



Law Society
of Scotland

Consultation Response

Social Security (Scotland) Bill – written evidence

August 2016



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

We welcome the opportunity to respond to the Scottish Parliament's call for evidence on the Social Security (Scotland) Bill. This response has been prepared on behalf of the Law Society by members of our Administrative Justice committee.

General Comments

We welcome the publication of the Social Security (Scotland) Bill, which we believe is quite unlike any other social security legislation that has gone before. The Bill has been drafted in accessible language which, with a few exceptions, is clear and easy to understand. The language and terminology of the Bill have made a positive effort to move away from that used in existing UK legislation, adopting new terms and conventions so that the Scottish system will be seen to have its own distinct identity, which is to be applauded.

We note that the Bill's provisions are to be supplemented by regulations for each type of welfare assistance, drafts of which are to be provided in due course. We look forward to commenting further on the draft regulations, and particularly those relating to Disability assistance, which will be likely to present the greatest challenge in their drafting.

Specific 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.*

Q. Do you have any views on this approach?

The Law Society is broadly content that the Bill should provide the framework of the new system, with the rules for different types of assistance to be set out in regulations, which is the usual convention for such matters. We also note that the regulations will be subject to Parliamentary scrutiny, which is welcomed. We look forward to responding to consultation on the draft regulations in due course.

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 any other principles you would like to see included?

This is a significant new departure for social security legislation in setting out the principles which underpin it, which is warmly welcomed. However, it is not entirely clear what the legal status of the principles will be (in tandem with the social security charter). In terms of their individual relative importance, the last principle (*the system is efficient and delivers value for money*) would seem to be the most crucial from the perspective of both users and taxpayers. And whilst it is helpful to include reference in the principles to respect and dignity being at the heart of the system, ultimately this will be of less importance to the person whose claim for assistance has been unreasonably delayed or refused.

We would have liked to see a principle around ‘*ensuring the integrity of the system*’, given the inherent risk of revenue loss through fraud and overpayments, which has led to the National Audit Office qualifying the DWP’s annual accounts every year since 1988/89.¹

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 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?

It would have been helpful to have sight of an early draft of the charter, or parts of it at least, in tandem with the principles, in order to be able to comment more meaningfully on its potential application and usefulness. We have previously welcomed the proposal to have a charter, which we suggested could provide a more accessible source of information for people about the new Scottish social security system.

So far as what we would like to see in the charter, we suggest that it should include clear information about the rights and responsibilities of individuals claiming assistance and the commitment of the Scottish Government to deal with applications fairly, speedily and accurately. The charter should also include details of what the government will do to put things right when they go wrong, either by way of service failure or when individuals disagree with the decision on their claim. The charter should also include details of the time limits within which requests for re-determination will be dealt with, and with regard to those cases that go forward to the First-tier Tribunal, details of the timescales within which appeals will be heard. The latter will require an agreed timescale to be brokered between Scottish Government and the Scottish Courts and Tribunals Service.

With regard to the principle concerned with respect for the dignity of individuals the charter will no doubt wish to include a clear statement of the new Agency’s customer service values. The basis for many complaints about the DWP and the organisations involved in the administration of disability benefits (e.g. Capita, ATOS etc.) concerns alleged mistreatment of claimants by staff in DWP, Capita and ATOS. There are clear lessons to be learned by Scottish government from the experiences of existing claimants, which

¹ Department for Work and Pensions 2015-2016 Accounts: Report by the Comptroller and Auditor General – ‘*Fraud and error in benefit expenditure*’.

are no doubt being picked up from the group of volunteers with whom the government is consulting on the new arrangements.

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?

We are broadly content with the proposal to make rules covering these matters, but without sight of the rules it is difficult to comment further. With regard to the Clauses in the Bill covering these matters, we would like to make the following observations:

Clauses 8 & 9 - Duty to give assistance' and 'Meaning of "determination of entitlement

This is another new and welcome departure in prescribing a specific duty obliging Ministers to give an individual whatever assistance it is determined that he is entitled to, whether the determination is made by Ministers or the First-tier Tribunal, Upper Tribunal or the higher Courts. It is not entirely clear what the position will be if the Scottish government wishes to appeal a tribunal decision to the next appellate level. It is assumed that, in this instance, power will be taken to enable a decision to be 'stayed' or 'sisted' pending the outcome of such an appeal

Clause 10 - Later determination supersedes earlier

The existing provisions relating to review and supersession of decisions have become very complicated, largely due to the way in which caselaw has developed over time through decisions of the Upper Tribunal and higher appellate courts. It is assumed, therefore, that regulations will spell out in greater detail the circumstances in which decisions may be reviewed and superseded.

Clauses 19 to 26 - Determining entitlement

Clause 23, *Right to request re-determination*, appears to be similar to the DWP's existing mandatory reconsideration provisions, whereby applicants will not have a right of appeal to the First-tier Tribunal until after the Scottish Ministers have had an opportunity to undertake a re-determination. We are disappointed

that the Scottish Government has not taken the opportunity to abolish this unnecessary stage in the process, which serves only to delay access to justice for many citizens. However, we welcome the proposal to have a time limit within which re-determination must take place and an automatic right of appeal to the First-tier Tribunal once that time limit is up.

Before the introduction of mandatory reconsideration it was the standard practice for an appealed decision to be reconsidered before an appeal was sent to the tribunal. If the decision was revised in the appellant's favour, the appeal would lapse and a fresh right of appeal was given. The introduction of mandatory reconsideration was tantamount to an admission on the part of DWP of the poor quality of decision making within its Agencies, but was presented as an effort to get more decisions right at an early opportunity. However, a study of the operation of mandatory reconsideration by the Social Security Advisory Committee in 2016 reported that "*Much evidence suggests that it (mandatory reconsideration) does not work as well as it should.....*".²

Clauses 27 to 29 - *Right to appeal to First-tier Tribunal*

We welcome the more favourable time limit for appeal of 31 days and the more favourable arrangements for dealing with late appeals.

Clauses 30 to 35 - *Obtaining information to make determination*

Clause 32, *Lifting of duty to notify a change of circumstances*, provides a new and welcome power to enable Ministers to lift the duty on an individual to notify changes of circumstances, presumably where it is clear that an individual's personal circumstances are unlikely to change in the near future. However, there are some obvious changes of circumstances that will always need to be notified such as the death of the individual, change of address, change of bank details etc. We look forward to seeing in the draft regulations how this power is to be exercised.

Clauses 36 to 38 – *Recovery of assistance given in error*

These provisions appear to depart from the existing UK overpayment provisions, which distinguish between overpayments as a result of official error, that is, an error on the part of the DWP, and overpayments caused by claimants, whether knowingly or due to an oversight. It might appear problematic to attempt to recover assistance given in error where this was not the fault of the individual concerned. Whilst Clause 37 places a requirement on Ministers to consider an individual's ability to repay, this could

² Decision Making and Mandatory Reconsideration: A study by the Social Security Advisory Committee, July 2016

still lead to someone being asked to repay an overpayment that they did not contribute to or realise had been erroneously paid.

We warmly welcome the provisions in Clause 35, *Determination without application*, providing the power for Ministers to make a determination of an individual's entitlement to a particular type of assistance without receiving an application.

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 appear to be comprehensive and complete in their provisions and it is helpful that they have been drafted in a uniform and consistent format for each different type of assistance.

In respect of Disability Assistance we expressed concern in our earlier consultation response about the widely reported negative experiences of claimants in connection with face-to-face interviews with Capita and ATOS healthcare professionals. The poor quality of their assessments has led to a significant increase in appeals to the First-tier Tribunal, the vast majority of which continue to have a successful outcome. Having to deal with so many unnecessary appeals generates unnecessary costs, and is also indicative of the failure of the mandatory reconsideration process, which was introduced in order to give the DWP the opportunity to put mistakes right and avoid cases having to go to the tribunal. We look forward to the Scottish Government's proposals for determining claims for Disability Assistance without the need for face-to-face assessments in every case and without the need to involve private companies like Capita and ATOS.

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?

We welcome the inclusion of this provision, aimed at providing short-term assistance to an individual who has had their benefits withdrawn or reduced and who is awaiting a re-determination decision or an appeal hearing. This is a much needed temporary stop-gap to prevent people falling into destitution.

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?

We are entirely content with this proposal. It is assumed that agreement will be reached between Scottish Government and the UK Government that any top up assistance will not be taken into account as income in determining any reserved means-tested benefit, for the obvious reason that this would nullify the effect of any top up.

8. *The Bill proposes that carer's allowance should be increased as soon as possible to the level of jobseekers allowance (from £62.10 to £73.10 a week).*

Q. What are your thoughts on this proposal?

While we are wholly supportive of the crucial role that carers have, the level of benefits provided is a matter of social policy which we do not feel best placed to comment on.

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?

We fully support the Government's proposals to continue the scheme for discretionary housing payments, aimed at preventing homelessness on the part of people affected by the benefit cap and the bedroom tax.

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

We have no further comments at this stage, though if we can assist the Social Security committee of the Scottish Parliament in its scrutiny of this Bill in any way, our Administrative Justice committee would be happy to do so.



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