

Social Security Committee Call for Views: Social Security (Scotland) Bill



23rd August 2017

About ENABLE Scotland

People who have a learning disability in Scotland are more likely than average to be reliant on social security due to a combination of high rates of unemployment, part time working and low pay. Many carers of a person with a learning disability are also reliant on social security whilst others are currently unable to access benefits which recognise their caring role.

ENABLE Scotland is the largest charity in Scotland dedicated to creating an equal society for every person who has a learning disability. We provide a wide range of support services for over 2000 people who have learning disabilities and their families in Scotland. Together with our 5000 members, ENABLE Scotland campaigns for an equal society for every person who has a learning disability.

ENABLE Scotland's welfare rights advice service has assisted people who have learning disabilities, their families and carers across Scotland to claim over £4,764,316.43 in social security entitlements since established in 2013. This service has been crucial to our members and families who find navigating the complexities of the social security system a real challenge; a consequence of which has been many missing out on what they are entitled to. Our service includes appeal representation at both Lower and Upper Tribunal Social Security Appeal Tribunals and so we are greatly aware of the importance that the legislative framework will have on individuals accessing devolved benefits.

ENABLE Scotland has responded to the Scottish Government consultation on a new future for social security and has previously commented on The Future Delivery of Social Security in Scotland via the then Welfare Reform Committee in written and oral evidence submissions to their call for views on the subject. ENABLE Scotland is pleased to have been invited to provide oral evidence on the subject in October and looks forward to engaging with the Committee further.

Opportunities presented by the Social Security Bill

It is our position that devolution of parts of the social security system provides an excellent opportunity to reframe the narrative around the social security system. **It has to be clear that the social security system is about empowering citizens, facilitating participation and recognising everyone's contribution and value to society.** Further, it provides an opportunity to examine and influence the culture and ethos embedded in the social security delivery system.

Furthermore, devolution should be seen as an opportunity:

- To implement a connected and responsive social security system that facilitates complete and streamlined access to all personal entitlements including 'passported' entitlements such as blue badges and concessionary travel scheme.
- To improve access to the social security system by embedding a properly funded advice sector, including specialist provision for disabled people, access to which is routinely offered the opportunity to access this by professional points of contact.
- To improve the claim and decision making processes for disability benefits to improve accuracy of decision making, reduce administrative and assessment costs and ensure that claimants are treated with respect at all stages of the process

Key Points about the Social Security Bill, in its current form:

- Getting the right balance between primary and secondary legislation.
- Strengthening the Scottish Social Security Charter - defining a route to recourse in the event that charter commitments are breached.
- Amending 'Types of Assistance to be Given' to ensure in-kind service alternative is positioned as a choice to be made by the person seeking assistance.
- The absence of provision for overpayments not to be recovered when they occur due to official error.
- The absence of provision for Uprating of social security entitlements

An equal society for every person who has a learning disability

Consultation Questions

- 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. Do you have any views on this approach?**

While the Scottish Government has set out the rationale for a short Bill; that it is intended to be a high level, enabling Bill, its shortness means a lot remains unclear about the new system and in some ways, makes it difficult to comment on key aspects. We recognise that a lot of the detail will be in secondary legislation, including regulations and guidance. However, there remains a number of key issues which need to be strengthened, and protected by being enshrining in the primary legislation and that it is clear in the primary legislation that they can be enforced and how.

We are also concerned that the lack of scrutiny of secondary legislation could lead to unintended consequences or things being missed including elements that could have financial implications for the Scottish Government but also for individuals and their families.

Whilst we understand the temptation to leave much of the detail of the devolved benefits to Regulations which we understand will be affirmative, it is our preference that the Bill sets out:

- the benefits/scheme that will be created
- the purpose(s) of the benefit/scheme and;
- the broad framework for how their operation

We are concerned that currently the Social Security (Scotland) Bill does not do this.

Whilst we accept that legislating in this area will be difficult given the complicated interaction between what will be devolved, what will be reserved and potential financial implications; we are clear there must be sufficient detail within the primary legislation to give individuals a reasonable idea of what they might be expect to be entitled to should the need for assistance arise.

Example: "John is 23 and has a learning disability. He has his meals delivered by a private company as his disability means he finds it hard to cook. John is struggling with the cost of these meals".

In this example it would be our preference that the primary legislation make it clear that there is the existence of a cash transfer, non means tested, non taxable disability benefit that exists to help with the additional costs that arise due to disability and that John might be able to access this. The Regulations could then provide further detail. We do not believe that the Bill, in its current form, does this.

We also do not agree that leaving the detail of the operation of benefits to Regulations will automatically simplify or make the process clearer. It is our experience that the reading of primary and secondary legislation in social security is primarily the work of the judiciary, advice agencies and decision makers (although in the main even decision makers rely on internal guidebooks and their interpretation of legislation than the legislation its self).

Claimants will typically rely on other sources of advice that have been created with reference to the legislation. With this in mind, the primary concern of the Bill should not be to simplify the system but to make it fit for the purpose which it has been created to deliver.

Finally, we are concerned that the bulk of operational legislation being left to Regulations may lead to a potential lack of scrutiny. With this in mind, we will be suggesting amendments and additions to the Social Security (Scotland) Bill but also suggesting that a Scottish version of the Social Security Advisory Committee is created to independently scrutinise legislation.

For practical reasons, scrutiny by this new independent body would not be necessarily for all Regulations made in relation to the Bill but could be selected by the body or a Parliamentary Committee.

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.

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

ENABLE Scotland views the devolution of parts of the social security system as an excellent opportunity to **reframe the narrative** around the social security system. It has to be clear that **the social security system is about empowering citizens, facilitating participation and recognising everyone's contribution and value to society**. Further, it provides an opportunity to examine and influence the culture and ethos embedded in the benefits delivery system.

ENABLE Scotland would comment that there should be more in the Bill about the purpose of social security. The Social Security (Scotland) Bill should at first instance set out that the social security system is about empowering citizens, facilitating participation and recognising everyone's contribution and value to society.

ENABLE Scotland welcomes the Scottish Government's conscious decision to use the terminology 'social security' in place of 'benefits'. Further, we welcome commitments to address the stigma attached to accessing social security entitlements.

Research by ENABLE Scotland¹ evidences the difficult journey parents of children who have learning disabilities go through, not only navigating the complexities of the social security system, but also being confronted by upsetting deficit-focused forms and processes.

Claiming DLA is difficult - the forms are horrendous and it is so upsetting having to justify every bit of support your child needs and having to write in minute detail all the things your child can't do. Then feeling you are viewed as a waster for claiming financial support for your child. (Parent of child with genetic condition and associated learning disability)

ENABLE Scotland would like to see the social security system reframed to look more positively at disability in terms of, 'what the person can do with support' and how benefits payments could support participation and remove barriers. Notwithstanding, we recognise that it is difficult to design a disability claim process that is not deficit focused. We are however clear in our opinion that these parents' experiences could have been greatly improved with proper support through the claim process to help them understand why they were being asked these questions. Parents and individuals should feel reassured that this is money that they are entitled to and that can be used to improve their or their child's life.

ENABLE Scotland broadly supports the principles as outlined in the Bill. ENABLE Scotland would urge that the language of these should be strengthened. Specifically, '*The Scottish Government has a role in making sure that people are given the social security assistance they are eligible for*' should be framed as a duty or responsibility, i.e.; '*The Scottish Government has a duty to make sure that people are given the social security assistance they are eligible for.*'

Beyond these points, ENABLE Scotland's primary concern is how the principles might be implemented in practice. Further detail on this point is provided

¹ ENABLE Scotland, *Exploring Concerns around a Child's Diagnosis of a Learning Disability (including ASD): Experiences of Parents, Young People and Professionals in Scotland*, 2015 (www.enable.org.uk/families)

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.

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

We support the commitment to write a charter for the Scottish Social Security System. However, 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. At the moment, as drafted, there is a risk that the Charter provides little more than a vehicle to report on performance to Parliament. 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.

We would ask that consideration be given to the inclusion in the act of a section similar to Rule 2 of The Tribunal Procedure which sets out the overriding objective for the operation of social security appeals. This rule sets out the basic principles which Tribunal judges should follow (especially when exercising discretion in judgements) and the failure to apply it can be used by individuals as a means to challenge a negative decision.

The inclusion of such a section in the Bill could potentially give tangible rights to individuals in relation to the principles.

4) 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?

ENABLE Scotland would emphasise that devolution of these entitlements creates a strong opportunity to create a **cultural shift** in the delivery of social security. It is necessary that this culture moves from one of mistrust where claims must be scrutinised to prevent misuse of public funds to one that recognises the fact that the vast majority of claimants are making genuine claims for social security that they are entitled to.

ENABLE Scotland wish to see those delivering social security properly trained and supported to ensure high accuracy of decision making and customer service. All staff, including decision making staff, should be equipped with the skills and competencies to be able to support the person to give an accurate representation of themselves and their life; and to recognise where someone needs extra support negotiating the social security system; making appropriate referrals to advocacy or social security advice services rather than issuing a negative decision at first instance.

ENABLE Scotland suggest that devolution of these benefits provides an opportunity to redesign the evidence gathering process to ensure that evidence is gathered in the best and most cost effective way. ENABLE Scotland feel that a specific medical assessment is rarely the best way to assess any claimant's disability and that it is in fact particularly unsuited to assessing those with a learning disability who can be particularly vulnerable to negative decisions in any process which involves communicating their difficulties. Benefit specific medical assessments tend to produce snap shots of a claimant's life rather than a long term picture and people with a learning disability may underplay their difficulties or not understand the questions asked.

It is our opinion that the best evidence will usually come from the people who know the claimant best such as GP's, consultants, support workers or family members and that these are often the sources of evidence where opinions should be sought.

We would also recommend that the evidence gathering process be amended in order to produce information which makes it easier for decision makers to make accurate decisions. The current medical evidence templates sent to medical professionals are inadequate and often do not prompt those completing them to ask themselves the right questions about their patients or the people they support when completing them.

We strongly recommend that these templates be redesigned and that consideration be given to other methods of evidence gathering such as phone calls that would allow those supplying evidence to respond in a more open way with a dialogue between them and decision makers rather than being restricted to yes no answers or limited capacity to respond.

ENABLE Scotland wish to raise the following specific points on these parts of the Bill:

- **The existence of a mandatory reconsideration process:**

ENABLE Scotland strongly oppose mandatory reconsiderations being replicated in the devolved social security system as they are a barrier to claimants accessing their right to appeal.

It is ENABLE Scotland's experience that claimants can become confused and feel that they have had their appeal when a reconsideration is refused, find the process overwhelming and so withdraw from the process..

It is our preference that upon a negative decision that a claimant can lodge an appeal directly with the Tribunal Service, the new Scottish delivery agency can then conduct an internal review and if the decision remains unchanged then the Tribunal Service will proceed on the basis that the claimant wishes to proceed with an appeal.

At the point the internal reconsideration is refused then claimants should be issued with a standard letter advising them that it will be assumed that they wish to proceed with an appeal unless the Tribunal Service is notified otherwise. This will give claimants who only wish to have an internal review the opportunity to withdraw from the process at this point should they wish.

- **Section 26:**

This section allows claimants to establish appeal rights where a decision has not been reached on their reconsideration request within a still to be specified timescale.

Whilst we support the idea of time limits being placed on decision makers to reconsider decisions, we feel that such a system risks confusion/anger with claimants who will have been waiting on a reconsideration that they might never receive should they proceed to appeal. They will then have to go through another administrative process to reach the appeal stage.

Whilst it is our preference that mandatory reconsiderations do not exist at all, we would suggest that section 26 should place a duty instead on decision makers to pass appeals directly to the First-tier Tribunal where time limits have not been met.

- **Section 28 (3):**

This section allows for the First-tier Tribunal to accept a late appeal "only if it is satisfied that there is a good reason for the appeal not having been made sooner".

We feel that this section should be amended to allow appeals to be accepted where the First-tier Tribunal accepts that it is reasonable to do so. Our concern is that the terminology used in this section unnecessarily limits the scope of the First-tier Tribunal to accept appeals that are late and that this section in its current format could potentially give rise to appeals/legal challenge over the definition of "good reason".

Amending this section to read that an appeal can be accepted late where reasonable to do so, allows the First-tier Tribunal to use its existing overriding objective to decide if an appeal should be admitted late.

- **Section 28 (4):**

This section allows for decisions to be sent to claimants in writing or by email. Given that such decisions will bring time limited appeal rights we strongly suggest that decisions are always sent in writing even if they are also sent electronically.

It is our reading that '*the individual is taken to have received the information 48hours after it is sent*' is the window after which the person is considered informed, therefore the 31day time limit for appeal starts 48 hours from when the determination is issued.

We would urge the committee to clarify that this as it was not immediately clear from current drafting.

- **Decision/review/supersession:**

We are concerned that there is a lack of clarity within the Bill on the different types of decision that can be made in relation to a request for assistance and the significant impacts that these can have on entitlement.

The issue of a decision being on an original claim, a review, supersession and the material date of its affect has given rise to much case law in the reserved system and it is our desire to avoid this confusion in the devolved system.

- **Section 30 (2):**

This section allows for a decision that a claimant does not satisfy the eligibility rules to be made where they fail to provide information that has been requested. Whilst we accept that it may be reasonable for decision makers to request information from claimants in order to process a claim, we would suggest that such a decision risks any subsequent challenge becoming a two stage process should a claimant proceed to appeal.

We would suggest that in circumstances where a claimant fails to provide information a decision is made on the evidence that is available. Whilst this decision may still be negative, it means that any subsequent review/appeal could deal with the decision as a whole rather than a staged process where it first must be decided if section 30 (2) should have applied.

It our experience that claimants disengage with requests for information, not because they do not wish to provide the information, but because they are struggling to understand or cope with what is being asked of them. We hope Scottish Government, in line with their stated principles, will address in Regulation and Guidance, a more supportive approach to evidence gathering, as outlined in our opening remarks.

- **Overpayments:**

ENABLE Scotland is concerned that the Bill does not include provision for overpayments not to be recovered when they occur due to official error. We call for such a provision to be included within the Bill and that definitions be made as clear as possible to guard against the number of appeals over these issues we have seen in the reserved system.

- **Fraud:**

Whilst ENABLE Scotland understands that powers will have to exist to allow authorities to deal with cases involving fraud, we would query the decision to position legislative basis for dealing with fraud within the Social Security (Scotland) Bill.

Given that levels of fraud for the entitlements being devolved are of minimal levels, it does not appear to make sense to give the issue of fraud such prominence within the Bill. This is especially important given the principles outline how a claimant should expect to be treated.

We suggest that separate legislation is used to deal with those claimants who are suspected of claiming fraudulently.

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?

- **Disability Assistance:**

ENABLE Scotland feel that the Social Security (Scotland) Bill should be clear from the outset that a cash transfer, non means tested, non taxable benefit(s) will be created that is/are intended to cover the additional costs that arise due to disability.

This will set in primary legislation the crucial foundations underpinning current DLA, PIP and Attendance Allowance and provide a clear policy intention for success/failure to be measured against.

ENABLE Scotland is concerned about current drafting at s.14(1) of the Bill as it relates to disability assistance (*which may or may not take the form of money*). This provision needs to be qualified so that

the recipient has the choice of 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.

What is crucial is that any “disability assistance” created under the Social Security (Scotland) Bill avoids the pitfalls of incoherent criteria and poor assessment/decision making.

Furthermore in relation to ‘disability assistance’, ENABLE Scotland would suggest that an equivalent of Regulation 29(2)(b) of the Employment and Support Allowance Regulations should be considered.

Regulation 29(2)(b) is an exceptional circumstance regulation which allows decisions makers/tribunals to make an award of the benefit even where the person does not meet the usual criteria. In the case of ESA (a benefit which measures fitness to work) it can be applied where there is evidence to suggest the person would be at risk where they not to be awarded the benefit.

A similar regulation could be created within any ‘disability assistance’ where negative determination against prescribed criteria would mean the person applying for assistance would struggle to cope with the additional costs of their disability without support.

- **Carers assistance:**

Carers Allowance is an earnings replacement benefit for those unable to work, or who work reduced hours, due to their caring responsibility. It can also bring about an underlying entitlement that can increase other benefits for those who have caring responsibilities but receive an overlapping benefit.

ENABLE Scotland feel that on Carers Assistance, the Bill and subsequent regulations needs to be drafted to make it clear that a Carers Assistance will exist that is an earnings replacement benefit. The Bill should also make clear that those in receipt of an overlapping benefit, such as State Pension, will be “treated as entitled” to Carers Assistance for the purposes of passported entitlements, such as carers premium; as is the current position with Carers Allowance.

The provision to provide “carers assistance” in a form other than cash should also be removed from the Bill. Whilst ENABLE Scotland would welcome any *additional* support for carers it must be clear that Carers Allowance, or what replaces it, is a cash transfer benefit.

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?

ENABLE Scotland 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.

ENABLE Scotland recommends that the Committee look to the example of Northern Ireland and the system of supplementary payments that have been created to militate against welfare reform related losses.

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?

ENABLE Scotland accepts that the detail of topping up reserved benefits is left to Regulation, with the understanding that this will provide flexibility to respond to any subsequent changes that are made to reserved benefits by the UK Government.

We note that there is nothing within the Bill to allow the creation of new benefits and assume this is to ensure that any new benefits that would be created would require primary legislation and so would be open to a greater deal of consultation and scrutiny.

On that basis we would welcome this approach as any new benefits that would be created would require a significant amount of work to ensure that they have a clear policy purpose they are intended to meet.

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?

ENABLE Scotland welcomes any increase in entitlement for those in receipt of Carers Allowance.

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

- **Appointees:** At present there is nothing specific within the Bill to allow for Appointees to make and manage claims on behalf of another individual. This should be amended.
- **Uprating:** At present there is nothing to confirm that benefits will be uprated. Although we can understand why the specifics may be left to Regulations, we would urge that the Bill requires details to confirm that this will happen.
- **Review of legislation:** Given the changing landscape of reserved benefits and the fact that the devolution of benefits will be a significant undertaking, we recommend that a clause is inserted into the Bill that the primary legislation is reviewed by Parliament after a fixed period.
- **No detriment policy:** The devolution of some benefits whilst others remain reserved has significant potential for claimants to lose financial support due to unintended consequences. We call for this principle to be included within the Bill to ensure it is a significant part of the framework of design for any subsequent Regulations.
- **Embed specialist advice provision:** ENABLE Scotland's research with families revealed more than 55% parents found it difficult to access benefits for their disabled child. Only 30% of parents had received any advice or assistance with accessing benefit entitlements for their child.²

ENABLE Scotland is clear that specialist advice is fundamental to support people who have learning disabilities and their families to navigate the complexities of the intertwined devolved and reserved parts of the Social Security System; and access their full entitlements.

People who have learning disabilities and their families should have access to specialist welfare advice and be routinely offered the opportunity to access this by professional points of contact; for example named person professionals.

To deliver on this, consideration should be given to the inclusion of a right to advice, and to advocacy, within the Social Security (Scotland) Bill.

- **Automaticity:** ENABLE Scotland see an opportunity to ensure that the principle of automatic entitlement, introduced at s.35, is applied to passported entitlements to create streamline access to all entitlements. Many people currently receive passported entitlement via their social security entitlements. These include; the concessionary bus travel and blue badge schemes, the Scottish Welfare Fund and free dental treatment. We want to see this continued and enhanced in the new social security system, with the removal of separate processes to access these entitlements. Our members are clear that a streamlining of functions would support better delivery of social security to people across Scotland and allow for greater automaticity of passported entitlements connected to benefits i.e. entitlement to the National Concessionary Travel Scheme.

ENABLE Scotland looks forward to continuing our work with the Committee to see the Social Security (Scotland) Bill produce the best possible outcomes for disabled people and carers.

For more detail on any element of this submission, please contact:

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² ENABLE Scotland, *Exploring Concerns around a Child's Diagnosis of a Learning Disability (including ASD): Experiences of Parents, Young People and Professionals in Scotland*, 2015 (www.enable.org.uk/families)