

THE SCOTTISH PARLIAMENT

SOCIAL SECURITY BILL

Call for Evidence

RESPONSE OF PROFESSOR TOM MULLEN

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?

There are competing considerations here. It would certainly be beneficial for the statutory rules on social security benefit entitlement to be clear and not be confusing and the need to look both at Acts of Parliament and regulations to determine entitlement in relation to reserved benefits certainly does make it more difficult to understand the legislation.

However, there is also the important general constitutional understanding that matters of principle should be included in Bills and delegated legislation should be used only for matters of detail or where there is some other justification for using it such as the need for speedy action, that the matter is one of considerable technicality requiring the application of specialist expertise, or for flexibility to cope with unforeseen circumstances. Parliamentary practice does not always follow this understanding but it remains the constitutionally desirable position otherwise Parliament would not effectively be scrutinising legislation, one of its most important tasks. The rules about benefits are the rules which will determine citizens' entitlements to those benefits, so they are clearly matters of principle which should be subject to Parliamentary scrutiny.

The arrangements for scrutinising delegated legislation set out in the Bill will not provide for an adequate degree of scrutiny either of policy or the technical adequacy of social security legislation and, however valuable clarity in the terms of legislation may be, it cannot outweigh the principle that the Parliament must effectively scrutinise legislation.

Whilst, the choice of affirmative resolution procedure rather than negative resolution procedure (see section 55 of the Bill) for a number of the regulation-making powers in the Bill is to be welcomed, this allows only for limited scrutiny – far less than is possible for Bills. There will be less parliamentary time available and no opportunity to amend regulations. As the question above states, 'Parliament cannot change Regulations, only approve or reject them.' Therefore, it is hard to agree with the Scottish Government's view, expressed at para. 12 of the Policy Memorandum that, "taking this approach should improve

Parliament's ability to scrutinise executive action." It will in fact result in less exacting scrutiny than typically occurs with Bills.

It is clear that the Scottish Government does not wish to put detailed provisions regarding entitlement in the Bill. However, there are ways of giving the Parliament more opportunity for effective scrutiny. The Bill could create procedures for enhanced scrutiny of regulations that will be made under the powers it confers. A possible model is the super-affirmative procedure used by the UK Parliament for certain orders under the Legislative and Regulatory Reform Act 2006. The Bill should be amended so that the principal set of regulations determining entitlement for each main benefit should be made subject to a similar procedure.

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.

I am concerned that the Bill does not make it clear what the legal status or effect of the principles is. There are a number of possibilities including:

- (i) The principles are rhetorical statements which have no effect on the rights and obligations of any persons and are not enforceable in any court or tribunal. Therefore, they impose only political and not legal obligations on the Scottish Government (other than the annual reporting requirement imposed by section 6).
- (ii) The principles are enforceable by individuals who may claim in relevant court or tribunal proceedings that they have not been complied with, e.g. that the person's human right to social security has been denied or that their dignity has not been respected.
- (iii) The principles do not confer rights or impose obligations on persons as such but may (or must) be taken into account by courts and tribunals interpreting the other provisions of social security legislation in cases brought before them.
- (iv) The principles impose duties on the Scottish Ministers but they enjoy a very wide discretion in deciding what is required to implement them and a court would question the exercise of that discretion only in exceptional circumstances.

It is difficult to work out the intention behind section 1 of the Bill by reading its terms. It does not directly address the question of legal effects nor does it clearly imply a particular intention as to legal status or effect. Whilst the language used is different from that normally

used to create enforceable legal rights and obligations, it would not be safe to conclude that a court would find the principles to be wholly devoid of legal effects.

Matters are not made clearer by reading the Policy Memorandum. Para. 44 states that “[t]he policy objective for the Bill, therefore, is to move the principles from their current position, as a commitment and an aim, to one where they can rightly be said to ‘govern’ decisions.” To say that the principles govern decisions suggests that decisions must be made in accordance with the principles. If so, the principles are legally enforceable. On the other hand, the word ‘govern’ has been put in scare quotes which suggests that it does not mean what it would normally mean. This leaves the Scottish Government’s intention as to the legal status and effect of the principles unclear.

If the legal status of the principles is not clarified, citizens and their advisers may be unsure what their rights and the Scottish Government’s obligations under social security legislation are and there may be wasteful litigation to determine their meaning and effect. Also, if the principles are not intended to be legally enforceable, but this is not made clear, the legislation may raise expectations which are not subsequently satisfied, leading to public disillusionment and cynicism.

These dangers are particularly acute in relation to the second principle, ‘Social security is a human right. It is essential to accessing other human rights.’ The UK is bound by a number of treaties which impose obligations relating to social security including the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of Persons with Disabilities, the European Social Charter and the European Convention on Human Rights. The inclusion of this principle in the Bill might be interpreted as giving some kind of effect in Scots law to these treaties and may lead persons seeking to rely on them in legal proceedings.

Again, it is not clear what the Scottish Government intends the effect of this particular principle to be. Para. 45 of the Policy Memorandum states that “the Scottish Government has decided to embed human rights in its legislation, by adding a further principle that, —social security is itself a human right and essential to the realisation of other human rights.”

Para. 46 goes on to say that:

“This new principle deliberately *reflects the requirement* [my italics] set out in General Comment 19 on the right to social security by the United Nations Committee on Economic, Social and Cultural Rights, that social security systems should “be established under national law and ensure the right of individuals and organisations to seek, receive and impart information on all social security entitlements in a clear and transparent manner. In adding this principle, the Scottish Government recognises that the right to social security is respected and protected in international law.”

Both the term “embed” and the reference to “reflecting” the requirement of General Comment 19 might be relied on to suggest that the principle that social security is a human right is legally enforceable. However, these paragraphs can also be interpreted in other ways.

The Parliament should press Scottish Ministers to (i) make clear precisely what their intentions are as to the legal status and effect of the principles, and (ii) to present amendments which clearly give effect to that intention.

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.

I will not comment on the value of having a charter but will again concentrate on the question of legal status and effect. The legal status and effect of the proposed charter are unclear. Section 2 neither states that the terms of the charter are legally binding nor that they are not so binding and it is difficult to infer a clear intention from the wording. The question of legal enforceability is not addressed in the Policy Memorandum either although its terms are less likely to suggest the inference that the charter is intended to be enforceable.

The dangers of being unclear about legal status and effect are the same as those set out in the answer to question 1 above. Parliament should press Scottish Ministers to (i) make clear precisely what their intentions are as to the legal status and effect of the charter, and (ii) to present amendments which clearly give effect to that intention.

It is instructive to contrast the provisions on this charter with the Charter of Patient Rights and Responsibilities issued under section 1 of the Patient Rights (Scotland) Act 2011. It clearly states that the charter is not enforceable, thus:

“ ...
(4) Nothing in the Charter is to—
(a) give rise to any new rights,
(b) impose any new responsibilities, or
(c) alter (in any way) an existing right or responsibility. ...”

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