

**Scottish Campaign on Welfare Reform (SCoWR)  
Social Security (Scotland) Bill  
Stage 3 Debate Briefing: 25<sup>th</sup> April 2018**

**About SCoWR**

The Scottish Campaign on Welfare Reform (SCoWR) is a broad coalition of voluntary sector organisations, trade unions, faith groups and others established in 2006 out of a shared concern about the direction of 'welfare reform'. Members have developed a shared vision for a new approach to social security. These are set out in the five principles of the SCoWR [Manifesto for Change](#) and in a Holyrood [supplement](#) to the Manifesto setting out priorities for the use of the new powers devolved by the Scotland Act 2016. **SCoWR members welcome the extent that our manifesto principles are reflected in the principles underpinning Scottish social security.**

SCoWR members have welcomed the opportunity to engage with parliamentarians and government as the Bill has progressed, and the significant improvements that have been made to the Bill as a result. These have addressed many of the issues raised by SCoWR when the Bill was introduced, including the need for independent expert scrutiny of subordinate legislation, a super-affirmative approach to regulations, a statutory requirement for annual uprating of benefits, recognition of the importance of independent advice and advocacy, a test of liability for recovery of overpayments and greater protection of the right to assistance in cash. However SCoWR members believe **there are still areas of the Bill that need 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 to provide assurance that the principles set out for Scottish social security are put into practice.

**Summary**

SCoWR members collectively **urge MSPs to support amendments:**

- 81-87 (offences)
- 124-131 (re-determinations and appeals)
- 133-136 (exclusion from overpayment liability)
- 137 (right of re-determination and appeal on liability for recovery of overpayment)
- 145 (scope of regulations under scrutiny of the new Commission)

**Key issues members seek further assurance on are:** that there will be further consideration given to ensuring the principle that social security is a human right is explicitly recognised in law; that the welcome recognition of the right to advocacy acts as a stepping stone toward access to advocacy for all that need it; and finally that the right to cash assistance will be protected as fundamental to Scottish social security.

## 1.0 Offences

### Amendments 81 – 87 (in the name of Pauline McNeil MSP)

1.1 Members believe the Bill must be amended to ensure the government's policy intent not to criminalise genuine error is reflected in statute. The Bill, even as amended at Stage 2, means that if a person does not report a change in their circumstances as required, this might be considered as an offence *even if this resulted from wholly innocent reasons*. Amendments 81-87 would ensure that individuals would only be at risk of prosecution if they 'knowingly' act in a way to obtain assistance they are not entitled to.

1.2 SCoWR members believe there must be no risk of prosecution unless there is dishonest intent. We do not understand the suggestion at Stage 2 that the use of "knowingly" will make it "virtually impossible to prosecute" in cases where there have been dishonest attempts to obtain assistance. Our understanding is that under the current Social Security Administration Act 1992 people are regularly prosecuted having been found to knowingly (dishonestly) make false statements or fail to report change in circumstances. We believe the same approach should be applied in respect to devolved social security. The amendments would ensure that the Bill protects innocent claimants from risk of criminalisation at the same time as allowing prosecution in cases of genuine fraud. **SCoWR members therefore urge MSPs to back amendment 81-87.**

## 2.0 Redeterminations and appeals

### Amendments 124-131 (in the name of Jackie Baillie MSP)

2.1 SCoWR members believe the process for redeterminations and appeals should make it as easy as possible for people to choose to proceed to independent appeal if they challenge a decision, whilst still ensuring the new social security agency has an opportunity to undertake internal redetermination. Members welcome the Bill's provisions for the redetermination period to be time-limited, and further welcomed Scottish Government amendments at Stage 2 that make the second application, for an independent appeal, easier to manage (by having the agency send an appeal form with the redetermination notice for people to return).

2.2 However many SCoWR members continue to be concerned claimants will still need to make a second application if the agency redetermination has not led to a successful outcome for them. This concern is based on members' experience of the current two stage process introduced by the UK government ('mandatory reconsideration'), and the extent to which the need for a second application to reach independent appeal has led to a significant drop off in the numbers of people proceeding to appeals.

2.3 **Many members therefore urge the Committee to support Amendments 124-131**, in the name of Jackie Baillie MSP. 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. Members believe this would better enable people to realise their right to a fair

hearing in lines with the SCoWR manifesto principles that 'human rights and dignity should be the cornerstone of social security' and that 'the system should be radically simplified.'

### **3.0 Recovery of an overpayment**

#### **Amendments 133-136: exclusion from overpayment liability**

#### **Amendment 137: a right of redetermination and appeal on liability for recovery of an overpayment**

3.1 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. Members of SCoWR welcomed government amendments at Stage 2 that set out (at s36A) 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.

3.2 However members are concerned that the **test of liability to repay is too strict** - and is stricter than nearly all UK-wide DWP benefits. SCoWR members therefore **urge MSPs to support amendments 133-136**. 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 the individual concerned to notice the 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. 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.

SCoWR members are also concerned that as the Bill stands **people have no right to appeal liability for recovery of an overpayment (a right they have currently)**. This runs counter to the SCoWR principle that 'human rights and dignity should be the cornerstone of social security', as well as the principles laid out in the Bill.

3.3 Members **strongly urge MSPs to support amendment 137** in the name of Jeremy Balfour MSP. Whilst the Bill may already provide a right to challenge the *existence* of an overpayment, it does not allow individuals to challenge their *liability* for that overpayment at the point that liability is decided under s36A. 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. **Amendment 137 ensures that the Bill's**

**redetermination and appeals provisions, as modified, also apply to decisions on liability for recovery of an overpayment.** Without amendment 137, there is an extremely important gap in people's appeal rights.

#### **4.0 On the scope of regulations under scrutiny of the new Commission:**

##### **Amendment 145 (in the name of Pauline McNeil MSP)**

4.1 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. The Bill's creation of a statutory Scottish Commission on Social Security and commitment to a 'super-affirmative' procedure for scrutiny of specific regulations are strongly welcomed by SCoWR members. The scrutiny framework established by the Bill, as amended at Stage 2, goes some way toward addressing the concerns members have over the extent to which the detail of new benefits will be left to regulations rather than included within primary legislation.

4.2 However there are important regulations (for example on applications, decision making and fraud<sup>1</sup>) that do not, as the Bill stands, need to be referred to the new Commission. These kinds of regulations have real impacts on people's money and experience of the system.

4.3 Amendment 145 establishes a 'light touch' scrutiny process for those regulations that do not require the full super-affirmative procedure. It ensures that there are "no exceptions to Scottish social security regulations that are within scope for scrutiny" once the new Commission is set up and running - as recommended by the Scottish Government's Expert Advisory Group on Disability and Carers Benefits (DACBEAG).<sup>2</sup> **SCoWR members therefore strongly support amendment 145**

#### **5.0 Other key issues**

In addition to the above amendments SCoWR members urge MSPs to seek assurance from the Scottish Government on the following key issues:

##### **5.1 Ensure that the principle that "social security is itself a human right" is grounded in law**

5.1.1 SCoWR members 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 the Human Right Leadership group to **ensure that 'consideration of the potential**

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<sup>1</sup> See page 2 of SPICe briefing at [http://www.parliament.scot/S5\\_Social\\_Security/Meeting%20Papers/PublicPapers\\_20180125.pdf](http://www.parliament.scot/S5_Social_Security/Meeting%20Papers/PublicPapers_20180125.pdf) SC/S5/18/2/2

<sup>2</sup> [http://www.parliament.scot/S5\\_Social\\_Security/Inquiries/Scrutiny\\_Workstream\\_DACBEAG\\_final\\_report.pdf](http://www.parliament.scot/S5_Social_Security/Inquiries/Scrutiny_Workstream_DACBEAG_final_report.pdf) (p5)

**effects of incorporating international human rights treaties into domestic law**<sup>3</sup> (as set out in the group's remit) **explicitly includes consideration of Scottish social security law.**

## **5.2 Ensure that the Bill's right to advocacy provisions are a stepping stone toward independent advocacy for all those that need it**

5.2.1 SCoWR members welcome amendments that have been made to the Bill to recognise a right to independent advocacy. Members call on Parliament to welcome progress that has been made but urge the Scottish Government to continue to work with the third sector to **ensure all those who need independent advocacy can assess it**, in line with the SCoWR manifesto call that government should 'invest in independent advice and advocacy to help claimants to secure their rights'. SCoWR members believe advocacy and advice are distinct but equally important services in supporting people to access the system and exercise their rights to social security.

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

5.3.1 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.

5.3.2 However, SCoWR members believe that the right to assistance in the form of cash must be fundamental to the Scottish social security system. We 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.

**In summary** SCoWR members welcome the extent to which the principles underpinning the new Scottish social security system reflect the principles that we have been promoting through our manifestos and activity since we came together in 2006. Members further welcome the amendments that have been made to the Bill which strengthen the extent to which those principle are reflected in the legislation. However we urge MSPs to support the amendments and raise the issues we highlight above in order to ensure this landmark Bill provides the robust legislative framework needed for a genuinely rights based social security system that treats people with real dignity.

**Members of SCoWR include:** AdvoCard, Child Poverty Action Group in Scotland, Disability Agenda Scotland (DAS), Engender, Health and Social Care Alliance Scotland (the ALLIANCE), HIV Scotland, Inclusion Scotland, NAWRA, One Parent Families Scotland, Oxfam, The Poverty Alliance, Scottish Council for Voluntary Organisations, Scottish Federation of Housing Associations, Scottish Independent Advocacy Alliance, Scottish Refugee Council, Scottish Women's Aid, Shelter Scotland

<sup>3</sup> <https://beta.gov.scot/publications/advisory-group-on-human-rights-leadership-terms-of-reference/>