

CPAG in Scotland briefing in advance of Stage 3 of the Social Security (Scotland) Bill

25th April 2018



CPAG in Scotland works to raise awareness of the devastating impact poverty has on children in Scotland and campaigns for positive policy changes to end that poverty. Almost one in four (230,000) of Scotland's children are officially recognised as living in poverty. A well-functioning social security system is a key pillar for the prevention and eradication of poverty.

The Social Security (Scotland) Bill is fundamental to the shape and direction of the new Scottish social security system. CPAG welcomes the principles set out in section 1 of the Bill, which reflect principles we have been promoting along with other members of the Scottish Campaign on Welfare Reform (SCoWR) since 2006. We further welcome the engagement with Parliament and government throughout the Bill's passage and the important improvements that have been made to the Bill. It has been strengthened through the introduction of independent expert scrutiny of subordinate legislation, a super-affirmative approach to key regulations, a statutory requirement for annual uprating of benefits, a test of liability for recovery of overpayments and greater protection of the right to assistance in cash, amongst other measures.

There are, however, still areas of the Bill that must be strengthened at Stage 3. Below we set out key amendments we urge MSPs to support, and other key issues we believe need addressed in debate.

These amendments would:

- Ensure individuals have a right to end their entitlement to assistance ([amendment 7](#))
- Ensure that all agency decisions are given in a way that leaves the individual with a record of the information which can be shown to or shared with others ([amendments 8,9 & 10](#))
- Ensure individuals are informed of any decision that their application for assistance is not valid and have the right to challenge that decision ([amendments 56 & 69](#))
- Ensure that in most cases individuals need only make one application to access an independent appeals process ([amendments 124-131](#))
- Ensure that Scottish Ministers report to the Scottish Parliament on exercise of the right to appeal ([amendment 132](#))
- Ensure a fairer test of liability for recovery of overpayments ([amendments 133-136](#))
- Ensure individuals can appeal decisions as to their liability for overpayments ([amendment 137](#))
- Ensure individuals need to knowingly or dishonestly mislead or fail to notify the agency to be liable for prosecution ([amendments 81-87](#))
- Ensure child benefit is topped up by £5 for all children in Scotland ([amendment 138](#))
- Ensure the Scottish Commission on Social Security, once established, has the opportunity to scrutinise and report to Parliament on all secondary legislation under the Bill ([amendment 145](#))

In addition we urge MSPs to seek further assurances that:

- The principle that "social security is itself a human right" will be grounded in domestic law
- The right to cash assistance is protected as fundamental to Scottish social security

Individual's right to end entitlement (amendment 7, Mark Griffin MSP)

1. CPAG urges MSPs to support amendment 7 which would ensure that there is an unqualified right for an individual to choose to end their ongoing entitlement to assistance. This would enable an individual to withdraw their claim at any point, even after they have received an award.
2. The amendment would address circumstances in which a person might want to stop getting assistance even though they are still entitled to it. This may happen, for example, when a person or couple has a choice between two benefits but can only receive one of them; or a couple has a choice about which of them makes the claim.

For example, Eva and Finn both care for their disabled child. Finn gets carer's assistance. Finn also has a health condition. They get universal credit. In universal credit, there are extra amounts for someone who gets a carer's benefit and for someone who has a health condition, but not both unless these are different people. Finn needs to withdraw his claim for carer's assistance so that Eva can claim it. If they can't do this, they will be over £150 a month worse off because their universal credit won't include a carer's element.

3. Given one of the proposed principles underpinning the Bill is that the social security system should contribute to tackling poverty we believe this issue should be addressed at stage 3.

Decisions in writing (amendments 8, 9 & 10, Mark Griffin MSP)

4. CPAG urges MSPs to support amendment 8, 9 and 10 which ensure that individuals are given **notice of decisions about their entitlement** (including initial determinations, redeterminations and notice that a redetermination has not been made timeously) **in a way that "leaves the individual with a record of the information" which "the individual can show to or otherwise share with others"**.
5. This amendment eliminates the possibility that individuals could be notified of decisions only over the phone, for example, making it extremely difficult for the individual to query or challenge the nature of the decision at a later date. The amendment would also facilitate access to advice and advocacy, ensuring decisions are in a format that would allow support services to view the content of the relevant notification and take further action where necessary.
6. Ensuring individuals have a record of all relevant decisions that can be shared is also necessary in accessing other 'passported' benefits, where proof of eligibility for an initial benefit is required.

Application for assistance (amendments 56 & 69, Jeane Freeman MSP)

7. CPAG urges MSPs to support the Minister's amendments to ensure that **individuals are informed of a decision that their application for assistance is not valid, and that reasons for that decision are provided.**
8. Vitally, the amendments also give applicants **the right to appeal against a decision that their application for assistance was not valid.** The absence of such a right of appeal in this context has been ruled incompatible with the right to a fair hearing under the Human Rights Act.¹ Without this appeal right on the validity of applications, there is no redress for official mistakes that could cause delay and loss of money for individuals. Even if a subsequent valid application for the same assistance were made there would be no reason to expect that any payment would be backdated to the initial point of application. This amendment will minimise the risk of a gap in payments and ensure people in Scotland continue to have a right to challenge decisions of this kind.

Redetermination and appeal (amendments 124-131, Jackie Baillie MSP)

9. CPAG, along with other members of the Scottish Campaign on Welfare Reform (SCoWR) urge MSPs to **support Amendments 124 -131.** These amendments ensure that where an individual challenges a decision (determination) and the redetermination is the same as the original decision the case will automatically be sent to the First-tier Tribunal. CPAG believe this would better enable people to realise their right to a fair hearing, making it easier for people to proceed to an appeal while also ensuring the agency has an opportunity to undertake internal redetermination.
10. Evidence from the Social Security Advisory Committee² shows the number of appeals went down dramatically when mandatory reconsiderations were introduced in 2013. The exception was housing benefit where mandatory reconsideration has never been introduced. Poor health, fatigue and lack of confidence can mean people find it difficult to 'take on the state' and navigate the system.³
11. The proposed Scottish redetermination and appeals system has features that will advance the right to a fair hearing when compared with mandatory reconsideration (such as a time limit for the agency to undertake the re-determination and provision of a form to facilitate an appeal). However, the approach enabled by amendments 124 to 131 could enable individuals to more easily exercise their right to a fair and impartial tribunal, whilst still leaving individuals with the choice to withdraw their challenge.

¹ R(IS) 6/04 <http://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=1004>

² Graph reproduced from Decision Making and Mandatory Reconsideration, Social Security Advisory Committee July 2016, Data from Tribunal and gender recognition statistics quarterly: January to March 2016 (2016)

³ [Decision Making and Mandatory Reconsideration, Social Security Advisory Committee July 2016](#); D. Cowan and S. Halliday, *The Appeal of Internal Review* (2003); R Thomas, 'Immigration Appeals for Family Visitors Refused Entry Clearance' [2004] P.L. 612, 625-631

Reporting to the Scottish Parliament on exercise of the right to appeal (amendment 132, Pauline McNeil MSP)

12. CPAG welcomes amendment 132 under which Scottish Ministers would have a duty to report annually to the Scottish Parliament on the number of individuals choosing to exercise their right to appeal to the First Tier Tribunal. Ministers would also have a duty to set out in their first annual report how such data would be collected.
13. This provision would improve transparency and provide essential insights into any obstacle to appeal for people with legitimate grievances (such as the existence of a two stage process to access an independent tribunal) so any such obstacle can be addressed. Indeed, the amendment would specifically require Ministers to consider the impact of the processes introduced by the current Bill to determine entitlement. This would ensure that there was ongoing consideration of decision making and appeal procedures, helping to ensure the Scottish social security system complies with the underlying principle of continuous improvement.

Liability for repayment (amendments 133-136, Mark Griffin MSP)

14. There will be occasions when, as result of agency errors, individuals are overpaid assistance. In a rights based system it is important that people have the right to challenge decisions on this, in the same way they are able to challenge other decisions by the agency. CPAG welcomed government amendments at Stage 2 that set out (at section 36A) the circumstances in which individuals have no liability for such overpayments (i.e. where the overpayment is neither their fault nor the kind of error that they could reasonably be expected to have noticed). The amendments mean that in many cases people will not have to repay overpayments that were not their fault.
15. However the test of liability to repay is still too strict - and is stricter than nearly all UK-wide DWP benefits. CPAG, along with other members of the Scottish Campaign on Welfare Reform, therefore urge MSPs to support amendments 133 to 136. These amendments ensure that individuals would only be liable to repay an overpayment resulting from an agency error:
 - where it would be reasonable to expect them as the individual concerned to notice that error (taking account of, for example, the distress they may be under);
 - not where the error is an error of *decision making* by the agency (on the basis that the individual could not be expected to notice such an error).

16. The first of these points would ensure that a person's own situation would be taken into account in deciding whether they were liable for an overpayment. As it stands, a person has to repay overpaid assistance if it is the agency's fault but it is 'the kind of error that *an individual* could reasonably be expected to notice'. In making this judgement, decision makers would consider whether a notional reasonable person looking at the information given to them would have realised that the agency had got the facts wrong. Instead, decision makers should consider whether the individual themselves could have been reasonable expected to notice errors. This would be a better test as it would take account of the person's own situation and not that of a notional person. This is illustrated by the following example:

A carer reports that the person they care for has died. The agency sends out a letter continuing to pay carer's assistance indefinitely. This is an agency error. Some people might notice the error because they would know that you cannot carry on getting carer's assistance for more than 8 weeks after a death. This carer did not notice it because they have been affected so badly by the bereavement that they are unwell and unable to deal with any official correspondence. The carer has continued to rely on the assistance for day to day expenses. They should not be liable to repay the overpayment. (Under the current UK system they would not be liable to repay the overpayment.)

17. The amendments would also ensure that an individual could not be held liable for an overpayment that was not their fault where the overpayment arose as a result of an agency error in the determination of their entitlement (on the basis that an individual could not reasonably be expected to notice such an error). Under the current UK system, s/he would not be liable to repay such an overpayment. This would protect the system but also make the test of liability fairer by ensuring the only consideration for individual liability is whether or not it was the individual's fault, except where the overpayment arose through payment processing or other accidental errors. This is illustrated by the following examples.

A young person is a carer for his mother. The young person starts college in August and informs the agency. The agency sends a notice stopping carer's assistance from September. This is an agency error in determination of entitlement. It should have stopped the assistance from August. The young person did everything that was expected of him. The agency made the error. The young person should not be liable to repay the assistance. (Under the current UK system, he would not be liable to repay the overpayment.)

A person is due to be paid assistance of £200. Through a payment processing error, they are actually paid £2,000. The person is liable to repay because although it is not their fault, it is reasonable to expect them to notice the error. (Under the current UK system, they would be liable to repay the overpayment.)

Liability for overpayments – appeal rights (amendment 137, Jeremy Balfour MSP).

18. CPAG along with other members of the Scottish Campaign on Welfare Reform (SCoWR) urge MSPs to support amendment 137 which creates clear rights to appeal against a decision on an individual's liability to repay an overpayment.
19. The Bill rightly gives individuals the right to challenge decisions made by the new agency through a redetermination and appeals process (sections 23 to 29, and government amendment 69). However, as it stands there is an extremely important gap in people's rights to appeal. Unlike in the current UK system, there are no clear rights to appeal against a decision on whether individuals are liable to repay an overpayment. Amendment 137 ensures that the Bill's redetermination and appeals provisions, as modified, also apply to decisions on liability for recovery of overpayment.
20. It is important that people can appeal whether they are liable for an overpayment as there will be occasions when, as a result of agency errors, individuals are overpaid assistance. In a rights based system it is important that people have the right to challenge decisions on this, in the same way they are able to challenge other decisions by the agency.
21. It is not enough that the Bill already gives a right to appeal the existence of an overpayment as there will be cases where individuals do not disagree that there has been an overpayment. However they may disagree that they have liability to repay that overpayment. People need to be able to appeal not just whether an overpayment exists, but also whether they are liable for it.
22. Furthermore, it is not enough that people may be able to appeal deductions from ongoing assistance as in many cases people will have no ongoing assistance from which an overpayment debt can be deducted. This may even be the most common situation.
23. Requiring people to challenge their liability through a debt recovery process would create needless anxiety for people and is inconsistent with an approach of dignity and respect. Given that the Bill creates a process of redetermination and appeal to the First-tier Tribunal then that must be the right route to challenge social security decisions, including decisions on liability for overpayments, as it is now.
24. It should be noted that manuscript amendments 146 and 147 are technical amendments giving powers to Ministers to transfer 'some or all of the competence and jurisdiction' that the civil courts have in relation to recovery. They do not in themselves create any right or mechanism for individuals to appeal liability through the redeterminations and appeals process and should not be seen as a substitute for appeal rights through amendment 137.

Offences (amendments 81-87, Pauline McNeill MSP)

25. CPAG along with other members of the Scottish Campaign on Welfare Reform (SCoWR), urge MSPs to support amendments 81 to 87 which would ensure that a person would not be committing an offence unless they *knowingly* (dishonestly) provided false information to the agency or *knowingly* failed to provide information about a change of their circumstances which resulted in them obtaining assistance.

26. As it stands, the Bill does not specify that people would need to ‘knowingly’ or dishonestly mislead the agency to be liable for prosecution. Furthermore, it does not exclude from prosecution those who give false information without knowing it to be false or have no knowledge that a change they have failed to report would affect their assistance. **In the current UK system it would not be an offence if a person does not actually know that a change might affect their benefit, or that information they have given is false.** If someone unintentionally provides the wrong information or fails to provide an update without actually knowing the effect on entitlement, they should not be prosecuted for doing so.
27. We recognise the government intention is not to criminalise genuine error by individual applicants, but as drafted the Bill leaves individuals at risk of criminal prosecution even if there was no intention to mislead.

Top-up child benefit (Mark Griffin, 138, supported by Elaine Smith and Alison Johnstone)

28. CPAG urges MSPs to support amendment 128 lodged by Mark Griffin and supported by Elaine Smith and Allison Johnstone which provides for a child benefit supplement within the Bill.
29. CPAG warmly welcomes the Scottish Government’s commitment to introduce an income supplement for low income families by 2022⁴. However with child poverty rising there is no time to lose. As members of the Give Me Five campaign⁵, CPAG strongly support the use of top up powers by the Scottish Government as an immediate way of boosting family incomes, lifting 30, 000 children out of poverty⁶ and protecting many more from hardship.
30. This amendment would ensure that all families across Scotland in receipt of child benefit would see a £5 increase for every child, providing a significant boost to family incomes and contributing towards the Scottish Government’s commitment toward the eradication of poverty in 2030.
31. CPAG urges the UK government to end the benefit freeze, and lift the benefit cap, but the Scottish Government must use the powers at its disposal now. A relentless focus on boosting family incomes and reducing the costs families face is needed if progress toward eradicating child poverty is to be made.

Scrutiny of regulations (amendment 145 Pauline McNeil MSP)

32. CPAG along with other members of the Scottish Campaign on Welfare Reform (SCoWR) urge MSPs to support amendment 145 which would ensure the Scottish Commission on

⁴ Every Child, Every chance, the Tackling Child Poverty Delivery Plan, <http://www.gov.scot/Resource/0053/00533606.pdf>

⁵ The Give Me Five campaign is a coalition of faith groups, children’s charities, anti-poverty groups and is supported by the Children and Young People’s Commissioner. <http://www.cpag.org.uk/content/give-me-five-child-benefit-top-campaign>

⁶ <http://jonathanbradshaw.blogspot.co.uk/2017/10/analysis-of-impact-of-increases-to.html>

Social Security, once established, has the opportunity to scrutinise and report to parliament on all secondary legislation under the Bill.

33. As Parliament is aware, the Bill establishes the framework within which devolved social security will be delivered. However, many important details, for example on eligibility, amounts, applications, assessment and decision making will be set out in secondary legislation. It is vital that these regulations are given adequate independent expert as well as parliamentary scrutiny.
34. However, as the Bill stands, there are important regulations (for example on applications, decision making and fraud⁷) that will not need to be referred to the new Commission. These kinds of regulations have real impacts on people's incomes and experience of the system.
35. The amendment places a duty on Scottish Ministers to refer proposals for regulations that are not already covered by section 55A to the newly established Scottish Commission on Social Security. The Commission would then have an *opportunity* to prepare a report on the proposed regulation, drawing on its knowledge of the formulation, implementation and evaluation of social security policy. If a report is prepared, the Commission would then have a duty to submit a copy of it to the Scottish Parliament to inform their scrutiny. Scottish Ministers would also be obliged to lay their response to the Commission's report before Parliament.
36. Such a procedure would allow for expert, independent scrutiny of often complex secondary legislation which has the potential to impact individual rights, entitlements and experience of the Scottish social security system. The Commission's discretion as to whether a report was necessary will ensure scrutiny is provided in a proportionate way, without encroaching unnecessarily on the Scottish Parliament's time or the time and resources of the Commission.
37. This amendment would not affect section 55A of the Bill, under which the Commission has a *duty* to lay reports before parliament in relation to regulations on the scope and nature of new Scottish benefits and the use of top-up powers.

Other key issues

38. In addition to the above amendments CPAG along with other members of SCoWR urge MSPs to seek assurance from the Scottish Government on the following key issues:

Ensure that the principle that "social security is itself a human right" is grounded in domestic law

39. We believe the principle that 'social security is itself a human right' (Section 1) would have been strengthened by a requirement for the Bill's provisions to have 'due regard' to international human rights frameworks. In the absence of amendment to that effect we **urge MSPs to engage with the First Minister's Advisory Group on Human Rights Leadership** to ask whether it will, as part of its wider remit, **specifically consider how best to give practical effect to the principle that social security is itself a human right**. In particular we urge that the Human Right Leadership group **ensures that 'consideration of the potential effects of incorporating international human rights treaties into domestic law'** (as set out in the group's remit) **explicitly includes consideration of Scottish social security law**.

⁷ See page 2 of SPICe briefing at http://www.parliament.scot/S5_Social_Security/Meeting%20Papers/PublicPapers_20180125.pdf SC/S5/18/2/2

Ensure the right to cash assistance is protected as fundamental to Scottish social security

40. CPAG and SCoWR members welcomed Scottish Government amendments at Stage 2 ensuring that cash will always be offered as a choice and that individuals can change their mind on that choice at any time.

41. However, we believe that the right to assistance in the form of cash must be fundamental to the Scottish social security system. We therefore urge Parliament to seek assurance from Ministers that this right is guaranteed and that:

- If there are any in-kind alternatives to cash, these should only be in a limited number of carefully defined circumstances.
- In-kind assistance will never be the only option for any type of assistance.
- People who make no positive choice keep their right to a cash payment.

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