

SOCIAL SECURITY COMMITTEE**SOCIAL SECURITY (SCOTLAND) BILL****SUBMISSION FROM: Rights Advice Scotland**

Control of a number of existing social security benefits is being passed from the UK Government to the Scottish Government. The Parliament would like your views on the Scottish Government's plans before they become law. The Social Security Bill is the proposed law.

1. 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.

Q. Do you have any views on this approach?

The advantage of having the benefit rules contained within regulations will allow for future changes to be introduced quickly and will avoid the need for a new act of the Scottish Parliament to make such changes.

The disadvantage is that this will mean that the opportunity for scrutiny and amendment will not be there. The intention contained within the Act is for the regulations governing the different benefit entitlements to be introduced by the Affirmative Procedure, which will require that Parliament has a vote on the regulations, unfortunately this will only be to adopt or reject and no scope for amendment. It would be preferable at least for first version of the regulations to have wider scrutiny. It is welcomed that the SG will seek external help in drafting the initial regulations. There should be an opportunity for consultation on draft regulations so that any unintended consequences or deficiencies may be detected prior to the Parliament vote.

The Parliament is not limited to using the Negative or Affirmative procedure and can stipulate additional requirements in the primary legislation.

“These are the standard types of SSIs. However, since the level of scrutiny is determined by the Parliament when the power is created, the Parliament can choose to impose a different type of procedure or other pre-conditions such as consultation or the preparation of supporting reports. “

(Page 6 paragraph 6 http://www.parliament.scot/S5_Delegated_Powers/Guide_to_SSIs.pdf)

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2. 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.

Q. What are your views on these principles and this approach? Please explain the reason for your answer.

We welcome these principles and the commitment to have these included within the legislation.

Q. Are there other principles you would like to see included?

It would be good to have a commitment to increasing the value of benefits annually in line with real costs faced by those claiming the benefits.

3. 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.

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

Yes. A public charter will be in a self-contained document and will be visible to many more people than would choose to read the regulations. It presents a clear statement of intent that both claimant and staff within the system can see. The Charter (or summary of) should be prominently displayed in all offices for social security staff and also in public areas for members of the public.

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

What people can expect from the service

A commitment to the principals contained within the Bill

How the service will be delivered

How to make contact if something is not right or has gone wrong

4. 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.

Q. Do you have any comments on these rules?

Determinations (Chapter 3)

We do not need a new set of labels for the decision making process, there is nothing wrong with the word 'decision', and this is widely understood by those claiming benefits. It would also avoid introducing confusion as we will still be referring to decisions in other areas of benefit entitlement. If we require something more formal for the written document then refer to it as a 'Decision Notice'

Re-determinations (S23)

There is no need for the redetermination process, this appears to be no more than a renamed version of the UK Government Mandatory Reconsideration (MR) which has been frequently criticised as a barrier to establishing appeal rights. For many the MR

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process is mistaken for an appeal and claimants having had two negative decision do not have confidence that a further appeal will deliver a different outcome. It also introduces into the process an unnecessary delay.

Prior to introduction of MR it had long been the case within DWP benefits that where someone lodged an appeal there was a provision that enabled the decision maker to make correction or more favourable decision which may avoid the need for appeal. In the absence of a more favourable decision that matter will proceed to an appeal.

This was a simpler and quicker process and one which should be applied to the devolved benefits.

In the recent Upper Tribunal Decision CE/766/2016 the barrier to appeal imposed by a refusal to carry out a late MR is considered to be unlawful.

The Scottish Government should distance itself from the much criticised MR process. If the re-determination process it to be part of the bill then there needs to be a provision for allowing a late request and for this not to fall foul of the deficiencies of the MR process with regard to accessing an appeal.

Overpayments (Chapter 4)

The proposed rules for recovery of overpayments does not take into consideration that some overpayments are made by official error and are not attributable to the claimant having misrepresented or failed to disclose material facts. Our position is that any such overpayment should not be recoverable. The test for whether or not a payment is recoverable should be the same as it is with the DWP benefits that are being devolved i.e. did the claimant either fail to disclose a material fact or did they misrepresent the facts. There has been considerable case law in this area and as such the principles are well-established.

Scottish Government might consider that by having a tribunal examine whether or not there has been a misrepresentation or failure to disclose in relation to an overpayment could inform any decisions to proceed to prosecute an offence. This may prevent some cases having to be heard in court to establish the same facts.

The intention to take a claimant's financial circumstances into consideration is a welcome new provision.

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Offences (Chapter 5)

Is the current law of Fraud not sufficiently adequate to prosecute those who make false claims for benefit? If so it is unnecessary to introduce further laws for the Scottish benefits. This will send out a message that existing laws are inadequate or that the Scottish Government wants to draw special attention to illegal benefit claims. This may undermine the principles set out in section one as it may perpetuate the myth that many benefit claimants are receiving benefits that they are not entitled to. The declaration that all claimants will sign at the end of the form can continue to state that making a false declaration is a crime and may lead to criminal prosecution.

The level of fines and imprisonment stated in the Bill mirror the penalties that are currently available to the courts in fraud cases.

Obligation to Provide Information (S30)

Where a person does not provide information requested then a decision should be made on the available evidence rather than simply a decision that they fail to meet the eligibility rules. While this may amount to the same effective decision in many cases there may be some where there is in fact sufficient evidence to make an award.

Placing a requirement to provide information including a report that may not exist at the time of the request is made may place an obligation that is impossible to complete. Patients do not always get copies of specialist reports sometimes these are only provided to the GP. Furthermore if the failure to produce the report in such circumstances proceeded to an automatic decision on no entitlement then this would be an unintended consequence.

5. 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

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- sure start maternity grants

Q. What are your thoughts on the schedules in the bill in regard to these benefits?

The schedules follow a repetitive format, a basic form of entitlement then scope to expand the conditions of entitlement followed by further criteria and give very broad powers to the ministers to create the regulations. As the detail will be contained within the regulations it is not possible to speculate what they may contain. As stated earlier it is important that there is scope to comment on the regulations so that they can be amended if required.

Sections 11 to 18 all make reference to payments which may or may not be in cash. While we do not have an objection to having the power to enable imaginative future arrangements we are keen to see claimants have the choice of how they use their entitlement.

There is reference to possible payment for industrial injuries and disability benefits as lump sum payments in some circumstances. Receipt of both of these as weekly benefits serve as an exemption to the UK benefit cap. It is important to ensure that any lump sum payments bring about the same protection for the same period as a weekly benefit.

It is also important that payment by lump sum does not interfere with entitlement to carer's allowance.

6. 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.

Q. What are your views on this proposal?

This is a welcome proposal which should protect individuals where benefit has been withdrawn and they disagree with that decision and want to pursue this through redetermination and appeal process.

7. 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.

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Q. Do you agree with these proposals?

With regard to the power to top up reserved benefits the bill only enables the creation of regulations. The details will be contained within the regulations and it is not possible to speculate what they may contain.

It seems odd that no such similar enabling provision is include with regard to creating new benefits even if there is no intention to create any new benefits at this time.

8. 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).

Q. What are your thoughts on this proposal?

This is a reasonable proposal. It is however important that all carers are treated equally and do not miss out through technicality.

For example: Two pensioners both claim carers allowance for looking after another person.

Pensioner A gets their State Pension which is paid at a rate higher than Cares allowance. As you can only receive the one that is paid at the higher rate they will not be paid Cares Allowance they will only receive the Retirement Pension but are advised of an underlying entitlement to Cares Allowance.

Pensioner B Has not paid having paid sufficient National Insurance Contributions and only has an entitlement to a small Retirement Pension below the level of Carers Allowance. They will be paid the Carers Allowance as it is the higher amount.

Assuming no other income in both cases they will qualify for a top up of Pension Credit which will include a Carer's Premium, both pensioner will have exactly the same amount of money and both will be regarded as carers by DWP. However only the one who actually receives the Cares Allowance will satisfy the rules for the proposed carers supplement.

The rules as they stand do not recognise underlying entitlement to Carer's Allowance.

9. 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.

Q. Do you agree that discretionary housing payments should continue largely as they are?

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DHPs should continue and it should be mandatory for all Scottish councils to distribute them. There should be a common framework preferably in legislation to ensure consistency across Scotland.

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

Whilst we recognise the importance of discretionary housing payments, particularly in relation to the Bedroom Tax, we do not support the general principle of discretionary payments as this creates winners / losers and a post code lottery.

We support a scheme that lays out the criteria for awards in regulations which can be applied nationally. Such regulations should also contain an appeals process.

In the absence of a regulated fund what we have two distinct discretionary schemes; the Scottish Welfare Fund and DHPs. Both are administered by local authorities and there is merit in bringing these into one single process. This would avoid claimants having to work out which is the correct support for them to apply for. Linkage to SWF could then bring the SPSO appeal process into play for DHP as there currently is no DHP appeal process.

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

1 An interim provision has been included to assist carers in recognition that the replacement benefits will be a few years away. There should also be an interim provision for people in Scotland who are currently receiving DLA so as to prevent them being re assessed under the PIP rules and the risk of losing benefit. This should also be applied to avoid those turning age16 having to end their DLA and claim PIP. A possible solution would be to adopt the current DLA regulations as they stand from UK government as "Interim DLA Scotland Provisions" with no further person being required to undergo the PIP reassessment. This would prevent people from potentially losing some entitlement under an unnecessary transition to PIP only to have some benefit restored under what will hopefully be more favourable Scottish disability benefit rules.

Also the fact that the money for this is going to be linked to the level of benefits in England and Wales, this introduces financial risk and as a consequence will limit the opportunity to be imaginative etc.

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