

Social Security Committee Call for Evidence - Social Security (Scotland) Bill

CPAG welcomes the opportunity to respond to the Social Security Committee's call for evidence on the Social Security (Scotland) Bill. A well-functioning social security system is a key pillar for the prevention and eradication of poverty.

1 Putting rules about new benefits into Regulations – our views.

1.1 The Social Security (Scotland) Bill is fundamental to the shape and direction of the new Scottish social security system. This is a critical opportunity to get the system right and invest in the support needed to enable everyone to participate fully in society, ensure the newly devolved benefits are structured simply to minimise delays and errors, and support the realisation of a rights-based approach.

1.2 CPAG has warmly welcomed the Scottish Government's commitments to use new powers to further a rights-based approach to social security that respects individual dignity and which takes a different approach to that of recent UK 'welfare reform.' We have also welcomed specific policy announcements on best start grants, carer's allowance and universal credit flexibilities. The challenge now is to translate these commitments into the legislation required to underpin a well-functioning rights-based social security system. It is in this context that we highlight below where we believe the Bill needs to be strengthened. We look forward to working constructively with the Scottish Government and Parliament to ensure the Bill delivers a legislative framework in line with the policy ambitions and commitments made to date.

1.3 CPAG is concerned that the broad scope of the Bill does not achieve the correct balance between primary and secondary legislation, creating challenges for people to fully achieve their rights. Many of those rights that would be realised through the implementation of the Bill's provisions could be changed or removed with insufficient consultation if put into regulations or guidance. It would be better to put more detail in primary legislation, and where significant changes are proposed, bring forward further primary legislation.

1.4 The broad framework of the Bill also provides for too wide a scope for government to introduce fundamental changes by regulation alone with a reduction in the ability of parliament to hold future governments to account.

1.5 It is difficult to scrutinise the proposals in the Bill because the policies for each individual benefit are not fully developed. Offering illustrative regulations at this stage will give a more concrete sense of the current government's policy intention. However, this does not address the concern that the framework approach would allow a future government to bring forward regulations with a fundamentally different approach to social security.

1.6 The primary powers do not sufficiently constrain what regulations can contain, so there will be limited opportunity to hold government to account should regulations overstep the policy intention of the Bill.

1.7 No legislation which is presented ahead of fully-formed policy can anticipate every eventuality. Where the Bill does not provide for Scottish Ministers to set out in regulations further detail around specific rules, then there is a risk more will be put into guidance – which is a further reduction in rights – because provisions need to be in law for a right of appeal.

1.8 The Scottish Government's stated policy intention of separating the legislative framework underpinning the system from regulations about specific benefits is to make the legislation accessible¹. It is CPAG's view that separating the two out is not fundamental to making legislation accessible nor in itself does it make social security legislation accessible. Crucially, an online legislation consolidation service to provide up to date revised and consolidated versions of Acts and Regulations is needed.²

1.9 The Scottish Government's policy memorandum sets out that the deliberate choice to put detailed rules in secondary legislation is to enable changes to be made more promptly to reflect changes in economic and social conditions. However CPAG believes that certainty of income is also of great importance for people on low incomes, and changes which may be made with minimal notice could be problematic.

1.10 More detail in the schedules is required as the drafting on some of the types of assistance is too broad. For example, the proposed disability assistance will cover DLA, PIP and attendance allowance. As the Bill is currently drafted, a future administration could bring in an entirely new form of disability assistance through regulations, without the full and extensive consultation which would be essential for a new disability benefit in primary legislation.

1.11 On the administrative side, there needs to be more detail in the primary legislation relating to applications, payments and decision making. As the Bill stands, in some key areas, not only is there no primary legislation, there will be no regulations either, with practice being governed by non-statutory guidance without accompanying rights of appeal.

2 A principles-based social security system: our views on the proposed principles and approach.

2.1 We support the approach taken by the Scottish Government with a view to embedding the principles in legislation. This approach could be strengthened by ensuring the principles set out in the Bill apply to the wider Scottish social security system including discretionary housing payments and the delivery of other benefits such as the Scottish Welfare Fund and Council Tax Reduction scheme.

2.2 The principle of social security as an investment in the people of Scotland and the recognition that social security is a human right are very welcome. It is absolutely vital that those principles and early improvements are clearly reflected in the legislation as a whole, including the rules for each benefit and any guidance produced.

2.3 The principle that *'The Scottish Government has a role in making sure that people are given the social security assistance they are eligible for'* should be strengthened so that the Scottish Government has a "duty to ensure" *'people are given the social security assistance they are eligible for'*.

¹ Social Security (Scotland) Bill Policy Memorandum, Paragraph 11.

[http://www.parliament.scot/Social%20Security%20\(Scotland\)%20Bill/SPBill18PMS052017.pdf](http://www.parliament.scot/Social%20Security%20(Scotland)%20Bill/SPBill18PMS052017.pdf)

² E.g. Council Tax Reduction (Scotland) Regulations 2012 have been updated by at least six sets of later regulations but there has been no consolidation of these changes.

2.4 The principle that *'The Scottish social security system is efficient and delivers value for money'*. must recognise the user's experience of the Scottish social security system and take into account the costs of poverty associated with inadequate social security, and the need not to reduce people's rights.

2.5 The recognition that *'social security is itself a human right'* should make explicit reference to Article 9 of the International Covenant on Economic, Social and Cultural Rights so as to clearly enshrine the right in law.

3 The social security charter: our views.

3.1 CPAG supports the idea of a charter as it provides a useful way to ensure the stated principles are well publicised and understood by members of the public.

3.2 It is essential there is a clear and practical purpose to the charter and it must be enforceable. When the charter sets out the expectations on individuals, there must also be clear avenues for people to take if they feel that their experience of the system does not meet the standards set out within the charter.

3.3 We welcome the proposal to develop the charter with the people of Scotland and would support it covering the following areas:

- An overarching statement which politicians, officials and agency staff are obliged to comply with in development of policy and delivery of services
- A description of what members of the public can expect from the social security system.
- Information on avenues of redress available to individuals, whether through internal complaints processes, ombudsman, tribunal or judicial review.
- Information for individuals on where further support is available if principles are not being adhered to.

3.4 Although the charter itself will be reviewed by the Scottish Government, and reported to Parliament every five years, there is no provision in the Bill as drafted for Parliamentary approval. Given the importance of the charter to making the principles meaningful, CPAG believes Parliament's role should be strengthened.

3.5 While the annual reporting to Parliament will pick up on aspects of the charter, it should also set out what improvements will be made by Scottish Ministers over the coming year and not just be a retrospective report. Developing clear benchmarks and targets for improvement based on a set of indicators would strengthen this reporting process.

3.6 There should be a duty to devise, implement and regularly review a strategy on reducing under-claiming of Scottish social security assistance. This should include specific targets for each type of assistance and a global target for the system. In particular there should be a review of under-claiming rates of all types of assistance with an early focus on disability assistance (because there has been no UK review since 2004/05).

3.7 Reporting on the Scottish social security system should recognise the crucial role social security can play in preventing and reducing poverty and progress on this could be measured against the Scottish Government's National Outcomes – particularly the commitment to tackle significant inequalities in Scottish society.

4 The rules for social security: our comments.

4.1 In general, rights should be upheld throughout the rules for the Scottish social security system. There should be no reduction in rights compared to the current system. As introduced there are examples in the Bill where there is a reduction in rights e.g. loss of appeal rights against recovery of overpayments.

4.2 All agency decisions and notifications must be communicated in writing and the Bill should be amended (Part 2, Chapter 3, sections 22, 25, 26, 31) to make this a legal duty as it is in the current system. Verbal notification is not sufficient on its own. If someone is informed by telephone or in person, they will have no written record of vital information needed to challenge a decision. For example, if someone is not completely clear about the date of the decision, they may miss the deadline for redetermination or appeal.

Application for assistance

4.3 There should be a right to appeal about whether an application is validly made. The absence of a right of appeal in this context has been ruled incompatible with the right to a fair hearing under the Human Rights Act.³ Without appeal rights on the validity of applications, there is no redress for official mistakes that could cause delay and loss of money for individuals. The current system provides such a right of appeal. The Bill does not.

4.4 There should be provision created for a third person to act on behalf of a person who is unable to act for themselves. In UK rules, a third person can be 'appointed' by the Secretary of State, and is referred to as an 'appointee'. It is a commonly used arrangement but is currently absent from the Bill.

4.5 Section 20 (3) provides that a person cannot apply twice for a particular type of assistance for the same period or event. This creates a high risk of unforeseen consequences. There may be circumstances in which people are prevented from making a fresh application but cannot realise their entitlement any other way. For example, it could mean carers losing out who have to apply twice because of delays in awarding disability assistance. There is no similar prohibition in the current UK legislation which relies on common law to avoid adjudicating unnecessarily on duplicate claims.

Withdrawal of application.

4.6 The Bill gives people a right to withdraw an application before it has been decided but not once they have an award. It can be important to be able to do this. For example, a couple on universal credit can claim extra amounts of universal credit where one of them gets carer's allowance and the other has a health condition. A couple who are both carers (e.g. parents of a disabled child) could lose as much as £150 a month in universal credit if they make the wrong choice of which of them claims carer's assistance.

Re-determination by the Scottish Ministers

4.7 CPAG supports a re-determination process, as long as this does not mean having to make a second application to appeal if the award is unchanged, and as long as it is done without undue delay. This is the best way to resolve issues early, to avoid people having to go to the time and effort of an appeal, and to give the agency the best chance to continually improve the system.

4.8 CPAG welcomes the Scottish Government's commitment to advance the right to a fair hearing within the re-determination process, for example through the introduction of a time limit for the agency to undertake a re-determination.

³ R(IS) 6/04 <http://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=1004>

4.9 However, in the most important respect – the requirement to make two separate applications to reach the appeal stage (which is the key barrier to reaching an independent hearing) – the re-determination process is the same as mandatory reconsideration. CPAG’s separate paper on Redeterminations and Appeals⁴ explores this in more detail.

4.10 CPAG recommends an improvement to this proposed re-determination process, which would retain a re-determination in every case but require just one application to reach an independent appeal. This would mean people would not have to make another application if there was no change at the internal re-determination stage but would have the option to withdraw at that point if they chose. This would be a real improvement for some of our most vulnerable citizens.

4.11 Timescales for challenging a decision should be sufficiently long to ensure individuals are able to seek advice and gather evidence – for example if there is a long wait for an appointment with an advice provider.

4.12 The Bill should make sure that the agency cannot act as gatekeeper for appeals, for example, by refusing a late request for re-determination thus denying an independent appeal. Such an approach has been held to be unlawful in UK benefits for requests made within 13 months.⁵ The Bill should not create lesser rights in the Scottish social security system.

4.13 For appeals, as the Bill is currently drafted, the time limit of 31 days, while in keeping with tax credits, is out of step with other benefits, which all have a one-calendar-month time limit. It will be simpler and clearer to communicate if the deadline is aligned at one month. To ensure the best outcomes, the agency should work closely with the advice sector to make sure people receive the advice and support they need.

First-tier Tribunal power to determine entitlement.

4.14 The First-tier Tribunal should be able to consider those issues raised by the appeal and not be required to consider other issues. Section 29 of the Bill, as drafted, may require a tribunal to make a complete re-determination (if not simply upholding the decision under appeal). Commonly, disability benefit appeals focus just on mobility difficulties, or just on daily living needs, and tribunals can choose to deal with just those particular aspects of the award that are at issue in the appeal. If they had to deal with all aspects, practically this could mean longer hearings, more resource required by the Tribunals Service, more stressful hearings for people and more time and money spent on gathering evidence to bolster aspects of an award that are not in dispute.

Obligation to provide information on request.

4.15 This section means that if someone is asked to provide information such as a payslip or medical test result and simply cannot, they could automatically be refused benefit. While this may be an unintended consequence of drafting, it is a reduction in rights compared to the current system. This section should be amended to create a fairer provision for individuals. For example it could provide for Ministers to make a determination based on the evidence which they already have.

⁴ CPAG’s paper on redeterminations and appeals: <http://www.cpag.org.uk/content/redeterminations-and-appeals-social-security-scotland-bill-briefing>

⁵ <https://www.gov.uk/administrative-appeals-tribunal-decisions/r-cj-and-sg-v-secretary-of-state-for-work-and-pensions-esa-2017-ukut-324-aac>

Duty to notify change of circumstances

4.16 Section 31 says that people must be told that it may be an offence if they fail to notify a change in circumstances. Currently UK benefit notices tell people two things: that they might have to pay money back if they do not report a change: and that it could be benefit fraud if they *deliberately* do not report a change.⁶ Just focusing on fraud, as this section does, highlights a problem with the way the rules are structured in the Bill. We say more about this in paragraph 4.21 below. It also ignores the more common situation where not reporting a change simply results in having to pay money back.

Determination without application.

4.17 Section 35 is intended to empower decision makers to do two very different things. Most obviously it provides for awards to be made without the need for an application. Less obviously, it also provides for every other situation when an ongoing award might need to be altered, other than in circumstances where someone specifically asks for a re-determination within the deadline set out in section 23. Commonly, awards need to be changed because of a change of circumstances, or because an official error or new information comes to light. There may be a request from an individual or the decision maker may act on their own initiative. As drafted, people do not have the rights they should have (and do have under the current system). For example, they should have a right of appeal if they tell the agency about a change in circumstances but the agency does not re-determine the award.

Liability

4.18 The policy intention is to recover overpayments from people when clearly caused by individual error. However, there is nothing in the Bill to this effect, meaning there is no power to make regulations. Leaving this to guidance means people have no right of appeal about whether an overpayment should be recovered as they do under the current system. This will lead to injustice and unnecessary hardship. The Bill should be amended to ensure a right of appeal to the First-tier Tribunal on decisions about recovery.

4.19 The consideration for debtors' circumstances only takes financial circumstances into account. Section 37 (2) should be extended to ensure Ministers must have regard to wider circumstances, such as mental health and disability. All relevant circumstances should be taken into account.

4.20 As drafted, the Bill makes no provision for regulations on how overpayments would be recovered. Leaving decisions to individual negotiation and discretion, for example, on how much money can be deducted from an ongoing award, risks disadvantaging those who are less able to put forward their case. Vulnerable people would be better protected by maximum deductions being set out in law.

Offences and Investigations

4.21 The policy intention recognising the distinction between fraud and unintentional error is not realised in the wording of the Bill. As drafted, innocent failure to notify could be an offence. This is because section 40 makes it an offence to fail to report changes not only when a person *knows* it might affect entitlement, but also when they *'ought to have known'*, and in either case whether it is dishonest or not. It should simply not be an offence if a person does not actually know that the change might affect their benefit. In the current system, this would not be an offence. It is easy to imagine circumstances where vulnerable people could be caught by this provision. It is vital to ensure there is a distinction between innocent and deliberate error in primary legislation and not leave it to the discretion of agency staff.

⁶ <https://www.gov.uk/report-benefits-change-circumstances>

5 The schedules for devolved benefits: our thoughts.

5.1 Although the Scottish Government has been clear that it intends the Bill to be a framework, CPAG believes that more detail in primary legislation is required to ensure rights are protected. Where the Scottish Government has developed its policy in relation to devolved forms of assistance, there should be more detail in the schedules e.g. on Best Start Grant. Where policy is not yet developed, primary legislation should be brought forward in due course.

5.2 In light of this, we are concerned about the ‘generality of enabling power unaffected’ provision in each schedule. This is an example of enabling powers being too wide, allowing fundamental changes to eligibility or assistance to be made by regulations alone. The safe transfer of benefits to the new Scottish social security system is vital, but this need not be accompanied by the ability to make fundamental changes without sufficient scrutiny.

5.3 A specific example of where significant changes can be brought about through regulations alone is in Schedule 1 on carer’s assistance where paragraph 7 provides for the introduction of means-testing of carer’s assistance through regulations alone. This should be removed from the schedule.

5.5 Schedule 4 on disability assistance appears to give Ministers the power to decide, without the individual’s consent, to make payments to a third party who they believe will use them to benefit the individual (paragraph 11). It is not clear what the purpose of this provision is. If intended to provide for appointees (who are otherwise missing from the Bill) then this is too broad and not in keeping with principles of dignity and respect.

6 Short-term assistance: our views on the proposal.

6.1 The policy intention of short-term assistance is to ensure people are not discouraged from challenging a decision by having to manage for a period on a reduced income. Cases from CPAG’s Early Warning System do show that income crisis affects people challenging employment and support allowance cases. For carers’ and disability benefits, on the other hand, cases show that sudden drops in income when benefit stops, and the consequent loss of passporting entitlements, are problems for people whether they are challenging a decision or not.

6.2 We support measures that reduce income crisis. However, we are concerned that there may be significant unintended consequences with short-term assistance as presented in the Bill. In particular, people could actually be put off from challenging a decision because of fear of debt unless there are guarantees that this assistance would not be repayable if they lost the appeal. Potentially debts could be large given open-ended assistance throughout the process.

6.3 A way to improve upon the proposed short-term assistance would be to provide an automatic run-on of carers’ or disability assistance whenever an award ends or is reduced, regardless of whether the decision is challenged. This would give people time to adjust. It would also allow premiums and passports to continue – because it would be a continued entitlement to the same benefit. In its proposed form, short-term assistance would not be able to do this without a complex set of consequential changes to other benefits and help across the UK. Time-limited run-ons of benefit already exists in the current system e.g. in carer’s allowance after the person receiving care dies.

7 Power to ‘top-up’ reserved benefits: our views.

7.1 We believe use of powers to top up ‘reserved’ benefits could make significant changes to the lives of children and families living in poverty.

7.2 The Bill provides a real opportunity to, in the first instance, legislate for a ‘top up’ to child benefit. Modelling suggests that in itself a £5 per week top up would lift 30,000 children out of poverty, making a significant and well evidenced contribution toward achieving the targets set by the Scottish Government’s Child Poverty (Scotland) Bill.⁷

8 Increasing carer’s allowance –temporary provision: our thoughts.

8.1 CPAG welcomes the supplement to carer’s allowance.

8.2 The Fiscal Framework requires that any new benefit must not result in people’s entitlement to UK benefits being automatically reduced.⁸ It is essential that the Scottish Government and UK Government agree that the supplement will not mean reductions in other benefits or tax credits and that they put arrangements in place to ensure this.

8.3 For example, carers commonly receive means-tested income support. The supplement would need to be paid on top otherwise, carers could lose not just the value of the supplement but also access to full passported benefits such as housing benefit.

8.4 Although the temporary supplement is linked to the level of jobseeker’s allowance, there is no commitment elsewhere in the Bill to uprate carer’s assistance once the temporary provision ceases.

9 Discretionary housing payments (DHPs): our views.

9.1 DHPs are a vital way to support families who may be struggling to meet their housing costs for a variety of reasons including lower local housing allowance rates, the benefit cap, the two-child limit, and changes brought about through the introduction of universal credit.

9.2 Increased demand may mean the current DHP budget will not be sufficient and may need reviewed. For example, recent figures from the DWP show a 397% increase in the number of people in Scotland affected by the reduced benefit cap since its introduction in November 2016.⁹

9.3 We believe the administration of DHPs could be improved in the following ways:

- Designing the applications process around the needs of the most vulnerable individuals - it should be as simple and straightforward as possible.
- Offering every applicant housing and income maximisation information and advice.
- Ensuring staff and systems processing DHP applications are up to date with recent developments e.g. the roll-out of universal credit.

⁷ CPAG Briefing Note: Using the SG Powers to Top Up Child Benefit <http://www.cpag.org.uk/content/using-scottish-governments-top-powers-detailed-briefing>

⁸ Fiscal framework, February 2016, para 89, <http://www.gov.scot/Resource/0049/00494765.pdf>

⁹ DWP Benefit Cap Statistics - Number of households capped at point in time, by region and local authority (Nov 16 – May 17) Table 3. <https://www.gov.uk/government/statistics/benefit-cap-number-of-households-capped-to-may-2017>

- DHPs are generally an interim measure and sometimes only paid for a short period of time. Awards should be longer where circumstances are not likely to improve in the short-term.

9.4 We are pleased that the Bill makes it clear that DHPs must not be given as a loan.

9.5 We are very concerned that the Bill does not place a duty on local authorities to provide DHPs. There must remain a Scotland-wide system, with no possibility that a piecemeal approach could develop across the country or that some local authorities could choose not to operate the scheme at all. DHPs are not just a vital response to welfare reforms, but are also a long-standing way of supporting people with housing costs who find themselves in difficult circumstances.

10 Other comments on the Bill.

Cash alternatives

10.1 Other than in carefully defined and restricted circumstances, all social security benefits should be delivered in cash rather than in kind. Any other approach is contrary to the principles of dignity and respect.

10.3 The government's policy intent is to explore with stakeholders what alternatives to cash may be offered but always as a choice.¹⁰ We think the Bill introduces more flexibility than is needed to deliver this aim and removes the right that should be fundamental in the system, the right to assistance in the form of cash.

10.4 As the Bill is currently drafted, it gives a future government the power to remove entitlement to cash benefits entirely through secondary legislation alone. This is not in keeping with a rights-based approach to social security.

10.5 A better approach is to provide that people are entitled to a cash payment which can then be paid to someone else to provide the alternative service. In UK law, an example is offering people the choice of a Motability car instead of cash DLA or PIP mobility payment. This is done by awarding benefit in the usual way while offering the person the choice to have their benefit paid to Motability.

10.6 There is already a provision in schedules to the Social Security (Scotland) Bill which would allow secondary legislation to provide for the Motability scheme or other choices. That is the 'Meeting liabilities' paragraphs (Schedule 4, Paragraph 10). This is framed in a similar fashion to the equivalent current legislation and would permit regulations similar to the Motability provision in regulation 44 Social Security (Claims and Payments) Regulations 1987.

10.7 We suggest that the provisions in paragraph (1) of clauses 11 to 18, are deleted '(which may or may not take the form of money}' and insert "financial" before assistance.

Uprating

10.8 The Bill makes no provision for uprating of rates of assistance. There must be a statutory duty to increase the level of assistance annually at least in line with inflation. This is the case in the current benefit system for carers' and disability benefits. Before there was a statutory duty in UK law, benefits were uprated at irregular intervals and some declined considerably in value.¹¹ While the value of benefits has

¹⁰ Social Security (Scotland) Bill, Policy Memorandum, Paragraph

134: [http://www.parliament.scot/Social%20Security%20\(Scotland\)%20Bill/SPBill18PMS052017.pdf](http://www.parliament.scot/Social%20Security%20(Scotland)%20Bill/SPBill18PMS052017.pdf)

¹¹ <http://researchbriefings.files.parliament.uk/documents/RP13-1/RP13-1.pdf> , Section 3

fallen in recent years largely as a result of the switch to using the lower CPI measure of inflation, this is felt even more acutely in those benefits where there is no statutory duty to uprate.

10.9 There should also be a commitment to regularly review the level of assistance to ensure that these are adequate to meet needs.

Independent advice and scrutiny

10.10 The Bill has no provision for a statutory scrutiny or standards body. CPAG believes there must be statutory scrutiny and standards provided for in the Bill. Both are vital to help government put into practice the principles in the Bill.

10.11 Independent scrutiny supports and complements the role of parliamentary committees. Bringing a wide range of perspectives, such a body can offer ‘expert, non-politically aligned analysis’.¹² The role must be statutory, rather than an informal advisory role, to ensure that scrutiny is fully embedded in the policy and regulation-making processes. Beyond a statutory role, a scrutiny body could also make its own independent contribution to examining how systems and processes could better realise Scottish social security principles.

10.12 Statutory scrutiny is of particular consequence given the Scottish Government’s approach to legislating on social security is to leave the detail to regulations and guidance. Statutory oversight of standards is important given that the delivery agency is setting up completely new processes. Quality of decision making and interactions, no less than legal underpinnings is what determines the success of a social security system.

10.13 Independent scrutiny and standards oversight should be set up in time to consider the first set of regulations following the enactment of this Bill.

10.14 Even with statutory scrutiny in place in Scotland, there will remain a scrutiny gap in relation to interactions with UK benefits. This should also be addressed.

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¹² [Social security systems based on dignity and respect](#), Simpson, McKeever and Gray, EHRC 2017