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Dear Convener,

Social Security (Scotland) Bill: Stage 2 consideration of amendments 116 and 117

On 8 February 2018, the Social Security Committee (the “Committee”) continued its Stage 2 consideration of the Social Security (Scotland) Bill (the “Bill”). Amendments 116 and 117 in the name of Mark Griffin MSP, which would have introduced a ‘due regard’ duty in relation to the human right to social security, were put forward by the Scottish Human Rights Commission (the “Commission”) and received considerable support from across civil society. A copy of the Commission’s briefing provided to the Committee in advance of consideration of the amendments is included.

During consideration of the amendments, a number of questions were asked. In the interests of encouraging further discussion and developing deeper understanding in this area, the Commission addresses all of the points raised below.

The Commission would be happy to discuss any of these points in greater depth should any members find that helpful.

Reference to the International Covenant on Economic, Social and Cultural Rights as opposed to other international human rights treaties

It is first important to note that amendment 117, dealing with the interpretation of the right to social security, is clear that courts and tribunals may also have regard to any obligation of the United Kingdom relevant to the right to social security and any comparative case law. This therefore would allow courts and tribunals to consider the

many international treaties and regional instruments where the right to social security features.¹

During debate, Ben Macpherson MSP placed emphasis on the European Social Charter which protects the right to social security under Article 12. It is worth noting that the UK has not ratified the revised version of the European Social Charter 1996. Although the UK has ratified the European Social Charter 1961, it has not accepted the majority of the social security provisions. The UK Government, and by extension the Scottish Government, is therefore not bound by many of the social security provisions contained in the European Social Charter.

The International Covenant on Economic, Social and Cultural Rights (“ICESCR”) forms an integral part of what is often referred to as the International Bill of Human Rights. The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (“ICCPR”) and, importantly, ICESCR. A number of other international treaties enacted subsequent to ICESCR also protect the right to social security. These largely mirror the content of the right protected by ICESCR, which gives the fullest and most comprehensive articulation of the right to social security.

It would therefore be consistent and complementary to the fulfillment of the right to social security as articulated in all other international instruments, as well as the European Social Charter, if ICESCR were to be embedded in domestic legislation.

Concerns that ICESCR is too vague and lacks legal determinacy

There is extensive guidance on the content of the right to social security set out in General Comment 19 of the UN Committee on Economic, Social and Cultural Rights. It is correct that some rights set out in international and regional human rights treaties do require context to give meaning to those rights and, ultimately, it is sometimes necessary for the judiciary to play a role in interpretation. This is also the case for civil and political rights found in documents such as the European Convention on Human Rights (“ECHR”). For example, Article 3 of the ECHR simply reads: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”. This has been the subject of extensive judicial interpretation at both a regional and domestic level, creating a body of case law which has given clear meaning to the right.

While courts must not usurp the role of the legislature, the judiciary have a clear role in giving substance and meaning to rights where appropriate. This is entirely consistent with the role of the judiciary and there is an extensive body of commentary and case law for

¹ For a full list of international treaties protecting the right to social security, see Scottish Human Rights Commission, Consultation Submission: A New Future for Social Security, October 2016.

judges to draw on in making determinations as to the ambit and content of the right to social security.

Democratic concerns – the UN Committee on Economic, Social and Cultural Rights is not elected

Both Ben McPherson MSP and Adam Tomkins MSP raised concerns around the democratic legitimacy of requiring courts to consider the opinions of non-elected committees.

The UN Committee on Economic, Social and Cultural Rights is comprised of subject specific experts at the international level and provides an authoritative interpretative analysis of how to give substance to rights contained in ICESCR. In addition, members of treaty bodies are nominated and elected by State parties, including the UK. Domestic courts already have regard to international treaties and reports of international organisations as important sources of law and interpretative resources.² In 2016 Lord Boyd referenced the work of international bodies stating “the reason that international bodies such as the UNHCR are accepted as authoritative is because of the breadth of their knowledge and experience...[Their views] will be taken seriously by governments, other international agencies, courts and tribunals as well as in the court of public opinion. Their views and opinions enjoy confidence and respect.”³

It is important to note that in a judicial determination in relation to the right to social security, or indeed any other right that is socio- economic in nature, the court in practice is likely to show deference to the legislature in the approach and standards of review used. Finally, amendments 116 and 117 did not oblige courts and tribunals to follow any particular guidance; rather, they were obliged to take account of it. This is an important distinction.

Assertions that the Scottish Social Security Commission would be sufficient to review performance of the human rights compatibility of the system

Accountability is a key facet of a human rights based approach and the Commission welcomes the Scottish Government’s amendments introducing a statutory oversight mechanism whose functions are linked to international human rights law. That said, as the Commission’s briefing makes clear, an accountability gap remains. Should the Scottish Social Security Commission report incompatibility with international human rights law, and the Government and Parliament fail to act on those recommendations, judicial oversight should be available as a means of last resort in order to hold the executive and legislature to account.

² See, for example, *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4.

³ Lord Boyd para. 81 IMI, MG & EA, Re Judicial Review [2016] CSOH 102.

The work of the Scottish Social Security Commission should guard against the need to use judicial remedies, and truly embedding a rights based approach to policy should ensure that rights respecting policy and law are made in the first instance. However, a court remedy must be available in cases where potential rights violations exist. The current administration has made its commitment to taking a rights based approach to social security clear and this is welcomed; however, a future change of administration could bring differing levels of commitment to rights protection. As this legislation is establishing a social security framework to be in place for years to come, Parliament should prepare for this eventuality and introduce legal mechanisms to allow rights holders to hold each arm of the state to account.

Concerns that successful Judicial Review could have an impact on the effective operation of the system

Regulations made in the field of social security will already be open to Judicial Review on a number of public law grounds, and therefore the possibility always exists that regulations could be struck down. This is not in itself a reason to resist judicial accountability mechanisms. Further, the Commission believes that Scottish courts are well equipped to respond to structural issues in a manner that does not result in leaving social security recipients in a precarious position without payment.

Concern around implementing on a ‘piecemeal’ basis

The Commission’s position is that economic and social rights should be incorporated in full into domestic law, and taking a Scotland wide approach would be desirable. That said, human rights can be protected in a number of different ways and the Commission believes that Parliament should, at all times, seek to realise rights whatever the legislative scheme before them.

The Scottish Government has made very welcome commitments around the rights respecting nature of Scotland’s new social security system, and the Commission believes that Parliament should seize the opportunity to create the strongest rights-based legislation possible. The introduction of a binding duty on Ministers would plug a gap that currently exists in this legislation, and would go some way to ensuring that the legislation were “future-proofed” to the fullest extent possible.

The Commission hopes that the Committee has found this letter to be helpful in allowing members to better understand the Commission's proposals and the broader debate around the incorporation of international standards into Scots law. The Commission hopes to continue its dialogue with the Scottish Government and would welcome more detailed discussions with parliamentarians.

Yours Sincerely



Judith Robertson
Chair, Scottish Human Rights Commission.

Enc: Scottish Human Rights Commission, Stage 2 Briefing, Social Security (Scotland)
Bill