

Social Security (Scotland) Bill: what do you think?

Response to call for evidence from Social Security Committee

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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?

Greater clarity is required about what is meant by developing the Regulations with “external help,” and whether this will embrace the principle set out in Question 2, below, on designing the system with the people of Scotland so that the “external help” might include the experience panels, for example. It is arguable that the sheer volume of social security legislation leaves little choice but to set out the detailed rules that apply to particular benefits in Regulations, but the inability of the legislature to amend these means there is a scrutiny deficit. At UK level this scrutiny gap is filled in part by the Social Security Advisory Committee. Since the Scotland Act 2016 prevents the SSAC from advising the Scottish Government on devolved benefits, until such times as an equivalent expert advisory committee for Scotland can be established there is a very real danger that Regulations would enter law without sufficient consideration of (for example) their compliance with the principles set out in the Bill. This is a worrying prospect given that (to focus on the largest area of social security expenditure to come under devolved control) article 14 and schedule 4 of the Bill give Ministers scope to create essentially any form of disability benefit they wish. Significantly more detail on the workings of Personal Independence Payment is provided in the Welfare Reform Act 2012.

We would therefore recommend consideration be given to the creation of an expert advisory committee that would provide scrutiny of Regulations before they are laid in Parliament, to provide constitutional comfort to the Scottish Parliament that potential problems with policy delivery are considered and dealt with before implementation. A working relationship with the UK Social Security Advisory Committee would seem beneficial to enable mutual understanding of the relationship between Scottish and UK-wide social security provision, and good inter-governmental co-operation will also be necessary to avoid unintended adverse geographical consequences arising from Scottish or UK Regulations.

If the objective of this approach is to increase clarity and reduce confusion, it should be borne in mind that when an initial set of Regulations is repeatedly amended by subsequent sets it can be difficult to obtain an up-to-date version. Consideration should therefore be given to replacing in full (rather than amending) Regulations when changes are made.

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.

The principles are generally admirable, although a number of questions arise:

- Interpretation – we engage with this issue in our report on social security systems based on dignity and respect for the EHRC, which notes that the concept of dignity, although widely used in human rights law, is rather vaguely defined. What course of action best serves the needs of claimants or delivers value for money is also a subjective judgement.
- Enforceability – if social security is a human right and the key to other rights (including the implied right to dignity) then the ability to judicially enforce relevant rights, beyond those protected by the European Convention, must be considered. Consideration could also be given to a judicially enforceable duty to have due regard to the needs or best interests of claimants, similar to that in the Equality Act 2010 and Rights of Children and Young People (Wales) Measure 2011.
- Resolving tensions between the principles – for instance, putting claimants’ needs first may at times be seen to conflict with efficiency and value for money.
- Designing a social security system with the people of Scotland – again, this issue is addressed in our report for EHRC. If this principle is to be meaningful, it is vital that participants in this process are supported to reach informed decisions on what a system based on the principles might look like, are given space to express these views, are listened to and that their input is shown to be taken into account in policymaking.

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

Rather than the slightly ambiguous statement that social security is a human right and the key to other rights, consideration should be given to establishing a medium-term objective of compliance with specific human rights standards, such as the European Social Charter.

An additional principle should set out a commitment to using devolved social security powers in pursuit of the objectives of the Child Poverty (Scotland) Bill.

We would also recommend considering the inclusion of a principle relating to the right to independent advice for claimants. This could be best protected as a statutory clause in the Social Security Bill, but an alternative might be for a Scottish Government commitment to provide additional resources for the advice sector to manage the new benefit changes.

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.

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

We support the introduction of a Charter and the stated objective of clarifying how the seven principles will be put into practice. This has potential to address the issue identified above of

interpreting the principles. Service users' charters have in the past been criticised due to lack of clarity as to whether their contents represent legal entitlements or mere aspirations, so clarification of the legal standing of any Charter would be welcome.

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

In keeping with principle 5, the contents of the Charter should be finalised in consultation with claimants, frontline staff and the wider public. The NHS Constitution for England is a good model, combining service users' legally binding rights and responsibilities with a set of non-justiciable service commitments, staff rights and responsibilities and more general guidance to staff on good practice in their interaction with service users, in a reader-friendly language and format. The indication in article 2 of the Bill that the Charter will also be directed at Ministers is particularly welcome and should cover conduct as well as policymaking: political elites have a responsibility not to stir up ill-feeling towards marginalised members of society.

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?

The Bill is not terribly informative on this front, which speaks to the concerns raised above about the extent of reliance on Regulations. To say that "An application for assistance must be made to the Scottish Ministers in such form, and accompanied by such evidence, as the Scottish Ministers require" (article 20), and that Ministers will then go on to make a decision on the individual's entitlement "when required to do so" (article 19), is a statement of the obvious that tells the reader nothing about how the system will actually work. Similar criticisms could be made regarding re-determination.

Articles 22 and 25 are more welcome. The right to request re-determination or appeal a decision will be more meaningful if the applicant knows of the reasons why the original application was unsuccessful, and it is important that unsuccessful applicants are informed that they have this right. Automatic signposting to advice services for support would be a welcome addition. It is also useful to have the right of appeal to a tribunal set out in the primary legislation.

Article 34 appears to be a sensible measure where disability benefits are concerned, so that claimants are not unexpectedly called for reassessment.

The vagueness problem raises its head again in relation to article 37. While it is essential that regard be had to the financial circumstances of any person from whom a debt is to be recovered, more clarity to how this duty will be discharged would be useful (whether found in the Bill or subsequent Regulations). For example, consideration might be given to setting a maximum percentage of income or of a benefit payment that can be recovered, or a minimum income below which no further recovery can be made (set with reference to household composition).

It is reasonable to criminalise the giving of false or misleading information with the intention of receiving a benefit to which the individual would not otherwise be entitled, as in article 39. It would be preferable to clarify that the false or misleading information should be *deliberately* or *recklessly*

given. While there may be a case for considering a distinction in sentencing arrangements between 'need' and 'greed' driven offences, it is also possible to argue that this can be taken on board in decisions on prosecution and sentencing. Offences of failure to notify changes of circumstances are more problematic and it may be difficult to determine when a claimant "ought to know" (article 40, 41) there is duty to notify in the context of a complex system. If such an offence is to be created it must be reflected with plain-English communication of when the duty applies and how it may be discharged, with sufficiently frequent reminders for prolonged claims.

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**
- **sure start maternity grants**

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

The schedules are not terribly informative – essentially they could be replaced by a statement that "the details will be worked out later." It might be better to wait until administrative responsibility for the benefits is devolved, run them initially on the same basis as DWP and gradually transition to a new, Scottish model. This would allow time to design the new Scottish benefits with the people of Scotland, in accordance with principle 5.

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?

The proposal is welcome and will reduce the risk of individuals suffering financial hardship as a result of an incorrect decision on the part of the social security agency. Consideration could also be given to continuing to pay the benefit as normal until the challenge to the decision has concluded. Article 18 is not clear whether short-term assistance will be recoverable – this should be stated.

Jobseeker's allowance sanctions are an area of social security decision making with a relatively high success rate on appeal. Although the Scotland Act 1998 (schedule 5, head F, exception 5), as reflected in article 46(2) of the Bill, currently prevents this kind of assistance being used to negate the effect of a sanction imposed by DWP, the possibility should be explored of paying short-term assistance to claimants appealing against a DWP sanction. If the appeal is successful the payment could be recovered from DWP, and if the appeal is unsuccessful the payment could be recovered from the claimant so that the rules under exception 5 would not be breached.

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.

Q. Do you agree with these proposals?

The power to create new benefits should be included in the Bill so that it can become part of the conversation with people in Scotland about how the devolved social security powers should be used. We have no specific proposals for its use at this time, but it would appear unwise for the primary legislation to set up obstacles to the future use of one of the new devolved powers. In *A new future*, the Scottish Government indicated that it was considering introducing a new young carers' benefit. As our report for EHRC indicates, we have some concerns about this proposal, but if the decision were ultimately taken to proceed with it, this would be easier if the enabling provisions had already been legislated for.

The top-up power is perhaps the most welcome of all the devolved social security competences due to its potential for poverty alleviation. The first priority for the Scottish Government on enactment of the Bill should be to investigate the possibility of using top-up payments to negate the impact of the two-child limit on child tax credits and universal credit. This would protect families in Scotland from the projected increase and deepening of child poverty, in keeping with the targets in the Child Poverty (Scotland) Bill and the best interests of children. We acknowledged that this would require some negotiation with DWP to ensure that top-up payments were not immediately recovered due to the household benefit cap. As 2030 approaches, further top-ups to child-related benefits may be required in order to achieve the targets in the Child Poverty (Scotland) Bill.

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?

We support this proposal, but the longer term aspiration should be to increase the rate of carer's allowance to the level of employment and support allowance (support group). This would better reflect the reality of CA as a long term benefit: whereas 60% of JSA claims last around six months, in all age groups except under-25s more than 50% of CA claims last at least two years and from age 40 upwards the most common duration of claim is over five years. Applying this increase as a top-up to universal credit rather than a direct increase to CA would enable it to be targeted at carers without significant other sources of income.

It is also appropriate at this stage to mention the proposal to introduce a dedicated young carers' benefit. While this would undoubtedly address the poverty many young carers experience, payment for caring would also risk entrenching their exclusion from ordinary childhood activities and educational underachievement, affecting longer term life chances. Young carers themselves must be closely involved in any decision on whether they should be supported through a cash benefit, increased investment in other services or a combination.

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?

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

In general we agree with the proposal, particularly the stipulation that DHPs should not be repayable. We recognise that article 50(2) reflects the reality of the devolution settlement, but feel that this should be a priority area for discussion in any future renegotiation of the division of social security powers. A sanction will not serve DWP's stated purpose of encouraging jobseeking and

engagement with the support available if it puts the claimant at risk of homelessness; at the very least, a DHP should be available to prevent such an outcome.

In keeping with the commitment to respect the dignity of claimants, we would also suggest that consideration is given to what sort of information local authorities may request in support of DHP applications. Some common questions, such as whether the applicant has any possessions he/she could sell or friends who might lend him/her money, are rather intrusive and push the applicant towards potentially undignified survival strategies.

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

We welcome the devolution of social security competences and the Scottish Government's ambition to use these in pursuit of its 'fairer Scotland' agenda. The commitment in respect of voluntary participation in devolved welfare-to-work programmes will further contribute to the realisation of the principles set out in the Bill. Looking ahead, we would encourage Ministers to continue to negotiate with the UK Government for the devolution of further competences, particularly those necessary to put in place a less punitive welfare-to-work model.

About the authors:

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This response draws on previous published work by all three authors, in particular a recently-completed co-authored report on dignity and respect in social security. This was commissioned by the Equality and Human Rights Commission in response to the publication of the principles for Scottish social security in the consultation document *A new future for social security in Scotland*. See M Simpson, G McKeever and AM Gray, *Social security systems based on dignity and respect* (Glasgow: EHRC, 2017). The report is attached with this submission.

We are available to give oral evidence if desired.