

DAS response to Social Security Committee consultation on Social Security Bill (Scotland)

August 2017

About DAS¹

1.1 The members of DAS are Action on Hearing Loss Scotland, Capability Scotland, ENABLE Scotland, RNIB Scotland, SAMH (Scottish Association for Mental Health) and Sense Scotland. DAS focuses on the issues that will have the most impact for disabled people in Scotland. Together our experience, expertise and interests cover physical disability, sensory impairment, learning disability, communication support needs and mental health. We work closely with the thousands of disabled children, young people and adults, families and carers involved with the member organisations.

1.2 We have kept this submission as short as possible, although not quite to four pages, due to the scope of the Social Security Bill (Scotland) and range of issues it covers. DAS would value the opportunity to attend another meeting of the Committee to give evidence in person, and discuss key issues. Given the extent to which disability benefits are being devolved, and that they account for an overwhelming majority of the budget, we believe that our input would add a lot to the discussions.

1.3 Key points raised in this submission relate to:

- Getting the right balance between primary and secondary legislation and guidance to ensure sufficient scrutiny, drawing on lived experience and technical expertise, and preventing unintended consequences.
- The need for more about the purpose of social security, including alleviating high levels of poverty among disabled people. There should be a statement of purpose for disability benefits within the text of the Bill, or subsequent regulations, coproduced by people currently assisted by the social security system. We are also calling for a commitment from the Scottish Government on the nature of consultation and timescales for regulations; and key principles for Disability Assistance placed in primary legislation.
- We welcome the generally positive language and principles, with some suggested amendments, and are keen that the principles and a human rights approach are fully realised for everyone accessing the new system.
- A call for an independent, comprehensive review of the system within 3-5 years of it being in operation.
- Accessibility and communications will be key for the success of the new system.
- Collecting evidence and information sharing should be improved in the new system.
- There needs to be a legal right for independent advice and advocacy in the Bill.
- We believe more information on timescales, for instance on processing applications, and uprating is needed.
- There is a pressing need to improve disability benefits, particularly the application and assessment process for Personal Independence Payments (PIP), and opportunities for longer term reform.
- DAS calls on the Scottish Government to use its top-up powers to mitigate cuts to Employment and Support Allowance (ESA) for those in the Work Related Activity Group (WRAG).
- There should be improved coordination between social security and other services including employment and training support.
- The section in the Bill on overpayments should be separated from the points about fraud.

Q1. The Scottish Government has chosen to put most of the rules about the new benefits in Regulations. Do you have any views on this approach?

Contents of the Bill and scrutiny

2.1 While the Scottish Government has set out a reasonable rationale for a short Bill, its brevity means a lot remains unclear about the new system and in some ways, makes it difficult to comment on key aspects. We are concerned that the lack of scrutiny of secondary legislation could lead to **unintended consequences** including elements that could have financial implications for the Scottish Government but also for individuals and their families. **There are a number of key areas on which there is currently nothing or very little**

¹ More information is available on our website: www.disabilityagenda.scot.

even in terms of framing legislation, in the Bill. We have focused on key points that need to be addressed within the Bill and/or regulation and guidance.

2.2 We welcome the fact that regulations will be positive rather than negative instruments: however, this still means that while Parliament gets a vote, it cannot amend the regulations. We also need an explicit commitment on the level of public consultation over changes to individual benefit areas.

2.3 We would ask that the Committee, and the Scottish Government, considers the creation of an independent scrutiny body, which would provide additional scrutiny and technical expertise for regulations and future changes. It would be useful for this to be developed as soon as possible. One model would be the Social Security Advisory Committee (SSAC) in Westminster although we are not tied to this, and believe it would be worth considering what would work best in Scotland for the new system, including a role in assessing how devolved and reserved powers and benefits interact. The expert panels that have been established should provide important lived experience but there is also a need for technical expertise and scrutiny, which we believe a Committee and/or working groups, with the input of welfare rights advisers, academics and lawyers, for instance would provide.

Purpose of social security

3.1 We believe that there should be more in the Bill about the purpose of social security. In particular, for disabled people, social security should play a key role in negating additional financial costs and the high levels of poverty faced by disabled people. Disability benefits account for the overwhelming majority of funds being devolved – around 84% according to the forecast expenditure in Scotland for 2017-18 in the financial memorandum. Reform of social security in Scotland must address the failure of the benefits system to adequately compensate disabled people for the extra financial costs they face to live an independent life. This is one of several reasons there are higher rates of poverty among disabled people. Another is that costs associated with disability average £550 per month². A recent report found that 39% of people in poverty are in a household with at least one disabled person³. **We believe there needs to be a statement of purpose for disability (and other) benefits within the text of the Bill, or subsequent regulations, coproduced by people currently assisted by the social security system. We also call for a commitment from the Scottish Government on the nature of consultation and timescales for regulations.**

3.2 DAS, and other organisations, are calling for the introduction, through the Bill and the reporting outlined in the Bill, for a disability poverty reduction target. With the recent precedent of a target in the Child Poverty Bill (Scotland), we believe it is possible to develop a target and ensure poverty amongst disabled people is reduced in the coming years.

Q2. 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?

Language and principles

4.1 We very much welcome the principles and the tone of much of the language that the Minister for Social Security and the Scottish Government have used in talking about the Bill and the new system. We are keen to focus on how we ensure we make those words, and the principles laid out, a reality. It is positive to see the principles laid out in the Bill and references to human rights, dignity, and continuous improvement. We also fully support the principle on the system to be designed 'with the people of Scotland on the basis of evidence'. We welcome the roles of the Disability and Carers Benefits Expert Advisory Group and Disability and Ill-Health Reference Groups. We believe the introduction of Experience Panels is fantastic and has a critical role to play, and a number of people who are supported by DAS members are involved in the panels. However, we believe it will be key how the evidence and discussions from the experience panels are utilised. In addition, there needs to be a critical role for technical expertise, for instance from welfare

² <http://www.scope.org.uk/campaigns/extra-costs/what-are-costs>

³ <https://www.jrf.org.uk/report/uk-poverty-causes-costs-and-solutions>

rights advisers, since they have a thorough understanding of how social security – and how previous, current and/or future systems can work across numerous people and any potential issues which may arise.

4.2 Research, recently published by the Equalities and Human Rights Commission Scotland (EHRC Scotland)⁴ and conducted by Ulster University, shows how comparable systems across Europe have met their international human rights obligations in the design of their own systems. We believe there are a number of lessons to be learned from this research and other systems. It would also be useful to consider some lessons from the system in Northern Ireland, where there is greater take up due to marketing campaigns and also potentially in how benefits are delivered.

4.3 While we welcome and support the principles, there needs to be further consideration of the precise wording and intention of each of the principles. For example, the “role” of the Minister should be strengthened to “duty”. In particular, the use of words like “efficiency” and “deliver value for money” are important but can be understood to mean different things to different people; and whether the system is delivering efficiency and value for money for the state and/or individuals. We recognise the need to manage the public purse and the need for efficiency, particularly to ensure claimants/applicants receive the money they need and are entitled to as soon as possible. However, there is an inherent tension between the principles such as human rights, dignity and people receiving what they are entitled to, with some interpretations of an efficient system that provides value for money, as well as with some of the points raised in the financial memorandum, such as challenges with forecasting. We believe it is possible to create a system that is focused on human rights, but also provides “value for money”.

Q3. 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?

Charter

5.1 DAS supports the commitment to develop a Charter for the Scottish social security system. The Charter must be developed through consultation with a wide group of stakeholders including people with lived experience of disabilities and the benefit system. One issue with the Bill as drafted is it does not include any reference to recourse in the event that commitments (from the state) are breached. To have real meaning applicants should have an avenue to complain and have legal redress if commitments in the future charter are breached by the social security agency. The Charter will also need to reflect different rights and responsibilities together in one document, given that they are mutually interdependent and also to reduce the number of documents in an already complicated system. In terms of developing the Charter, there should be meaningful co-production on this and all aspects of the system for it to work effectively and an advisory group could be involved. There is currently a lack of communication about rights and entitlements and a sense that people have to be aware of their rights and know to ask the ‘right questions’. It would be positive and support equality if we moved away from this to more of a culture of assisting people to claim what they are entitled to, and the Charter should assist with this, if it is like the Milan Principles in mental health, rather than some other examples of charters and other documents which have not been used as much in key settings. **There needs to be clarity in the Bill or regulations over processes for individual recourse where the principles and obligations in the charter are not met.**

Comprehensive, independent review within 3-5 years of operation

6.1 There is a review mentioned in the section of the Bill about the Charter but **it is crucial that there is a more comprehensive, independent review of the whole system within 3-5 years of it being in operation.** The role of this review would be to assess how the new system works, opportunities for improvement and the potential for more significant changes to entitlements and the wider system than may be possible in this term of the Parliament. This review would support the principles on “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”. The review would also provide a temperature test and means to address any smaller unintended consequences or other issues which may have arisen. It would build on the precedent of the

⁴ <https://www.equalityhumanrights.com/en/our-work/news/scottish-social-security-system-must-be-respectful-equality-chief-says>

independent reviews of the Employment and Support Allowance (ESA) and Personal Independence Payments (PIP). It would also allow the Scottish Government to achieve its aim of safely transitioning benefits as they currently exist but ensure we do not miss the opportunity of more radical change further down the line.

Q4. The Bill proposes rules for social security. Do you have any comments on these rules?

Definition of disability benefits

7.1 There is not currently a definition of disability in the Bill. We understand that there is an underlying assumption that the definition is one used in the Scotland Act, as defined in the Equality Act. DAS would appreciate some clarification on this and also, to prevent confusion, for a definition (preferably, for consistency, the definition in the Equality Act) to be on the face of Bill. **The key things missing from the Bill as it stands are short definitions of each benefit to the extent of a short description of its role and who would be eligible, with further details provided in regulation.**

7.2 There have been concerns raised about one particular aspect of disability assistance in the Bill, whether payment should be money or in kind. DAS believes this aspect of the Bill needs to be qualified so that the recipient has the choice for a cash benefit in the first instance or how to use the cash, but can have the choice of an in kind service only if they would prefer. In addition, the Bill also refers to giving other people payments, which would worry some, although this should be solved by including a definition of appointees. These changes are necessary in order to maintain dignity and respect, and other principles.

7.3 The principles for Disability Assistance should be placed in primary legislation. This should include a definition of disability, eligibility for benefits, timescales for determination and principles for assessment. Schedule 4 of the Bill sets out the scope of disability assistance regulations. This includes eligibility criteria, liabilities, and award level and type. We believe key principles should be placed within the Bill itself rather than regulations. At a minimum these should include:

- A definition of disability. We recommend the definition from the Equalities Act 2010⁵
- Maximum timescales for determination of entitlement. We note that the Bill already includes maximum timescales for re-determination by Scottish Ministers
- Eligibility Criteria
- Principles governing assessments

Communications and accessibility

8.1 There needs to be a clear statement in the Bill that information that can be accessed by as many people as possible, and ensure dignity and respect, it will be crucial that a range of communication options should be available in accessible formats. The Scottish Government should not choose the 'digital by default' option for the new Scottish social security system. We understand that this is not the intention and therefore should be included in the primary legislation. There are some cost implications involved as accessible communications e.g. note takers or British Sign Language (BSL) interpreters do require additional resource, and are essential for some people and a clear commitment is needed to reassure people that their needs will be met.

Evidence and information

9.1 There appears to be an emphasis on individuals having to gather evidence to support their claim. We would like to see the Scottish Social Security Agency (or whatever it is agreed that it will be called) having primary responsibility for collecting additional evidence. Medical evidence is important for assessment but other types of evidence, such as from occupational therapists, teachers, other professionals, carers etc, should be taken into account as for some individuals, they can provide a more

⁵ <http://www.legislation.gov.uk/ukpga/2010/15/section/6>

current perspective on an individual's claim/application for benefits. These points need to be included in the Bill, with further information in regulation and guidance.

Advocacy and advice

10.1 Everyone accessing the Scottish Social Security system should have a legal right to independent advice and advocacy. The level of successful appeals⁶, particularly when advocacy is provided, highlights this. Additional information is also drawn from the detailed interviews and evaluation undertaken during the Welfare Advocacy Support Project⁷. Access to such support will help to ensure the principles laid out for the new social security system are realised. This requires some additional resourcing but is invaluable to the people who need it and these are often the most vulnerable. And there are costs – economic and social – from not providing this support, including greater costs to the state from supporting disabled people who, if they do not have sufficient funds to live an independent life, such as higher healthcare costs, will result in a lower likelihood that they will (re-)enter the jobs market or volunteer work, for example.

10.2 As the financial memorandum, and other Scottish Government documents highlight, it is expected that the introduction of a Scottish social security system will cause additional requests for information and support. This could impact on existing advice services and sufficient funding needs to be provided for quality, professional services that can provide independent support to people.

Uprating

11.1 Six devolved benefits – Attendance Allowance (AA), Carer's Allowance, DLA, PIP, Severe Disablement Allowance (SDA), and Industrial Injuries Disablement Benefit (IIDB) – are currently uprated. Retaining the link to the rate of inflation for devolved benefits would ensure that they kept pace with the cost of living and help to deliver the "no detriment" principle outlined by the Smith Commission. There need to be clear mechanisms for setting the rates of payments and uplifts. **The amount people will receive should be inflation-linked – and the Scottish Government and others should carefully consider and legislate for whether to use RPI (Retail Price Index) or CPI (Consumer Price Index) and when benefits would be uprated.**

Timescales

12.1 It would be reassuring to see more information and greater commitment to timescales for processing applications/claims in the Bill.

Opportunity for greater improvement

13.1 We understand the challenges in transferring systems and data and that it is imperative that the social security system works so that people are not missing payments they are entitled to. However, it is the powers being devolved rather than benefits and the focus sometimes seems to be on transferring the existing system, with some limited improvements.

13.2 We support many of the changes being proposed but believe the Scottish Government should ensure it fully grasps this opportunity. **We welcome the commitment that the Scottish Government intends for children in receipt of DLA to be granted an automatic award of the benefit to the age of 18. We would propose that consideration should be given to extending this to 21.** This would have the benefit of postponing an area of concern for young people with a disability and their families while they are likely to also be transitioning in areas such as social work involvement, education and/or health services. This could be an additional incremental change in the future.

13.3 There is an opportunity to lay the ground at least for further, incremental change in the future, such as one whole of life benefit for disabled people, replacing DLA (Disability Living Allowance), PIP and AA (Attendance Allowance). Even though this probably would not all be on the face of the Bill, it would

⁶ <http://news.scotland.gov.uk/News/PIP-failing-disabled-people-2b29.aspx>

⁷ <http://www.alliance-scotland.org.uk/what-we-do/our-work/policy/welfare-advocacy-support-project/>

be helpful to see more about **longer term ambitions**. This would be fairer as it can be confusing for people who move from one benefit to another, and receive a different level of benefit, simply because they are a year older. In addition, the advantages of a single, whole of life benefit would include:

- Greater consistency across the benefits in terms of criteria and who is eligible for what award
- There would not be the challenge of people having to transition at 16 and 65, for instance
- Reduce unneeded administration
- Along with greater automatic entitlements and lifetime awards, this would reduce some assessments and also stress for people and their families

13.4 We would like to see a move to **long term awards**, including automatic entitlement for certain conditions/disabilities and greater “passporting” (where people are entitled to one benefit, they automatically qualify for other entitlements e.g. a bus pass). For some conditions, in the context of lifetime awards, it would need a significant technical and/or medical breakthrough for there to be a change. Longer term awards would reduce uncertainty and stress for claimants; and reduce the need for, and costs of, reassessment.

Personal Independence Payments (PIP)

14.1 The existing PIP application and assessment process is one of the issues which people raise with DAS the most. While many people have not yet migrated from DLA to PIP, since PIP was introduced, our conversations with people have told us there are significant problems with the how the benefit works. These problems are increasing stress and anxiety and often preventing people from getting the support they need^{8,9}. We understand that with the transition needed to takeover delivery of delivery benefits, it is not possible to address issues with disability benefits, including assessments, until later in this Parliament. However, this is a key issue and does need to be addressed as soon as possible. We continue to work with other people and organisations to influence the Westminster Government. As these powers are being devolved to Scotland, **DAS also believes that a number of improvements and efficiencies could be made within the new system, which would benefit applicants but also save money.** For instance, by reducing the number of face-to-face assessments for Personal Independence Payments (PIP) and improving decision making. Assessments should be more personalised to a person’s condition and avoiding irrelevant questions and repeat assessments for long term conditions. Better use could be made of the application form and paper evidence, including medical and other evidence. This would reduce the number of assessments and the negative impact this process can have on people and those around them due to stress etc.

14.2 If the Scottish Government intends to replicate PIP in some form in the new system, even for the short to medium term, legislation should reflect some key changes to ensure the system works better than it currently does, including for instance:

Assessment process

- There should be a ‘paper’ new-claim route, which is not time-limited to four weeks and a simplified PIP2 form to enable people to claim PIP more easily.

Evidence gathering

- The agency should be responsible for gathering evidence, rather than the individual.
- Consider evidence gathering processes, to ensure that medical and other professionals are clear on how to provide supporting evidence and that the duties and responsibility of the assessor, the Government and claimant are clear and observed.
- In order to restore faith in the process, assessors should be obligated to review all supporting evidence provided by a claimant.

Assessments

- A root and branch review of the PIP assessment criteria should be urgently conducted, with meaningful involvement from disabled people, to ensure criteria are set fairly and truly reflect the extra costs that people face. In particular, the 20m rule for enhanced mobility support and rules setting out how fluctuation is considered should be amended.

⁸ Personal Independence Payment: what’s the problem, SAMH, October 2016 <https://www.samh.org.uk/our-work/public-affairs.aspx>

⁹ ‘Taking the PIP: Examining of the effectiveness of Personal Independence Payment’, to be published in August/September 2017 <https://disabilitybenefitsconsortium.wordpress.com/>

- Under PIP, a claimant must require support with an activity for the majority of the time. This is a departure from DLA where a more rounded picture of the claimant's life could be used to decide on entitlement. This needs to be reversed in the new Scottish system.

Awards

- Introduce indefinite PIP awards for people with the most severe, complex conditions which have no prospect of improvement. If reassessments absolutely must be undertaken because additional support may be available, these should happen 'on paper' through a call or a conversation with a health professional

14.3 Should the system work more effectively than the current system, there would need to be more effective decision making and a significant reduction in appeals. Nearly two-thirds of appeals over PIP decisions are successful at tribunal. According to statistics from the Tribunal Service, the success rate for PIP appeals in the last quarter of 2015/16 was 63%, up from 53% in the same period of the year before. The rate of successful appeals has gone up quarter by quarter since PIP was introduced – and the number of appeals heard has also gone up very significantly, from 3,826 to 15,971. The DWP introduced “mandatory reconsideration” as an extra step claimants have to complete before going to appeal, but even with this, a clear majority of cases that go to appeal find in favour of the claimant¹⁰. Beyond the stress to the people who apply for these entitlements, a burden and significant costs are being placed on the Tribunal Service. As has been acknowledged, the mechanism designed and implemented for a Scottish appeal process will have an impact on the Scottish Courts and Tribunal Services (SCTS).

14.4 We have been told by many people we work with and support that they just want **clarity and consistency in decision making**. The high number of successful appeals demonstrates that decision making could be improved. We recognise that not everyone who applies for a benefit may be eligible for it but criteria need to be clear, as much as that is feasible, and decision making consistent, with some explanation provided to the claimant as to the rationale for the outcome of their application.

Q6. 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. What are your views on this proposal?

15.1 DAS very much welcomes the proposal for a new type of short-term assistance for someone who is challenging a decision to stop or reduce a Scottish benefit. This is recognition of the costs and stress people face while awaiting a decision. **We believe it would be best for this new form of assistance to apply to all benefits, including those that will remain reserved.**

Q7. What are your thoughts on the power for the Scottish Government to be able to top up 'reserved' benefits?

16.1 Another potential opportunity for the Scottish Government to improve social security for people in Scotland, would be to use top-up powers to mitigate the negative consequences caused by the UK Government's recent decision to cut Employment Support Allowance (ESA) for those in the Work Related Activity Group (WRAG) by £30 per week. **We call on the Scottish Government to explore the best ways of reversing this cut and to mitigate it as soon as possible.** Going forward, the cut will also apply to the equivalent payment under Universal Credit. The UK Government has said it believes the £30 is disincentivising disabled people from working. No robust evidence was presented to back up this assertion. Indeed the Work and Pensions Committee described in its February report that the Government's evidence was "ambiguous at best". Currently there are 444,740 disabled people across the UK in the ESA WRAG. The largest group are those with 'Mental and Behavioural Disorders' (228,650). This includes those with mental health issues, a learning disability or autism. Disabled people in this group have been found currently unfit for work, albeit can take steps to move towards the work place. Some people will move closer and into work, others may experience a deterioration in their condition and move into the ESA support group where they are not expected to prepare for work. The cut has also created a perverse disincentive for people to get work, as people who get into work and then lose their job after three months will be treated as new claimants, and receive £30 a week less.

¹⁰ <https://www.independentliving.co.uk/advice/pip-esa-appeals/>

Q8. The Bill proposes that carer's allowance should be increased as soon as possible to the level of Job Seeker's Allowance. What are your thoughts on this proposal?

17.1 We welcome the proposal to increase carer's assistance/benefit. Even so, by bringing Carer's Allowance in line with JobSeeker's Allowance (JSA), it is still not very high and there is a strong case for increasing this further in the future, in terms of a minimum income and poverty. However, in line with the "no detriment" principle, entitlement to Carer's Benefit should be disregarded in relation to other benefits. DAS strongly believes that there should be no detriment to existing benefits and that the increase in carer's allowance should be disregarded in terms of assessing for other benefits and support, including Universal Credit, housing benefit and social care charging etc. There have been assurances on this from Westminster and the Scottish Government but we believe it needs to be clearly placed in legislation to prevent unintended consequences. **Given that the policy development in some areas is more developed, such as on Carer's Assistance, more could be placed in the Bill. In terms of the Social Security Bill (Scotland), an outline of the role of carer's assistance and a 'no detriment' principle need to be enshrined in primary legislation.**

Q10. Is there anything else you want to tell us about this Bill?

18.1 The section in the Bill on recouping overpayments should be separated from the legislation on fraud. These are two separate issues and should not be conflated. In addition, social security law differs from criminal law and the burden of proof also differs. There is very little instance of overpayment and fraud in disability benefits. We recognise these issues need to be addressed but need to be done in a considered manner, in different ways and in separate legislation. For overpayments where an error has occurred within the Government, claimants should not be required to pay this back, as was the case until recent years.

18.2 More could be done to link social security and employment, in a positive and supportive manner, for those who are able to work. This would work towards the Scottish Government's stated aim of "at least halving the disability employment gap", which was included in the 'Fairer Scotland for Disabled People' delivery plan¹¹. Despite the employment rate improving and the advent of the Equality Act, there is still a significant difference in the number of disabled people in employment compared to those who are not disabled. The number of disabled people in employment is 42%, compared to the overall figure of 73.4%.¹² Employment rates have actually fallen in recent years among some disabled. There is a lot of evidence that disabled people being in work, where possible, can have economic and social benefits for individuals, the people around them and beyond. Often, disabled people want to work but find that there is either inadequate support available to help them achieve this, or that employment is difficult to obtain when they are work ready.

18.3 There is also an opportunity for social security to be **better coordinated** with other systems of support and referral, which colocation may encourage; and wider signposting people to other forms of advice and support. **While we believe this to be the Scottish Government's intention, there isn't anything in the Bill which would legislate for this.**

For more information, or to discuss the contents of this submission, please contact: Layla Theiner (layla@disabilityagenda.scot; 07876 865342).



¹¹ www.gov.scot/Publications/2016/12/3778

¹² <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/regionallabourmarket/apr2017>