

SOCIAL SECURITY COMMITTEE
SOCIAL SECURITY (SCOTLAND) BILL
SUBMISSION FROM FALKIRK COUNCIL

The Bill aims to provide a framework for the creation of the Scottish social security system. In addition the Scottish Government has chosen to put most of the rules about the new benefits in Regulations. It believes that putting the rules in Regulations will make things clearer and less confusing. Parliament cannot change Regulations, only approve or reject them. The Scottish Government intends to develop Regulations with external help.

Question 1: Do you have any views on this approach?

We welcome this approach, particularly the desire to create a simpler system that is easier to use than the current UK system. Our concern is that this method, over time, could lead to a multiplicity of delegated legislation that is inaccessible, cumbersome to navigate and difficult to establish the currency of the rules in force (both for claimants, their advisers and Agency staff). For example, the rules relating to Universal Credit as established by the Welfare Reform Act 2012 are contained across both the parent statute and no fewer than 25 items of secondary legislation. Our preference would be to avoid amending individual Regulations over time, and replacing each Scottish Statutory Instrument wholesale to ensure that it remains accessible.

The Bill proposes that the Scottish social security system will be based on the following seven principles:

- Social security is an investment in the people of Scotland.
- Social security is a human right. It is essential to accessing other human rights.
- Respect for the dignity of individuals is at the heart of the Scottish social security system.
- The Scottish Government has a role in making sure that people are given the social security assistance they are eligible for.
- The Scottish social security system will be designed with the people of Scotland, and based on evidence.
- The Scottish social security system should always be trying to improve. Any changes should put the needs of those who require social security first.
- The Scottish social security system is efficient and delivers value for money.

Question 2: What are your views on these principles and this approach? Please explain the reason for your answer.
Are there other principles you would like to see included?

We endorse these principles and the fact that they are more closely aligned to and reflect the original aims of welfare legislation designed to help those in need. They do not appear to be punitive and recognise social security as a human right. We welcome the comprehensive nature of these principles and believe that, if adhered to, they will ensure that those in need receive the support that they are entitled to.

We believe that the principles take a balanced approach to developing the social security system in Scotland, in particular welcome the view that social security represents an investment in the people of Scotland. We believe that it recognises that

cuts to welfare can act as a fiscal hindranceⁱ and in doing so can potentially lead to damaging effects upon the economy.

We would, however, prefer to see an explicit statement that fairness will be one of the overriding principles within the system, as it sends a powerful and positive message about how citizens will interact with the Agency; within the Bill (as proposed) there is no reference to fairness. Our proposal is to re-word clause 1(c) thus:

(c) respect for the dignity of individuals [*and fairness are*] to be at the heart of the Social Security system.

Whilst social attitudes towards increased spending on disability benefits may have softenedⁱⁱ, we believe that the Scottish Ministers must take the lead in promoting fairness at the highest levels to ensure that Scotland leads the way in building a fair and sustainable social security system.

The Bill proposes that there will be a publicly available social security 'charter'. This will say how the Scottish Government will put the seven principles above into practice. It will also say what is expected from people claiming benefits. A report on the charter will be produced by the Scottish Government each year.

Question 3: Do you agree with the idea of the charter? Please explain the reason for your answer.

Is there anything specific you would like to see in this charter?

In principle, we support the use of a charter as a fair and accessible means for individuals to understand what social security means for them and how they can expect to be treated. However, we have reservations in terms of the practical application of a charter – it must have a practical rather than notional purpose and so must ensure that the Agency (at all levels) and Ministers must act compatibly with the charter in both the formulation of policy and in terms of operational decision making, with an effective means of addressing disputes in these circumstances.

Consideration needs to be given to what happens when an applicant feels that the Charter has not been met. We take the view that judicial review is prohibitively expensive and does not afford a sufficiently expedient means of challenging a failure to meet obligations under the Charter.

It is our proposal that a formal right of redress is included in the Charter by way of complaint to the Scottish Public Services Ombudsman. The independence and experience of SPSO in acting as second-tier reviewer for the Scottish Welfare Fundⁱⁱⁱ means that we believe it is ideally placed to take on this role. We would also suggest that, in developing and reviewing the Charter, the SPSO be added to the list of persons the Scottish Minister must consult under clause 3(3). This will not only enhance the perception that the Agency and Ministers are subject to proper scrutiny, but deliver it substantively too.

In terms of what should be in the charter: it would be worth considering what is required of individuals in receipt of benefits. We would urge the Scottish Government not to take the punitive approach that is part of the UK Benefits system. We see the charter as a means of ensuring a more person-centred approach.

The Bill proposes rules for social security which say:

- how decisions are made and when they can be changed

- how to apply and what information people have to provide
- how decisions can be challenged
- when overpayments must be repaid
- what criminal offences will be created relating to benefits.

Question 4: Do you have any comments on these rules?

1. Our comments relate to specific rules as follows:

How decisions can be challenged

We welcome the inclusion of a time limit for a redetermination with the ability to go to First-Tier tribunal if a redetermination does not happen within this time limit.

The inclusion of a re-determination step before moving to tribunal follows good practice from other areas such as for Housing Benefit and Council Tax Reduction. However we need to ensure that the requirement to seek a re-determination (pursuant to clauses 23-26) does not lead to a repeat of the mistakes made with the mandatory reconsideration system and lead to few decisions being overturned.

With regards to the current system used by DWP we have concerns that this does not expedite the disputes process or results in any greater number of decisions being resolved in the claimant’s favour. There is also risk of creating a culture of setting targets for reconsiderations which would fatally undermine the principles enshrined in clause 1iv.

On the other hand, experience of claimants submitting appeals against Housing Benefit decisions, there is a healthy change of decision more often than not it’s because the claimant provided further information or evidence with their request for reconsideration that enabled the change to be made.

Our view is that the new agency and particularly the redetermination stage needs to positively engage with claimants and listen to their own evidence.

How to apply and what information people have to supply

We are concerned that the duty to provide information on request does not make provision for ‘good cause’ where the individual supplies the information outside of the time limit; our primary reservation is that anecdotal evidence would indicate that the most vulnerable customers can find it difficult to comply with information requirements and, without more, the clause could operate to penalise such individuals. Our proposal would therefore be to reword clause 30(2) as follows:

If the individual fails [*without good cause*] to provide the requested information by the end of the specified period the Scottish Ministers may, without further consideration, proceed to make the determination on the basis that the individual does not satisfy the eligibility rules prescribed in the applicable regulations

If ‘good clause’ is added then a definition of ‘good cause’ should also be included in legislation. Within Council Tax and Housing Benefit guidance is provided on ‘good cause’

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236948/hbgm-a2-claims.pdf

Within Housing Benefit this is one of the most common areas of dispute regarding backdating of claims and is subjective so a legal definition would be preferred rather than “guidance”

When overpayments have to be repaid

Our concern also extends to the provisions in clause 37(2) with relation to recovery of money under clause 36. It provides only for consideration of a debtor’s financial circumstances, whereas we propose that an ‘all the circumstances’ approach would be far more just and equitable – particularly in relation to health concerns and causing hardship to children. We would therefore propose to reword clause 37(2) as follows:

In making a decision to which this section applies, the Scottish Ministers must have regard to financial circumstances [*and the health*] of the individual [, *and that of his or her immediately family,*] who owes the money (so far as those circumstances are known to the Ministers).

This would enable clause 36 to operate more broadly in line with the principle of respecting the dignity of the individual by making a holistic assessment of the ability to repay, and avoid decisions which are unduly harsh. It would also offer parity with the DWP Repayment Negotiation Framework.

We note that whilst the financial circumstances are to be taken into account when considering overpayments they are not mentioned in Chapter 5 in regard to fraudulent claims. Experiences within our organisation shows that a greater proportion of those prosecuted are in poor financial circumstances, probably due to these circumstances making it more likely that they will commit fraud in the first place. We suggest that financial circumstances should be taken into consideration in relation to fraudulent claims and that the costs associated with the consequences of convictions, i.e. imprisonment, need to be considered relative to the level of fraud committed.

The Scottish Government will take over responsibility for some current benefits. The Bill does not explain how they will work in detail. This will be set out in Regulations at a later date. The current benefits which will be run by the Scottish Government are:

- disability assistance (including disability living allowance, personal independence payment, attendance allowance and severe disablement allowance)
- carer’s allowance
- winter fuel payments
- industrial injuries disablement benefit
- cold weather payments
- funeral payments
- sure start maternity grants

Question 5: What are your thoughts on the schedules in the bill in regard to these benefits?

Whilst the bill makes provisions to allow for a financial consideration to determine entitlement to benefits such as winter fuel payments it does not provide detail on

whether this will be implemented and to what extent. We are interested in the details of any financial restriction to entitlement to the previously universal benefits. Whilst financial consideration will allow these benefits to be targeted towards those in greater need any assessment needs to be proportionate to the amount of benefit being provided.

We are supportive of the approach that this is taking as the current system of health assessments for DLA and PIP claimants including frequency and content can be distressing and unnecessary. In addition we welcome the previously announced commitment that the Scottish Government will not use for profit organisation to carry out health assessments.

In relation specifically to the provisions of sch. 4 of the Bill as proposed:

We are concerned that para. 6(a) gives the Scottish Ministers the power to make receipt of disability assistance contingent upon being, or not being, in receipt of another type of assistance, or being entitled (or not) to receive such assistance. Our concern is that this power could be used to introduce means-testing of disability benefits at some future stage, a principle we are firmly opposed to. We would therefore recommend para. 6 be deleted and reworded accordingly:

The regulations may make an individual's eligibility depend on the individual [not being in receipt, eligible for or entitled to another type of assistance (whether under this Act or another enactment)]

The use of a negative construction would allow the Scottish Ministers sufficient flexibility to create disability benefits targeted at different age groups, as with Disability Living Allowance, Personal Independence Payment and Attendance Allowance, that prevents entitlement to one or both of these benefits.

We are similarly concerned that para. 10(b) envisages recovery from a disability benefit in satisfaction of a liability owed to the Scottish Ministers pursuant to clause 36. Our belief is that, from a point of public principle, deductions should not be made from a disability benefit.

The Bill proposes that a new type of short-term assistance will be introduced. This will be for someone who is challenging a decision to stop or reduce a Scottish benefit.

Question 6: What are your views on this proposal?

The proposition of providing short-term assistance whilst challenging a decision to stop or reduce a Scottish benefit as set out in clause 18 is unequivocally supported. Our submission is that short-term assistance pending the resolution of a challenge to stop or reduce a benefit is the only practical and fair means of avoiding hardship when a decision proves to be wrong. Our own evidence highlights in particular the significant effects abrupt withdrawal of a benefit can have.

Citizen E had significant and enduring mental health issues which are not always immediately apparent. Following a decision that he was fit for work, he could not cope with the prospect of attending Jobcentre Plus whilst waiting for his mandatory reconsideration due to the high likelihood of exacerbating his mental health problems. He had to wait eight weeks for a decision, during which time he had to rely upon crisis grants and food parcels, both of which are subject to a fixed number of awards.

Whilst a decision may be later 'backdated' following a successful reconsideration or appeal, this overlooks the impact it has upon claimants (for example, high cost borrowing, reliance on foodbanks), the public sector (health, social care, housing and the Scottish Welfare Fund) and the economy.

We believe that where someone was previously entitled to the benefit and has now been deemed as not entitled or entitled to a lower amount, this short term assistance should be provided without any requirement for pay-back. In addition it should be offered to people before encouraging them to go to foodbanks and charities. The current Department for Work and Pensions guidance on Recoverable Hardship Payments states that staff are to encourage claimants to go to charities and foodbanks for support before taking up Hardship payments. We believe that the approach taken by the DWP around foodbanks/charities and hardship payments does not meet the ethos of treating people with 'dignity and respect'.

Additionally guidance is required on how short term assistance is treated for Housing benefit or Universal Credit as it will affect premiums and allowances such that an individual could still be financially worse off during the interim period.

Once a final decision has been made, whilst we would not support claw back of any short term assistance in cases of unsuccessful appeal, if the appeal was successful the short term assistance would be deducted from any entitlement for the interim period.

The Bill includes the power for the Scottish Government to be able to top up 'reserved' benefits (ones controlled by the UK Government), but does not say how these will be used. The Scottish Government also has the power to create new benefits. This is not included in the bill.

Question 7: Do you agree with these proposals?

We are disappointed that the Bill does not make more detailed provision for the topping-up of reserved benefits. Our view is that we support the principle of top-up provided that it has no negative effect upon the claimant's existing entitlement to a reserved welfare benefit. It is also a matter of concern that no firm guarantees appear to have been given by the UK Government regarding claw-back, with the evidence of the Rt Hon Damien Green when asked whether any mitigations, top-ups or new benefits created by the Scottish Government will not be subject to the benefit cap being that "Broadly speaking, yes, but, as I say, clawback is itself an interesting phrase^{vi}."

Clarity is therefore required from both Governments as to how such a system would operate in practice.

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

Question 8: What are your thoughts on this proposal?

Any proposal to increase the level of financial support for carers is wholeheartedly supported. In our view, however, it should not materially and detrimentally affect their entitlement to other (particularly means-tested) benefits. We would move to seek assurances from the Scottish Ministers that the proposal has been properly scrutinised to ensure that there will be no negative effect on the other financial entitlements of carers in Scotland.

The Bill proposes that discretionary housing payments continue as they are. They will still be paid by local authorities. The Bill does not require any local authority to have a discretionary housing payments scheme but if they do, they must follow Scottish Government guidance on running it.

Question 9: Do you agree that discretionary housing payments should continue largely as they are?

Do you have any other views on the proposals for discretionary housing payments?

We welcome the approach of introducing guidance for decision making in relation to Discretionary Housing Payments in Scotland. We believe that this can lead to a distinctly Scottish approach to the problems that tenants in Scotland face in relation to the cost of renting a property. We also agree with the information requirements introduced upon local authorities to publicise their schemes of entitlement.

Whilst we accept that the nature of making an award is discretionary, we do not believe that operation of the scheme should be similarly so. The Scottish Government should set out a national table of amounts and criteria so that there is consistency across all 32 authorities. Some LA's don't seek "intent to claim" and award without any contact whereas others follow the guidance set out by DWP in this regard. We also believe there is considerable variation between Local Authorities on the circumstances where DHP is awarded.

Provision of a table of amounts to be used for financial assessments and guidance around the administration of Discretionary Housing Payments would bring consistency to the scheme and remove the chances of the scheme being viewed as a 'postcode lottery'.

Additionally we are concerned that using schemes such as Discretionary Housing Payments may not always offer the most cost effective mechanism of addressing specific benefit issues. A prime example of this is the use of Discretionary Housing Payments to mitigate the spare room subsidy. Whilst we were supportive of this mitigation the requirement to collect consent individually from each tenant household had significant resources implications that could have been avoided had it been possible to accept applications from landlords on behalf of tenants.

ⁱ *Building a Sustainable Job-Rich Recovery*, The International Institute for Labour Studies, http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_168161.pdf

ⁱⁱ *British Social Attitudes Survey 34*, The National Centre for Social Research, <http://www.bsa.natcen.ac.uk/latest-report/british-social-attitudes-34/key-findings/context.aspx>

ⁱⁱⁱ Welfare Funds (Scotland) Act 2015, s. 7