

**Social Security (Scotland) Bill – Call for Evidence  
Response from the Low Incomes Tax Reform Group (LITRG)**

**1 About Us**

- 1.1 The LITRG is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998 LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes. Everything we do is aimed at improving the tax and benefits experience of low-income workers, pensioners, migrants, students, disabled people and carers.
- 1.2 The LITRG works extensively with HM Revenue & Customs (HMRC) and other government departments, commenting on proposals and putting forward our own ideas for improving the system. Too often the tax and related welfare laws and administrative systems are not designed with the low-income user in mind and this often makes life difficult for those we try to help. We are particularly interested in the potential interactions between the tax and welfare systems.
- 1.3 The CIOT is a charity and the leading professional body in the United Kingdom concerned solely with taxation. The CIOT's primary purpose is to promote education and study of the administration and practice of taxation. One of the key aims is to achieve a better, more efficient, tax system for all affected by it – taxpayers, advisers and the authorities.

**2 Background to this response**

- 2.1 In recent years, LITRG has engaged with the Scottish Government concerning the setting up of Revenue Scotland, including the development of the Revenue Scotland website, and has responded to consultations on the Revenue Scotland and Tax Powers Act 2014. We have

been involved in discussions on issues relating to Scottish Income Tax and have given evidence to the Finance Committee of the Scottish Parliament on tax management issues in respect of low-income individuals. In August 2015, we submitted evidence to the Scottish Parliament Welfare Reform Committee inquiry on the future delivery of social security in Scotland and in October 2016, we responded to 'A new future for social security in Scotland' consultation.<sup>1</sup>

- 2.2 Some of the questions in this consultation relate to the detail of new benefits in Scotland which is outside our remit, though the interaction of tax and benefits systems is very much part of our work. We have limited our response to those questions where we have experience and can add value.

### **3 Question responses**

#### **3.1 *Framework of the bill – Do you have any views on this approach?***

- 3.1.1 It is generally accepted that secondary legislation is appropriate for matters of detail whereas matters of general principle should always be dealt with by primary legislation where they can be subjected to full parliamentary scrutiny. We do not think that a shift towards greater use of regulations will necessarily make the law as a whole any clearer or less confusing.
- 3.1.2 We strongly recommend that if most of the detail is to be left to secondary legislation, those regulations should be subject to the affirmative resolution procedure to ensure there is the maximum opportunity for scrutiny and debate, which is crucial. Allowing regulations to be subject to the negative procedure would mean in all likelihood they would be subject to no parliamentary scrutiny at all which is wrong, yet the content of the regulations will have a significant impact on social security and Scottish claimants.
- 3.1.3 In our evidence to the Scottish Parliament Welfare Committee inquiry, we suggested that a full 'checklist' of key issues be drawn up and agreed upon that can be used to assess each change to ensure that all relevant interactions have been fully considered. Such a checklist could include some of the key issues identified in paragraph 4.1.7 of 'Scotland in the United Kingdom: An enduring settlement'.<sup>2</sup>
- 3.1.4 Given the complexity of the changes proposed and the decision to leave most of the detail to secondary legislation that is likely to be developed at different times, we strongly urge the Scottish Government to consider a checklist which can be presented with any secondary legislation to identify and confirm all of the factors/interactions that have been considered

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<sup>1</sup> <http://www.litrg.org.uk/latest-news/submissions/161101-new-future-social-security-scotland>

<sup>2</sup> <https://www.gov.uk/government/publications/scotland-in-the-united-kingdom-an-enduring-settlement>

and any changes that have been made as a result. There would be merit in also including a provision in the Bill to ensure that any regulations made under powers in the Bill take account of interactions between them and any other primary or secondary legislation that might have an impact. The checklist would then be a means of demonstrating that this has been complied with.

**3.2 *Do you agree with the idea of the charter? & Question 4: Is there anything specific you would like to see in this Charter?***

- 3.2.1 In our response to ‘A new future for social security-Scotland’<sup>1</sup> we strongly supported enshrining general principles in legislation and having a claimant charter that has statutory backing. We are therefore pleased to see that this is the approach that has been taken in the Bill.
- 3.2.2 While enshrining general principles in legislation ensures that secondary legislation is developed and key decisions are taken in line with the principles, it does not directly empower claimants. A claimant Charter would help to fulfil claimants’ needs, assuming it is sufficiently detailed, given that it should be more easily accessible and understood by claimants than the legislation itself.
- 3.2.3 We worked closely with Revenue Scotland when they developed their Charter of Standards and Values and we think their Charter provides a very good model to follow. That Charter also has statutory backing which we believe is crucial for ensuring that the Charter is effective and enduring. We welcome the decision to enshrine the social security claimant Charter in primary legislation.
- 3.2.4 We feel that the success of the Charter for claimants will depend on the ability to enforce it and therefore the Charter itself should include the right of redress if the principles are not upheld by the body responsible. The Charter also needs to be given prominence in communications with claimants and it should be referenced as standard on all written publications and letters and appear as a prominent link from online benefits material.
- 3.2.5 The policy memorandum accompanying the Bill makes it clear that the Charter will set out the standard of official conduct and service that people have a right to expect in relation to social security in Scotland and we think this is the right approach. It must be clear, concise and usable. Furthermore, it should set out not only the rights of the claimant and what they can expect from the governing body, but also what the governing body can expect of the claimant and how they will hold themselves accountable and can be held to account by others.
- 3.2.6 The Bill as drafted places responsibility for preparing and publishing the Charter (within six months of the section coming into force) upon Scottish Ministers who must consult with

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<sup>1</sup> <http://www.litrg.org.uk/latest-news/submissions/161101-new-future-social-security-scotland>

such persons as they consider appropriate. Scottish Ministers then have a duty to review the Charter within five years and again consult with such persons as they consider appropriate.

3.2.7 HMRC currently have a statutorily backed Charter and their legislation places similar duties as proposed in this Bill on the Commissioners of HMRC in terms of preparing and reviewing their Charter. HMRC deliver their Charter by way of a Charter Committee<sup>1</sup> (a sub-Committee of the HMRC Board) which monitors performance against the Charter and advises the HMRC Board on whether the strategies, policies, practices and measurement of the performance in these areas is effective and appropriate.

3.2.8 The HMRC Charter Committee is made up of five external appointees and two people from HMRC's non-executive Committee ensuring a diverse range of experience is brought into reviewing the Charter. We recommend a similar approach is adopted for the social security charter to assist Ministers in carrying out their Charter role.

### 3.3 ***Rules for social security – Do you have any comments on these rules?***

3.3.1 There are many other welfare rights specialist organisations which will no doubt comment on these sections of the Bill.

3.3.2 We do however have some concerns about the wording in Section 36 with regards to liability, based on our extensive experience of the tax credits system which has been plagued by overpayment problems since it began in 2003.

3.3.3 Section 36(1) in the Bill states that an individual is liable to pay the value of any assistance that was given to them as a result of a mistaken entitlement decision. Section 36(4) states that a decision is 'mistaken' if (a) an error occurred in the making of it or (b) while made correctly, it was made on the basis of incorrect information or an assumption which proves to be wrong.

3.3.4 Although Section 37 goes on to state that Ministers must have regard for the financial circumstances of a person in terms of repayment, we are concerned that there does not appear to be any discretion in Section 36 in terms of recovery.

3.3.5 The Bill's policy memorandum at paragraph 251 states that 'it is also proposed that where overpayments are made as a result of agency error, they will not be pursued, unless under exceptional circumstances such as a very large and obvious overpayment.' It goes on to say in paragraph 258 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.' However, our reading of Section 36 is that it does not seem to distinguish between errors by the individual and those made by the agency in the definition of a 'mistaken' decision.

3.3.6 If the intention is to leave the detail of the recovery policy to either regulations or a written policy (such as the Code of Practice 26 policy used by HMRC in the exercise of their

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<sup>1</sup> <https://www.gov.uk/government/publications/your-charter-annual-report-2016-to-2017>

discretion to recover tax credit overpayments), it is necessary for Section 36 to give that discretionary power. We strongly urge that Section 36(1) is changed so that it gives that discretion by stating:

*'An individual **may** be liable to pay the Scottish Ministers the value of any assistance that was given to the individual as a result of a mistaken decision under section 33(1).'*

3.3.7 Without this discretion, it appears claimants will be liable to repay an overpayment caused by agency error unless Section 37 applies in cases of financial hardship.

3.3.8 We also recommend strengthening Section 37 which currently states that Ministers should have regard to the financial circumstances of the individual when deciding whether to seek recovery of money owed under Section 36 and the method of that recovery. We recommended that a further section is added as Section 37(3) which would allow for error by the Agency (official error) to be considered as a factor:

*'(3) whether official error contributed in whole or in part to the mistaken decision...'*

Along with the change suggested above to allow discretion in Section 36, we think this addition will ensure that claimants are not penalised for errors by the Agency.

3.3.9 Section 37(2) currently only allows financial circumstances to be considered when deciding whether to seek recovery of money owed. We think there is a strong case for this to be extended to include personal circumstances as well as financial circumstances. This would ensure factors such as bereavement or terminal illness can be taken into account.

#### 3.4 ***Do you agree with these proposals? (top-up of reserved benefits)***

3.4.1 We do not have any specific comments on the powers to top-up reserved benefits and how they should be used. However, we would like to flag again the potential for tax issues to arise. Northern Ireland have introduced similar welfare supplementary payments (WSP) recently and the tax position is quite confusing for claimants. Put simply, where the benefit being replaced is taxable, the WSP is taxable. Thought will need to be given not only about whether these top-ups will be taxable but also the status of the top-ups in terms of interactions with other benefits and that the position is settled and made clear at the outset (see section 3.5 for further comments on this in relation to the increase in carer's allowance).

#### 3.5 ***What are your thoughts on this proposal? (increase of carer's allowance)***

3.5.1 We make no comment on the proposal to increase the amount of carer's allowance or whether the level chosen is the correct one as there are many organisations with more expertise than us who can comment on these aspects. We do support the acknowledgement in the Bill Policy Memorandum that carers make an immense contribution and it is essential that they are supported and sustained in this role.

- 3.5.2 The only comment we would make in this respect is that increasing carer's allowance cannot be considered in isolation. Carer's allowance is a taxable benefit and so any increase would be taxable (unless legislation was introduced that changed this position). In addition, those receiving the increase who receive tax credits or universal credit would see those benefits reduced – most tax credit claimants would lose 41p for each £1 of increase and universal credit (UC) claimants would have their UC reduced £ for £.
- 3.5.3 The Smith Agreement stated that 'any new benefits or discretionary payments introduced by the Scottish Parliament must provide additional income for a recipient and not result in an automatic offsetting reduction in their entitlement to other benefits or post-tax earnings if in employment.'<sup>1</sup> However, as far as we can see this was not carried through to the Scotland Act 2016 or the current Bill. Consideration may need to be given to alternative ways of providing additional income in order to mitigate the impact of reductions elsewhere or an agreement reached with the UK Government so that the increase does not lead to a reduction in the other benefits.
- 3.5.4 The Bill contains a provision to allow a carer's allowance supplementary payment to be paid twice a year. This supplement is being paid because Scottish Ministers cannot immediately increase the rate at which carer's allowance is paid until regulations for carer's assistance are introduced and is therefore only an interim measure.
- 3.5.5 We cannot see any detail in the Bill or accompanying documents about the nature of these supplementary payments and whether they will be taxable and, if so, how tax will be collected, whether HMRC will be notified about them so that PAYE codes can be adjusted and what the status of them will be for other benefits. For example, will they count as income for tax credits and UC?
- 3.5.6 While this is only an interim measure, thought will need to be given to how information about the payments will be communicated and any written notification of the payments will need to be absolutely clear as to the tax position and the nature of the payment so that claimants can meet their obligations for tax and other benefits. Claimants are likely to be confused as to whether these are payments of carer's allowance or something entirely separate and if separate how that will affect them. While they might welcome the increase, they may find it confusing if they then see another benefit reduced to claw some of the increase back.

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<sup>1</sup> Published 27 November 2014, report accessible from <http://webarchive.nationalarchives.gov.uk/20151202171017/http://www.smith-commission.scot/> - see para 55

### 3.6 ***Other thoughts about the Bill***

- 3.6.1 Recently, the Scottish Government consulted on regulations intended to introduce flexibilities into the UC system in Scotland. In our response<sup>1</sup> to the consultation on those regulations, we raised concerns about the definition of a 'Scottish Claimant' as 'a person (and any one of joint claimants) applying for, or in receipt of, UC who lives in Scotland'. The draft regulations did not offer any further definition of when someone would be treated as living in Scotland.
- 3.6.2 Our response raised various issues around this lack of further definition. For example, what happens if someone owns a house in Scotland but works away in England for two months at a time before returning home? What if they work away Monday to Friday? We suggested that some work should be done with HMRC who have implemented the definition of a Scottish taxpayer for tax purposes.
- 3.6.3 In the Scottish Government's response to that consultation,<sup>2</sup> these concerns were acknowledged, and in the final regulations 'Scottish Claimant' was replaced with 'Scottish UC applicant or recipient' but with the definition still linked to someone living in Scotland with no further definition as to what that actually means.
- 3.6.4 We note that throughout the Bill there is reference to residency and presence requirements and in particular Section 47 (which introduces the carer's allowance supplement discussed in section 3.5 above) a qualifying individual is classed as someone who is 'resident in Scotland'. However, no further definition is given for who or what 'resident in Scotland' means and we can see various problems developing on whether someone qualifies for the top-up payment. This needs to be addressed as soon as possible to ensure that it is clear who will be entitled to a supplementary payment.

LITRG  
23 August 2017

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<sup>1</sup> <http://www.litrg.org.uk/latest-news/submissions/170315-universal-credit-claims-and-payments-scotland-regulations-2017>

<sup>2</sup> <http://www.gov.scot/Resource/0052/00521851.pdf>