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I am writing to let you know that the Scottish Government has lodged a series of amendments, which I believe will, if agreed, make important improvements to the Social Security (Scotland) Bill. I am attaching a short overview of those amendments, which sets out what each set of textual changes is intended to achieve. At the time of writing, the reference numbers for the amendments hadn't yet been assigned by the Scottish Parliament clerks. I will therefore ensure an updated version of the attached document, with reference numbers, is provided to the Committee as soon as possible.

These amendments are the product of careful consideration and close reflection of the evidence provided to all three scrutinising committees during Stage 1. As with all of our work on the Bill, they reflect the extensive consultation and engagement that we have undertaken so far, which will continue as the Bill moves through the Parliamentary process. They do also of course reflect the points raised by your Committee in the Stage 1 Report and my response to that.

In my view, these amendments demonstrate that all of us at the Scottish Government have been listening to the concerns raised by stakeholders and that we are prepared to make changes and improvements, where the Bill allows scope for improvement and where it is in keeping with our social security principles.

I should also say, at this juncture, that the Scottish Government expects to lodge further amendments in due course but, in lodging these ahead of the start of Stage 2 proceedings, we are seeking to make plain the majority of key improvements that we propose to make, in response to the issues raised.

I trust this letter, and the accompanying overview, will be of interest to you and your members and I look forward to discussing these at the Social Security Committee meetings in the coming weeks.

Kind regards



**JEANE FREEMAN**

# **Social Security (Scotland) Bill**

## **Scottish Government Stage 2 Amendments**

### **Introduction**

Stage 2 scrutiny of the Social Security (Scotland) Bill is due to commence at the Social Security Committee meeting on Thursday 1 February 2018. The Scottish Government is pleased to bring forward a series of amendments to the Bill, the initial set of which were lodged with the Scottish Parliament on Wednesday 17 and Friday 19 January 2018. This paper provides a short overview on the amendments lodged. The amendment numbers refer to those assigned by the Scottish Parliament and published in the daily Business Bulletin<sup>1</sup>.

The Scottish Government believes that these amendments demonstrate it has listened to stakeholder concerns and is prepared to make changes where action is required and where they are consistent with the social security principles. These amendments are brought forward after careful consideration and reflection of all of the evidence provided during the Stage 1 process, and also the extensive consultation that has been undertaken to date, and will continue as the Bill moves through the Parliamentary process.

It is understood that the first Committee meeting will go no further than Part 1 of the Bill. The Scottish Government intends to lodge further amendments and these will be available by the lodging deadline for the Committee meeting where the relevant section of the Bill will be considered.

### **Principles**

#### *Eradication of poverty*

The Social Security Committee supported the inclusion of an additional principle that 'Social security has a role to play in the eradication of poverty in Scotland.' The Scottish Government agrees that the Scottish social security system has a role to play and understands a non-government amendment will be lodged at Stage 2.

#### *Equality and Discrimination*

The Scottish Government believes that amendment no. 6, to include a principle on equality and non-discrimination, will further strengthen the principles. Though the Social Security Committee did not make an explicit recommendation on the inclusion of a principle of this kind; the Scottish Government has been persuaded by the many prominent stakeholders such as Engender, Scottish Women's Aid and the Coalition for Racial Equality and Rights who have argued that it would enhance the human rights credentials of the Bill and complement the existing commitments to respect and dignity.

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<sup>1</sup> <https://bb.parliament.scot/Legislation>

## **Take-up, advocacy and advice**

The Scottish Government proposes a number of amendments that respond directly to matters on take-up, advocacy and advice raised by stakeholders, the Social Security Committee and MSPs during the Stage 1 scrutiny process.

### *Scottish Minister's duty to promote take-up*

Amendment no. 7 provides that Scottish Ministers have a 'duty', rather than a 'role', to ensure that individuals are given what they are eligible to be given under the Scottish social security system. This was previously included in the principles at 1(d), but it is now placed into its own separate and distinct position within the Bill. Correspondingly, a separate amendment (no. 4) has been lodged to remove part 1, section 1, paragraph (d) from the principles. Amendment no. 11 is a technical amendment which ensures that this new duty is still captured by the social security charter. Changing the 'role' into a 'duty' was suggested by a number of groups, including the Coalition for Racial Equality and Rights, the Child Poverty Action Group in Scotland (CPAG), Enable Scotland, Support in Mind Scotland, Disability Agenda Scotland (DAS) and Age Scotland.

### *Recognition of importance of independent advice and advocacy*

The Scottish Government has previously stated it recognises there are some individuals whose reliance on independent advocacy and advice is important in helping them negotiate their interaction with any public body, and it is vital that such individuals have a right to receive information about how to access the support they need when interacting with the new social security agency. This was raised by stakeholders including the Scottish Independent Advocacy Alliance, Inclusion Scotland, the Health & Social Care ALLIANCE, Camphill Scotland, AdvoCard, DAS, Enable Scotland, the Scottish Council for Voluntary Organisations, Citizens Advice Scotland (CAS). To address this, amendment no. 8 recognises the role that independent advocacy and advice has and requires Scottish Ministers to ensure they provide information about independent advocacy and advice to those individuals. This amendment also defines "independent" as being provided by a person other than Scottish Ministers. An advocate should assist with enabling the person to whom they are supporting to have as much control of, or capacity to influence, that person's understanding of and access to the new system.

### *Right to advocacy*

Building on this, amendment no. 9 places a right to advocacy for every individual with a mental disorder in connection with the determination of the individual's entitlement to be given assistance under the Scottish social security system, and places a duty on Scottish Ministers to ensure that independent advocacy services are available to the extent necessary for that right to be exercised. The same definition of a "mental disorder" as at section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 is used here. It also defines "advocacy services" in this section as a service of support and representation made available for the purpose of enabling the individual in question to have as much control of, or capacity to influence, the decisions that determine their entitlement to assistance through the Scottish social security system (as is, in the circumstances, appropriate). Stakeholders such as Inclusion Scotland (and others) have noted that individuals with mental health issues (as well as learning disabilities and personality disorder,

which are covered by the definition in this amendment) currently experience difficulties in accessing and negotiating the UK Government's social security system. The Scottish Government intends that this amendment will ensure that is not the case in the Scottish system.

### *Right to support*

With the importance of independent advocacy and advice recognised above, amendment no. 39 ensures that an individual can have another person (“a supporter”) present in any discussion or assessment in relation to the support that they are entitled to from the Scottish social security system (unless the request is unreasonable). A supporter is someone who provides support to the individual during the discussion or assessment relating to their entitlement to assistance (as defined in chapter 2 of the Bill), and could include making representations on the individual's behalf. The supporter could be a friend, a family member, or someone from any of the organisations that provide independent advocacy and advice services across Scotland. Finally, the amendment clarifies that nothing in this section should indicate a requirement for Scottish Ministers to provide or pay for said supporter. Again, it is hoped that this – as with amendments no. 8 and no. 9 – will be welcomed by the various stakeholders outlined above who raised concerns about the omission of this from the Bill as an issue that has been consistently raised in consultation since 2016.

## **Charter**

### *Pre-enactment consultation*

As currently drafted, the Bill includes a requirement for Scottish Ministers to consult when preparing the Charter. The technical amendment no. 12 will ensure that any consultation or co-design work carried out during the Bill's passage and prior to the Bill receiving Royal Assent will be acknowledged as part of the consultation requirement set. This is important as the Scottish Government intends to commence the co-design process prior to the passage of the Bill and prior to commencement of this section.

### *Charter review*

Stakeholders, such as Inclusion Scotland, have raised concerns that the process of reviewing the charter, as set out in Section 5, could result in a future Government substantially diluting the charter. The Scottish Government believes that substantial protection is already offered by the Bill as currently drafted:

- Section 5(3) requires Ministers to consult with people who have received assistance and it is unlikely they would be in favour of dilution or removal of their rights.
- Section 5(4)(b) then requires Ministers to report to the Parliament on consultation undertaken (including whether changes were supported or opposed); reasons for the decision to make changes and a summary of those changes. This would make it politically difficult to amend the charter in ways that were not clearly supported in the consultation process.
- The duty being placed on the scrutiny body to have regard for human rights is also highly relevant in that any dilution of the charter would potentially result in the system falling short of international human rights standards.

- The principles matter too – the charter must reflect them, meaning it might be hard to fundamentally alter the charter without also changing the principles. This would require an amendment to the primary legislation which a future Parliament would have the ability to reject.

However, the Scottish Government acknowledges the concerns of stakeholders and, in order to further strengthen the approach, the Scottish Government proposes amendment no. 13 to place an additional duty on Scottish Ministers to consult the scrutiny body on any proposed changes to the charter. This would enable the scrutiny body to highlight any concerns to both Ministers and the Parliament prior to changes being made. It also fits well with the body's other duties to have oversight of the charter and to have regard to human rights instruments.

#### *Charter-based complaints*

Amendment no. 18 responds to the long-standing argument that the rights to be set out in the charter can only be meaningful if individuals are able to seek redress where those rights have been breached. Many stakeholders supported this view, including the Equality and Human Rights Commission (EHRC), the Scottish Human Rights Commission (SHRC), CPAG, CAS and HIV Scotland.

As individual redress implies casework, the Scottish Government believes that this is a separate and distinct function to the strategic oversight role that Scottish commission on Social Security (SCoSS) will have and should therefore be undertaken by a separate body. The current amendment provides for Scottish Ministers to specify more detail in regulations, including which body should undertake the function of handling and investigating these complaints. This is for purely pragmatic reasons as the Scottish Government requires time to identify the most appropriate body and to then work with them to agree the detail around how this function would work in practice. If this can be confirmed in advance of stage 3, then the Scottish Government will ensure the Bill is amended at Stage 3.

#### **Restriction on private-sector involvement in assessments**

The Scottish Ministers made a clear commitment to Parliament on 27 April 2017 that profit-making companies will not be involved in delivering assessments for disability assistance once devolved to Scotland. In response to calls that commitment should be made clear on the face of the Bill, the Scottish Government has brought forward amendment no. 10 to extend a 'private sector ban', by setting out that an individual cannot be required to undergo an assessment by anyone who is not employed in the public sector.

'Public Sector' covers the Scottish Ministers, most NHS bodies and Local Authorities. It also makes provision that will cover associations of public bodies (for example, a partnership between neighbouring health boards) and some "public sector" companies limited by guarantee.

The amendment permits Ministers to require people to submit to an assessment by an individual acting in the course of employment by a public body. This approach allows for a person to submit evidence derived from the private sector, if they wish, and for this to be considered by decision makers.

It is possible that eligibility criteria for devolved assistance may depend on receipt of a UK benefits. A condition for eligibility to that benefit could depend on a private sector assessment. The amendment would enable receipt of a UK benefit to continue to be available as a qualifying criterion for a Scottish assistance.

There has been widespread support amongst stakeholders on the Minister's commitment to ensure that the private sector are not involved in delivering assessments, including from Inclusion Scotland, the Glasgow Disability Alliance and the Health and Social Care Alliance.

### **Independent Scrutiny**

Amendments no. 15-17 give clear and unequivocal effect to the Scottish Government's commitment to introduce a statutory, independent scrutiny body. These amendments respond directly to the recommendations made by the Social Security Committee and the Disability and Carers Benefits Expert Advisory Group (DACBEAG) working group, and deliver on commitments made by the Minister for Social Security, both when she appeared before Committee on 2 November and during the Stage 1 debate on 19 December.

They also address feedback from a wide range of stakeholders. The issue of independent scrutiny was raised in evidence given to the Committee by groups and organisations such as: Age Scotland, Alzheimer Scotland, Carers Scotland, Carers Trust Scotland, CPAG, CAS, Coalition for Racial Equality and Rights, COSLA, DAS, Engender, EHRC, Inclusion Scotland, MND Scotland, MS Society Scotland, NHS Health Scotland, North Lanarkshire Council, One Parent Families Scotland, Parkinson's UK in Scotland, Poverty Alliance, Scottish Council on Deafness, Scottish Independent Advocacy Alliance, Scottish Refugee Council and Scottish Women's Aid.

The schedule no. 16 makes provision for the establishment of that body to be known as the Scottish Commission on Social Security (SCoSS). It is proposed it will have a chair and two to four members. Members would be appointed by the Scottish Ministers, subject to the need to ensure that the body has the right mix of knowledge and expertise, including knowledge of the effects of disability, arising from a physical or mental impairment.

It is proposed that SCoSS will have certain specific functions and also for the Scottish Ministers to have the power to confer additional functions on the SCoSS by regulations:

- to scrutinise proposals for regulations about assistance;
- to prepare and submit to the Scottish Ministers a report on any matter, relevant to social security, that the Ministers request;
- to prepare and submit to the Scottish Parliament a report on any matter, relevant to social security, that the Commission is requested to report on by the Parliament;
- to prepare and submit to the Ministers and the Parliament, from time to time, a report containing—

- (i) an assessment of the extent to which any or all of the expectations set out in the Scottish social security charter are being fulfilled, and
- (ii) recommendations for improvement where the assessment is that those expectations are not being fulfilled.

All reports prepared by the SCoSS must be published, to ensure transparency.

The amendments also recognises the role that SCoSS may play in relation to the question of whether the system, as a whole, is delivering on the expectations set out in the charter. In preparing its assessment of whether the expectations set out in the charter are being fulfilled, the SCoSS may also make recommendations for improvements, in order to help ensure that expectations so set out are fulfilled in future. There is also express provision to say that, if the SCoSS receives evidence which suggests that expectations set out in the charter are frequently not being fulfilled, then it must consider reporting on this. In effect this could mean that e.g. stakeholders supporting and advising people using the system could refer evidence to SCoSS where they feel there is reason to believe the system is falling short of the charter.

This would be a strategic oversight role in relation to the charter, protecting people's rights at systemic level in a way that is separate and distinct to the question of individual redress. This is provided for separately in amendment no. 18 and is discussed in the section on charter-based complaints above.

In addition, these amendments also provide that, when carrying out its functions, the body must have regard to relevant human rights instruments and, in the case of scrutinising proposals for regulations, to the social security principles. The Scottish Government considers that giving the SCoSS an on-going role in assessing whether components of the system (such as future regulations), as well as the wider system as a whole, deliver on the requirements of human rights instruments will have a practical and meaningful effect in ensuring that human rights instruments are taken into account. These amendments represent an explicit acknowledgement by the Scottish Government that the right to social security has an objective meaning and mean that the system will be independently evaluated against these international standards. This was called for by stakeholders including SHRC, EHRC, Inclusion Scotland and HIV Scotland.

### **Super-affirmative procedure**

The Scottish Government made clear in its response to the Social Security Committee's Stage 1 report that it accepts an enhanced level of Parliamentary scrutiny for regulations is required. This new section (amendment no. 55 and 56) fulfils that commitment by introducing a requirement to apply a super-affirmative procedure to regulations for social security assistance made under part 2, chapter 2 ('Types of assistance to be given') and section 45 ('Power to provide for top up') of the Bill.

It would require Scottish Ministers to take a series of actions prior to being able to lay any regulations – to which this section applies – before Parliament. These are:

- Publish their proposals for draft regulations;

- Refer the proposals to the independent scrutiny body and notify the Parliament of that;
- The independent scrutiny body must then prepare a report on the proposals that sets out any observations and recommendations they would wish to make. The report must take into account the Scottish social security principles and any relevant international human rights instruments; and
- Scottish Ministers have a duty to respond to the report, which should be submitted to Parliament when the draft regulations are laid. The response must set out where the regulations differ from the report (and why), what Scottish Ministers have done to address any comments and/or recommendations made in the report, and/or detail if they disagree with any of the report's conclusions.

Together with the proposals for independent scrutiny, the Scottish Government believes this will provide the enhanced levels of scrutiny required, and will address any concerns that the balance between primary and secondary legislation has not been appropriately struck.

### **Re-determinations and appeals**

The Scottish Government lodged the following amendments on 17 January:

#### *Determination of entitlement by the UK Supreme Court*

Section 9 of the Bill lists the various levels of appeal from First-tier Tribunal to Court of Session (these are the levels of appeal mentioned in the Tribunals (Scotland) Act 2014). The technical amendment no. 19 to Section 9, makes explicit the possibility of the Supreme Court determining entitlement. The role of the Supreme Court in such a case would be to determine a narrow point of law. The Supreme Court might rule on the point and remit the case back to the Court of Session to apply the ruling to the facts of the case and make a determination of entitlement on that basis. In some cases, however, the Supreme Court might prefer to make the determination of entitlement itself. This amendment avoids any doubt that the option is open to the Supreme Court.

#### *Late re-determination request*

Amendments no. 33 – 36 will make it possible for an individual to pursue a request for a re-determination after the end of the prescribed time if there is a good reason for the request not having been made sooner. An absolute cut-off of a year is applied. If the agency refuses the late request, this will carry a right of appeal to the First-tier Tribunal. The provision will further strengthen the rights-based approach and will ensure an individual is not disadvantaged from pursuing a re-determination and appeal if they missed the deadline prescribed in the regulations and have a good reason for missing it.

The Scottish Government lodged the following amendments on 19 January:

#### *Re-determinations and appeals process*

Amendments no. 82, 84, 85, 87-93 respond directly to the concerns raised by stakeholders such as CPAG, Inclusion Scotland, Citizen's Advice Scotland and Enable Scotland about the two stage nature of the re-determinations and appeals process. In considering the various proposals, the key driving factors for the Scottish

Government has been to ensure the process is as easy as possible for an individual to exercise their right of appeal and that they have the right to control whether their appeal is made.

The approach, which has the support of Citizen's Advice Scotland and Inclusion Scotland, proposes that the agency will have a duty to assist people to exercise their right of appeal, should they wish to do so. After the re-determination and as part of its notification, the agency will provide the individual with information on what action the individual needs to take to initiate an appeal and provide the necessary form that they would need to complete and return back to the agency. This form need not be paper based and could come in, for example, an electronic format. Upon receipt of the completed form, the agency will then forward it and the documentation it holds in relation to the determination to the First-tier Tribunal which will then manage the appeals process.

The amendments also make clear that, as the Tribunals Service can set out its own rules for appeal, those rules must take account of a form that has been submitted to Scottish Ministers as the start of the appeals process.

### **Recovery of assistance given in error**

The Scottish Government has made clear the policy intent that an overpayment made as a result of agency error will not normally be recovered, unless there are exceptional circumstances (such as a large and obvious overpayment). However, there were concerns raised by a number of stakeholders during the Stage 1 process that the Bill, as currently drafted, could allow all overpayments as a result of agency error to be recovered from individuals. These included stakeholders such as DAS, Poverty Alliance, Inclusion Scotland and CAS.

The amendments to Section 36 of the Bill no. 40-43 therefore define the circumstances in which a person does not have any liability to repay for an overpayment. When an error is created by the agency, or otherwise is not the individual's fault, and it is not reasonable for the individual who received the extra money to have noticed and told the agency about it, they will not be liable to repay it.

A further amendment no. 44 also clarifies the application of the common law remedy of unjustified enrichment to overpayments made in error. The purpose is to bring all types of error that result in an overpayment within the statutory framework set out in Section 36. The practical effect is that it brings the entire social security framework around those errors within a statutory framework, set out clearly and transparently in the Bill. This means that Scottish Ministers will have no recourse to common law rules of unjustified enrichment for recovering such overpayment liabilities.

### **Liability of deceased's estate**

Amendment no. 45 is a technical amendment that will allow the agency to recover Funeral Expense Assistance (FEA) from the estate of the deceased. Recovering an FEA payment from the estate of the deceased is consistent with the general principle that following a death, reasonable funeral expenses take priority over all other debts

on the person's estate. There is a wider benefit that the recovered funds would be available to be reinvested in the wider social security system.

It can take some time for assets from the estate to be assessed, particularly if the person arranging the funeral is not the executor of the estate, and so an FEA payment may have been made before it became apparent that the person who has died had the resources available to meet the funeral costs. Recovery in these cases would be from the estate of the deceased, never from the person that the FEA payment has been made to.

Design of the recovery process will be progressed alongside the development of the systems to deliver FEA and the Scottish Government has already committed to involve individuals and stakeholders in this process.

### **Offence of failing to notify**

The Scottish Government has always made clear the policy intent that genuine errors or misunderstandings will not result in someone being criminalised, but acknowledges the concerns raised by a number of stakeholders during the Stage 1 process. A report from Justice Scotland, submitted to the Committee in September 2017, was critical of the fraud offence provisions in the Bill. Their view was that genuine or trivial errors could be criminalised, and these concerns were echoed by a number of stakeholders, including CAS, Enable and Poverty Alliance.

Amendment no. 46 to Section 40 of the Bill therefore makes it absolutely clear that an offence will only be committed where there is no reasonable excuse for the person having failed to notify a change in circumstances. The individual will have an opportunity during an investigation by the agency to explain any mitigating circumstances. These factors would be taken into account before the agency concluded the investigation and, where a genuine error had happened, the case would not proceed further.

### **Duty to consider effects of inflation and to uprate disability and employment injury assistance**

The Scottish Government has set a clear commitment that disability and employment-injury assistance will be annually uprated in line with inflation. While the Bill currently allows this to be implemented in full through the rate-setting powers within the individual benefit regulations, there has been significant interest in this issue. Many stakeholders, such as CPAG, Poverty Alliance, Joseph Rowntree Foundation, Inclusion Scotland and COSLA, believe that a statutory duty to uprate devolved social security assistance should be on the face of the Bill. In its Stage 1 report, the Committee stated that the majority of the Committee supported the commitment to uprate disability assistance, but also noted that the Bill should include an annual duty on Scottish Ministers to have regard to the impact of inflation on the value of assistance.

The amendment no. 47 addresses these concerns and places a statutory duty on Scottish Ministers to annually review the rates of social security assistance, to assess the impact of inflation. This duty will further require Scottish Ministers to lay

before the Parliament a report on the findings of this review and its intentions as a result of it.

Amendment no. 48 also places an annual duty on Scottish Ministers to bring forward legislation that uprates the value of disability and employment-injury assistance in line with inflation. The amendment has been drafted in a way that does not commit Ministers to a particular inflationary measure, as it is important there is flexibility to select an appropriate measure.

### **Restriction on giving assistance in a form other than money**

The Scottish Government's policy intention has always been for an individual to have the choice of whether or not to receive assistance in a form other than cash, and that cash will be the default option.

Concerns were raised by a number of stakeholders, such as Inclusion Scotland, CPAG, COSLA and CAS, that the Bill, as currently drafted, did not match the policy intent, therefore amendments no. 20-32 make it clear that assistance in kind can only be given with the individual's agreement, or that of a person acting on behalf of the individual.

The inclusion of these amendments introduces an unintended consequence in relation to the recovery of overpayments. The Scottish Government's policy on recovery of overpayments is to seek to come to a mutually-acceptable repayment plan with an individual that must be reasonable and take into account their financial circumstances. But it has to be recognised that an individual might not agree to repay. Where the overpayment relates to an on-going assistance type, one way in which the agency may recover the overpayment is through a deduction from future payments.

The practical effect of recovering an overpayment through benefit deduction is to reduce a person's liability (as determined under Section 36 of the Bill) and, in doing so, it could be argued as a form of 'in-kind' assistance. In this scenario, an individual should not have the ability to prevent a deduction, as to do so would mean the liability would have to be pursued in other ways. Any decision of Ministers to impose a deduction of this type, in the absence of the individual's agreement, can be appealed to the Tribunal, which gives a protection against inappropriate use of the power.

Scottish Government  
22 January 2018