



## **Social Security (Scotland) Bill**

### **Written evidence to the Social Security Committee**

#### **Scottish Human Rights Commission**

**23 August 2017**

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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.

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#### **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<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>
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.<sup>4</sup> 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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<sup>1</sup> Universal Declaration of Human Rights 1948, Articles 22 and 25.

<sup>2</sup> 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](#).

<sup>3</sup> See A. Heredero, 'Social security as a human right: the protection afforded by the European Convention on Human Rights', Council of Europe, 2007.

<sup>4</sup> 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.

<b>Participation</b>	People should be involved in decisions that affect their rights.
<b>Accountability</b>	There should be monitoring of how people's rights are being affected, as well as effective remedies for when things go wrong.
<b>Non-Discrimination and Equality</b>	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.

<b>Empowerment</b>	Everyone should understand their rights, and be fully supported to take part in developing policy and practices that affect their lives.
<b>Legality</b>	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.

<b>Principle as set out in the Bill</b>	<b>Proposed revised principle</b>	<b>Commentary</b>
Social security is an investment in the people of Scotland.	Social security is an investment in the people of Scotland, provided without discrimination.	<p>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.</p> <p>CESCR 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.</p>

<p>Social security is itself a human right and essential to the realisation of other human rights.</p>	<p>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.</p>	<p>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.</p>
<p>Respect for the dignity of individuals is to be at the heart of the Scottish social security system.</p>	<p>No change.</p>	
<p>The Scottish Ministers have a role in ensuring individuals are given what they are eligible to be given under the Scottish social security system.</p>	<p>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.</p>	<p>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.</p> <p>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.</p>
<p>The Scottish social security system is to be designed with the people of Scotland on the</p>	<p>No change.</p>	

basis of evidence.		
<p>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.</p>	<p>The Scottish social security system will be rights based and designed, implemented and monitored for continuous improvement with the people of Scotland.</p>	<p>Participation and accountability are essential to the realisation of the right to social security.</p> <p>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.</p> <p>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.</p>
<p>The Scottish social security is to be efficient and deliver value for money.</p>	<p>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.</p>	<p>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</p>

		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.
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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’.<sup>5</sup>

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.<sup>6</sup> 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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<sup>5</sup> Social Security (Scotland) Bill, Policy Memorandum, at para. 57.

<sup>6</sup> General Comment 19 of the UN Committee on Economic, Social and Cultural Rights, 2007. Para. 77.



**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.'<sup>7</sup>
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'.<sup>8</sup>

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<sup>7</sup> Policy Memorandum, at para. 79.

<sup>8</sup> General Comment 19 of the UN Committee on Economic, Social and Cultural and 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.<sup>9</sup> 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 4<sup>th</sup> 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.<sup>10</sup> 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.<sup>11</sup>
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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<sup>9</sup> General Comment 19 of the UN Committee on Economic, Social and Cultural Rights, 2007. Para. 26.

<sup>10</sup> *Salesi v Italy*, 26 February 1993

<sup>11</sup> See R. Reed and J. Murdoch, 'Human Rights Law in Scotland', 3<sup>rd</sup> Ed, at pg. 519.

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;<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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**

**August 2017**

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<sup>12</sup> Policy Memorandum, at para. 258.

<sup>13</sup> <https://www.gov.uk/government/statistics/fraud-and-error-in-the-benefit-system-financial-year-201617-preliminary-estimates>

<sup>14</sup> Policy Memorandum, at paras. 283 – 285.