generally taken to refer to a state in which no person can be made better off without making someone else worse off. Productive efficiency generally refers to the production or delivery of a service at the lowest possible unit cost. The lowest possible unit cost is generally achieved by compromising objectives to minimise costs. It may be productively efficient, for example, to limit the number of home visits; to put the onus of clarification on claimants rather than paid officials; or to reduce services to claimants who are particularly expensive or difficult to deal with, a process which has been a major concern in employment programmes.<sup>1</sup> This is not how the Scottish social security system should be trying to operate. The principle that should be referred to is not “efficiency”, but the achievement of policy objectives at the minimum cost. This is properly termed “cost-effectiveness”.

## Question 4: Review, appeal and overpayments

4. *Access to justice.* The principle that all benefits will be subject to appeal is proper and welcome. However, there is a serious problem with the proposal that before any review by the courts, there must be a “re-determination” or mandatory internal review, and appeals may be registered only after that review has taken place. This approach is based on the relatively recent arrangements introduced for Mandatory Reconsideration, or MR. The Policy Memorandum issued with the Social Security (Scotland) Bill makes the same argument for a two-stage process that has been made for Mandatory Reconsideration:

“Having a re-determination stage ensures decisions will be reconsidered quickly, is more accessible for the applicant than a tribunal, and gives the agency an opportunity to review its decisions and put right errors it identifies. Without a re-determination stage, it would mean that all decisions being challenged would go to a tribunal. This could lead to the tribunal being inundated with large volumes of appeals, which will increase the likely waiting times for individuals to have their cases heard, resulting in a frustrating experience.”

In relation to the first part of this, HH Judge Robert Martin, President of the Social Entitlement Chamber of the First-tier Tribunal, has given evidence to the UK Parliament about the process.<sup>2</sup> He notes that the justification for this policy, that it would guarantee internal review, was nugatory: under the previous system, all grounds for appeal were scrutinised and acted on by the Department for Work and Pensions before the introduction of MR. The second part justifies the measure as a means of preventing cases reaching a tribunal. The effect of MR has been to deter appeals :

“the introduction of MR, rather than leading to a justified reduction in appeals, might discourage claimants who might have had ‘winnable’ cases from appealing, because they found the process too onerous.”

5. The second part of this argument may be unlawful. The Supreme Court of the United Kingdom has recently argued, at some length, that creating barriers to access to justice is incompatible with the rule of law. The recent decision of the Supreme Court in *Unison v Lord Chancellor* has stated directly that the creation of administrative barriers with the intention of preventing people reaching court is unlawful,<sup>3</sup> and has struck out the procedure. Mandatory Reconsideration is such a barrier, and it is doubtful whether following that decision it will now survive a challenge in court. The Scottish Parliament should not be introducing measures of questionable legality, and it should certainly not be introducing barriers to access to justice.

6. *The effect of legal decisions.* The Supreme Court also expressed a strong view that the primary purpose of appeals was not simply to protect the interests of the individual who took them, but of others: “Access to the courts is not, therefore, of value only to the particular individuals involved”. However, the protection currently offered to benefit claimants in this respect is limited. The House of Lords has previously determined that in circumstances where, they decided that where it was found that the DWP had previously acted unlawfully, they would not have to apply the revised rule to previous cases, because it would be too burdensome to do it.<sup>4</sup> This will continue to be the law, and there are only two means by which it can be altered: that is, by primary legislation or by a review in the Supreme Court. The Bill should ensure explicitly that rights will be respected and that mistakes will be rectified.

7. This is all subject to a major reservation, but one which falls outwith the direct scope of the Bill. The UK social security treats complaints, rectification and review as a quasi-judicial, adversarial process. Other public services attempt to learn from complaints and use them as feedback to improve their processes. The Scottish Social Security Agency should do likewise.

8. *Overpayments.* The current rules relating to overpayments of DWP benefits also reflect recent reforms to the social security system. Before the introduction of Tax Credits, the normal rule in social security was that claimants might be required to repay overpayments if they had misrepresented or failed to disclose a material fact. The Tax Credit scheme, based on a whole-year assessment, asked many claimants to repay extremely large sums of money which may have been paid in error by officials but which they could not reasonably have known they were not entitled to. The Parliamentary Ombudsman commented at the time:

“There are many for whom the experience has been, and indeed remains, highly distressing. ... the impact on the customers concerned, typically those on the very lowest incomes who are amongst the most vulnerable in society, is huge.”<sup>5</sup>

The principle has been recently been extended to other benefit. Being subject to repayment of money that has been paid through official error, that people may not know is paid in error and which they may no longer have, is oppressive.

### **Question 5: The framework of benefits**

9. Much of this Bill outlines a framework for development rather than making specific proposals for benefits. The character and design of benefits, not just the details, are left to future regulations. Although the Bill identifies areas of operation, that is not the same as identifying the specific benefits that will be introduced. For example, the government has already announced that there will be a “Best Start Grant”, but the area under which this is considered in the Bill is as a measure relating to “Early Years Assistance”. In the same way, it would be compatible with section 14 and Schedule 4 of the Bill for the Parliament to agree an introduction of a mobility allowance, which I would argue would be the best way to resolve current anomalies in the provision of mobility support. (Schedule 4 does not reflect the existing distinction in current benefits between provision for “care” and “mobility”; this does not create any impediments to policy development, but nor is it clear.)

10. This flexibility is not a problem; it has the advantage of leaving policy options open on a range of issues. By the same token, however, it does raise questions about the process of scrutiny. Because so much of the work about benefits will be done in relation to regulations, it is important to consider how those regulations will be reviewed. Some part of the process of review is technical, and requires detailed knowledge of the social security system. There is no current proposal for an independent statutory body equivalent to the Social Security Advisory Committee. It may be that the Act should create such a body. Alternatively, if the regulations were referred directly to the Social Security Committee, it could be open to the Social Security Committee to take advice from an expert group answerable to it.

### **Question 6: Short term assistance pending review and appeal**

11. The continuation of financial assistance during review and appeal is important both to avoid hardship and to protect access to justice. It is open to question, however, whether this kind of assistance has to be confined to devolved benefits. The Scottish Parliament already has the power to top up reserved benefits. In the Scotland Act, there are four places where measures to

mitigate sanctions are expressly denied, but this is subject to a significant exception: that

- “(a) the requirement for it also arises from some exceptional event or exceptional circumstances, and
- (b) the requirement for it is immediate.”<sup>6</sup>

The word ‘exceptional’ has a long-established use in social security legislation. From 1966 to 1980, the Supplementary Benefits Commission operated an extensive network of discretionary rules, including provision for “Exceptional Needs Payments” and “Exceptional Circumstances Additions”. In relation to the first, the Supplementary Benefits Handbook explained:

“as their description implies, exceptional needs payments are the exception rather than the rule. ... The main question to be decided in each case is whether the need is *essential*, that is whether hardship would be caused to the particular claimant or his dependents if it were not met. .. The exceptional needs payment is thus intended to help those who would otherwise fall below the standard of living provided by the supplementary benefit scheme; it is not designed to raise people above it.”<sup>7</sup>

The Department of Health and Social Security further explained, in its review of *Social Assistance*, that

“ECAs are awarded for continuing expenses which are exceptional in the sense that they are not covered by the scale rates or which are thought to be greater than normal”.<sup>8</sup>

Note that the wording of the Scotland Act specifically and directly refers both to exceptional events and to exceptional circumstances. It follows that in both established senses of the use of “exceptional”, the Scottish Parliament has the power to make provision in this respect.

### **Question 10: Further issues**

12. There is a further important omission. The right to benefits is personal, and the legislation needs to state that the benefits are inalienable. Otherwise third parties, such as the Accountant in Bankruptcy, may divert the benefits from their intended purpose.

### **References**

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1. House of Commons Work and Pensions Committee, 2011, Work Programme, <https://www.publications.parliament.uk/pa/cm201012/cmselect/cmworpen/718/718i.pdf>
  2. House of Commons Work and Pensions Committee, 2014, Employment and Support Allowance and Work Capability Assessments, <https://publications.parliament.uk/pa/cm201415/cmselect/cmworpen/302/30209.htm>
  3. R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent), [2017] UKSC 51
  4. Chief Adjudication Officer v Bate [1996] 2 All ER 790 HL
  5. Parliamentary and Health Service Ombudsman, 2007, Tax Credits - Getting it Wrong? HC 1010, p 43.
  6. Scotland Act 2016, ss 24,25,26, 28
  7. Supplementary Benefits Commission, 1977, Supplementary Benefits Handbook, London: HMSO, p 39.
  8. DHSS, 1978, Social Assistance, London: DHSS, p 74.

*Professor Paul Spicker is Emeritus Professor of Public Policy at the Robert Gordon University, currently working as a writer and consultant on social policy and administration. This submission has been prepared independently.*