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## **Social Security Committee Comataidh Tèarainteachd Sòisealta**

# **Stage 1 Report on the Social Security (Scotland) Bill**



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# Social Security Committee

To consider and report on matters relating to social security falling within the responsibility of the Cabinet Secretary for Communities, Social Security and Equalities.



<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/social-security-committee.aspx>



SocialSecurityCommittee@parliament.scot



0131 348 5228

# Committee Membership



**Convener**  
**Clare Adamson**  
Scottish National Party



**Deputy Convener**  
**Pauline McNeill**  
Scottish Labour



**George Adam**  
Scottish National Party



**Jeremy Balfour**  
Scottish Conservative  
and Unionist Party



**Mark Griffin**  
Scottish Labour



**Alison Johnstone**  
Scottish Green Party



**Ben Macpherson**  
Scottish National Party



**Ruth Maguire**  
Scottish National Party



**Adam Tomkins**  
Scottish Conservative  
and Unionist Party

# Executive Summary of Key Conclusions and Recommendations

## *Scottish Government approach*

1. The Social Security (Scotland) Bill is a landmark piece of legislation. It puts in place the new Scottish social security system. Stakeholders have been very complimentary about the Scottish Government's approach to creating this system and its willingness to consult, including the creation of Experience Panels.
2. **Whilst the Committee is supportive of the consultative approach that the Scottish Government has taken to create the new Scottish social security system, of which the Social Security Bill is an important part, it has some concerns in key areas.**

## *Primary v secondary legislation*

3. There have been a number of consistent concerns raised about the Bill, in particular the balance between what is contained in the Bill and what will be in regulations. Many want to see more contained on the face of the Bill, especially the eligibility criteria of the 8 forms of assistance created by the Bill.
4. **The Committee has received considerable evidence suggesting that the balance between what is contained in primary or secondary legislation has not been appropriately struck. It believes that this is an issue that needs to be carefully addressed by the Scottish Government as the bill proceeds.**
5. A number of options have been suggested in evidence to respond to the current balance between what is incorporated in primary and secondary legislation and to ensure proper Parliamentary scrutiny of the entitlements.
  - (a) the eligibility criteria for the 8 forms of assistance should be included in the bill, or
  - (b) the eligibility criteria for the 8 forms of assistance for which policy has been developed should be included in the bill and the remainder included in legislation in due course, and/or
  - (c) the super-affirmative procedure must be used for regulations under the bill
6. **The Committee invites the Scottish Government to reflect on the evidence that suggests that the eligibility criteria for the 8 forms of assistance should be included within primary legislation.**
7. **The Committee believes that, in its current form, the bill does not allow for adequate scrutiny as there is no provision for a super-affirmative procedure for, or independent scrutiny of, regulations produced under it. The Committee requests that the Scottish Government comes forward with further detailed proposals on these matters.**

## *Independent scrutiny*

8. Stakeholders have been universal in proposing the creation of a new body to undertake independent scrutiny of the new system and particularly the regulations for the new benefits - a Scottish Social Security Advisory Council.
9. **The Committee supports the creation of a Scottish Social Security Advisory Committee with a role similar to the UK Social Security Advisory Committee and an initial focus on assessing the draft regulations produced under the Bill.**

#### *Residency*

10. One of the issues that has emerged during the course of scrutiny is the lack of a definition of residency in the Bill - who would be eligible for Scottish benefits - and issues for people who move cross border.
11. **The Committee believes that it is important that a definition of residency is developed - who is eligible for the new Scottish benefits - and that this is included in the bill or regulations.**

#### *Uprating of benefits*

12. There has also been a call from stakeholders for a regular uprating of forms of assistance following the commitment made by the Scottish Government on this for disability benefits.
13. **The majority of the Committee supports the Scottish Government's commitment to uprate disability assistance. The Committee notes that the majority of those who gave evidence on this issue felt that uprating all forms of assistance should be included in the Bill. The majority of the Committee believes that the Bill should include an annual duty on Ministers to have regard to the impact of inflation on the value of assistance.**

#### *Principles*

14. There has been a universal welcome for the inclusion in the Bill of a set of principles on how the Scottish social security system should operate.
15. **The Committee welcomes the innovative inclusion in the Bill of a set of guiding principles , especially that "respect for the dignity of individuals is to be at the heart of the social security system".**
16. However, there is currently confusion on the legal status of the principles contained in the bill which is not helpful and the Committee believes that their status must be clarified.
17. **The Committee recommends that the Scottish Government clarify the legal status of the principles contained in the bill and where appropriate amends the bill to achieve this clarity.**

#### *Right to advocacy*

18. **The Committee supports the addition of a principle to the bill to state that individuals will have the right to independent advocacy under and with regard to the Scottish social security system.**

### *Eradication of poverty*

19. **The Committee also supports the inclusion of an additional principle in the Bill that 'Social security has a role to play in the eradication of poverty in Scotland'.**

### *Duty to give individuals what they are eligible for*

20. **In addition, the fourth principle that gives Scottish Ministers a role in ensuring that individuals are given what they are eligible to be given under the Scottish social security system should be amended to give them a duty to do so.**

### *The Charter*

21. There has been a broad welcome for the concept of a Charter for social security to govern the way the system operates in practice, but concern about how to challenge if the system does not match up to the charter.
22. **The Committee believes that there is an important role for a charter to set out in clear language what claimants can expect from the Scottish social security system and this is a welcome initiative by the Scottish Government.**

### *Redress*

23. **However, the Committee believes that there is a need for a robust mechanism for redress for individuals if they feel their treatment has not been compatible with the Charter. It believes that there is doubt currently over the legal status of the charter and therefore what this process for redress would be. It recommends that the Scottish Government clarify what this process will be and where appropriate amends the bill accordingly.**

### *Types of assistance*

24. The Committee recognises that this is a framework bill. As the bill stands, the detail for each form of assistance, including eligibility criteria, will be brought forward in regulations. Much of the evidence received related to substantive questions on the types of assistance. With the exception of short-term assistance, the Committee does not feel able, at this stage, to make recommendations on the substance of the specific forms of assistance. The evidence received is summarised in an annex to this report and we invite the Scottish Government to reflect on it. There are a number of issues considered in the annex that the Committee anticipates will be returned to at stage 2, for example the definition of terminal illness.
25. **The Committee recommends that the Scottish Government confirms whether, and if so when, illustrative regulations will be available for each of the forms of assistance. The Scottish Government is also asked to confirm when it plans to consult on draft regulations for each of the forms of assistance.**
26. **The Committee welcomes the Minister's reassurance that an individual will always have the choice of whether or not to receive assistance in a form other than cash and that cash will be the default. We welcome the Minister's commitment to bring forward amendments at stage 2 to make that clear in this bill.**

*New benefits*

27. The Minister explained why the Bill does not make any provision to create new benefits beyond what is covered by the forms of assistance as detailed. She told the Committee it would not be consistent with principles of good scrutiny to include a power without setting out what the new benefits might be. This could result in a new benefit being created by subordinate legislation.
28. **The Committee notes the Scottish Government's position. The Committee asks the Scottish Government to confirm that the social security principles and charter will apply to any provision in primary legislation to create a new benefit as they do to the forms of assistance set out in this bill.**

*Short-term assistance*

29. The Committee welcomes the clarification from the Minister that short-term assistance will ensure that the level of financial assistance will be retained until any process of appeal has been concluded.
30. **The Committee seeks clarification from the Scottish Government on whether short-term assistance will be repayable.**
31. **As the Scottish Government has made clear its policy intention on short-term assistance, it should amend the bill to reflect this; that the level of assistance will be maintained during any time an individual is challenging a decision to reduce or stop that assistance. The Scottish Government is asked to clarify, and set out in the bill whether, and if so in what circumstances, short-term assistance will be repayable.**

*Determinations, re-determinations and appeals*

32. **The Committee notes the evidence calling for the Bill to include a timescale for making a determination and asks the Scottish Government to respond.**
33. **The Committee is of the view that where a request is made by the agency for further information and it is not received, a determination should be made on the available evidence.**
34. **The Committee agrees that regulations should set a time limit within which the agency is required to complete the re-determination process.**
35. **The Committee acknowledges concerns about the two-stage appeal process and asks the Scottish Government what further assurances it can provide that this will not create barriers for those wishing to challenge a decision. Whilst acknowledging the concerns, the Committee accepts that the agency should have an opportunity to correct any mistake, before a case proceeds to an appeal. The Committee notes that re-determination means an application will be looked at afresh. A majority of the Committee agrees with the Minister that it should then be for an individual to decide whether to continue with a challenge to the First-Tier Tribunal.**

*Recovery of assistance given in error*

36. **The Committee welcomes the stated intention that overpayments resulting from official error will not normally be pursued, except in exceptional circumstances. The Committee draws the Scottish Government's attention to the evidence received on this point and asks it to consider whether the bill adequately reflects this policy.**

*Offences and investigations*

37. The Bill creates new criminal offences in the areas of giving false or misleading information to try to get a devolved benefit and failing to notify, or causing someone else to fail to notify, a change of circumstance.
38. **The Committee supports calls for the bill to be clarified to ensure that genuine errors or misunderstandings will not result in someone being criminalised. It is the Committee's view that the bill does not reflect the Scottish Government's stated policy intention.**

*Carer's allowance*

39. **The Committee welcomes the Scottish Government's commitment to increase carer's allowance.**

*Discretionary housing payments*

40. **The Committee invites the Scottish Government to reflect on the evidence received about discretionary housing payments.**

*Financial memorandum*

41. **The Scottish Government is requested to provide further detail on arrangements it is putting in place to manage the new budgetary risks in its response to this report.**
42. **The Scottish Government is requested to provide further detail on the potential costs associated with the Charter in its response to this report.**
43. **The Scottish Government is requested to provide a further breakdown of the £190 million figure and further detail on the system specification for Wave 1 benefits in its response to this report.**
44. **The Scottish Government is requested to outline its view of the anticipated wider impact of spend on social security benefits in its response to this report.**
45. **The Scottish Government is requested to outline when and how Parliament will have the opportunity to scrutinise the costs associated with the Bill in its response to this report.**
46. **The Scottish Government is requested to report to the Committee on ICT implementation on a 6 monthly basis.**

*Overall conclusion*

47. **The Committee supports the general principles of the Bill.**

# Introduction

48. This report is on the general principles of the Bill and whether to agree to them.
49. Clare Adamson MSP replaced Sandra White MSP on 16 November 2017 and Jeremy Balfour MSP replaced Gordon Lindhurst MSP on 27 June 2017.

## About the Bill

50. The Social Security (Scotland) Bill (the Bill) was introduced to the Scottish Parliament by the Cabinet Secretary for Communities, Social Security and Equalities (the Cabinet Secretary) on 20 June 2017. The long title of the Bill states its purpose is to make “provision about social security”.
51. This Bill stems from the changes to the devolution settlement following the Smith Commission made by the Scotland Act 2016. The 2016 Act granted legislative competence to the Scottish Parliament in respect of various benefits. These include disability, industrial injuries and carer’s benefits, benefits for maternity, funeral and heating expenses and discretionary housing payments. Among other things, it also enabled the Scottish Parliament to top-up benefits reserved to Westminster and allowed for the creation of new benefits in certain circumstances.
52. The Bill is divided into five Parts. There are seven schedules to the Bill. A summary of each Part and the schedules is set out below:
  - Part 1 establishes the “Scottish social security principles”. The principles are to be reflected in the “Scottish social security charter”. The Scottish Ministers are required to lay an annual report on the performance of the Scottish social security system at the end of each financial year.
  - Part 2 requires the Scottish Ministers to provide assistance to individuals who are entitled to it. It sets out eight types of assistance that are to be created and provides regulation-making powers prescribing rules on eligibility and what assistance is to be given. The types of assistance relate to carers, cold-spell heating, winter heating, disability, early years, employment injury, funeral expenses and short-term assistance. Part 2 also makes provision in relation to applications for assistance, determinations of entitlement and appeals. In addition, it provides for the recovery of assistance given in error and various offences.
  - Part 3 grants the Scottish Ministers powers to provide for the top-up of benefits reserved to the UK Parliament. It includes various restrictions on the power, such as that financial assistance cannot be given for housing costs. Part 3 also provides for a supplement to be paid to individuals in receipt of UK Carer's Allowance.
  - Part 4 allows local authorities to make payments to individuals to assist with housing costs. Various restrictions on this power are provided for, such as that financial assistance may not be given by way of a loan. Local authorities are required to provide information on their rules for assistance and must have regard to any guidance issued by the Scottish Ministers.

- Part 5 contains the technical matters that are usually set out at the end of a Bill.
- Each of schedules 1 to 7 of the Bill is connected to one of the seven new types of assistance introduced in sections 11 to 17. Each schedule sets out further details as to what the regulations for each type of assistance “may”, “must” and “may not” provide for.

## **Scrutiny by the Social Security Committee**

53. The Social Security Committee is the lead Committee scrutinising this Bill in the Scottish Parliament. We have sought the views of a wide range of people.
54. We issued a call for evidence in July and August 2017 and received 119 written submissions. <sup>1</sup>
55. These submissions were from people with experience of being on benefits, charities, campaigning organisations, housing associations, local authorities, professional bodies, academics, carers, volunteering networks, unions, advice services, advocacy services, foodbanks and churches.
56. The Committee heard oral evidence between 7 September and 2 November 2017. We heard from 32 people; both individuals with lived experience and organisations representing different groups. We also heard from academic experts and professional bodies.
57. In addition, we met with people at workshops and informal meetings to hear about their experiences and their opinion of the Bill.
58. We ran a workshop called ‘Your Say’ to hear from people with experience of applying for and being on benefits on 24 August 2017. Participants gave the Committee valuable insights into how the social security system works in practice. 3 people from the group went on to give oral evidence to the Committee on 7 September 2017.
59. Members of the Committee also met informally with organisations in Glasgow, Perth and Edinburgh. In Glasgow, we met with disabled people at an event organised by Inclusion Scotland on 16 August 2017. In Perth, we heard from carers at an event organised by Coalition of Carers in Scotland on 30 August 2017. In Edinburgh, we spoke to Chinese and South Asian carers at events organised by MECOPP on 29 and 31 August 2017.
60. The Committee is extremely grateful to everyone who submitted evidence or took time to meet with us formally and informally.

# Scottish Government Approach

61. The Social Security (Scotland) Bill is a landmark piece of legislation. It puts in place the new Scottish social security system. Stakeholders have been very complimentary about the Scottish Government's overall approach to creating this system and its willingness to consult, and the creation of Experience Panels.
62. The Child Poverty Action Group (CPAG) for instance in its written submission outlined its view-
  - ” 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.<sup>2</sup>
63. Inclusion Scotland, in its written evidence, expressed similar views-
  - ” Inclusion Scotland also welcomes the Scottish Government's commitment to a human rights based approach to social security. this will mark a clear departure from UK policies of recent years that have focussed on the affordability of benefits over the ability of benefit recipients to maintain a decent standard of living which enables them to meet basic costs (e.g. food, fuel, housing) and participate fully in society.<sup>3</sup>
64. The Scottish Government has carried out significant consultation on the shape of the new Scottish social security system.<sup>4</sup>
65. A consultation on social security in Scotland ran from 29 July to 30 October 2016. The consultation received 521 responses and a full analysis was published by the Government.
66. The consultation was accompanied by a wide range of events to seek views - at least one in every local authority.
67. Stakeholder reference groups have been set up to inform and advise Ministers on each of the devolved benefits and on the operation of the Scottish Social Security Agency. The groups include stakeholder organisations with expertise on the topic.
68. Experience panels, set up by the Scottish Government in Spring 2017, should allow people with direct personal experience of the current benefits system to help to decide how benefits are delivered in Scotland's new social security system. Over 2400 volunteers from across Scotland have signed up to be part of the experience panels, which will run for four years.
69. In September the Minister for Social Security, Jeane Freeman MSP, made a statement in Parliament on the establishment of the social security agency.<sup>1</sup>

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<sup>1</sup> <https://beta.gov.scot/publications/delivering-social-security-for-scotlands-people-ministerial-statement/>

70. She confirmed that the Scottish Social Security Agency will be headquartered in Dundee, with a second major site in Glasgow. These central functions will support a locally based agency presence across Scotland. The first benefits will be delivered by summer 2019 and these will be Carer's Allowance, Best Start Grant and Funeral Expenses Assistance. She committed to all the devolved benefits being on-stream by the end of this Parliamentary session.

71. Whilst the Committee is supportive of the consultative approach that the Scottish Government has taken to create the new Scottish social security system, of which the Social Security Bill is an important part, it has some concerns in key areas.

# Issues not Included in the Bill

## Primary v Secondary Legislation

72. There have been a number of consistent concerns about the Bill, in particular the balance between what is contained in the Bill and what will be in regulations. Many stakeholders want to see more contained on the face of the Bill, especially the baseline entitlements or purposes of the 8 forms of assistance created by the Bill.

73. Twice as many (38) of the written responses received by the Committee by the deadline, argued that more detail on the devolved benefits should be included on the face of the Bill than agreed with the Scottish Government's intended approach of leaving this to secondary legislation (19). Most responses agreed about the difference that more detail in the Bill would make (whichever approach they preferred). For example, One Parent Families Scotland (OPFS), who wanted more detail in the Bill, argued that this would—

” ensure that the legislation is future-proofed so that forthcoming governments can be held to account over any planned changes.<sup>5</sup>

74. The MS Society set out the argument more fully—

” The MS Society has concerns about the approach being adopted. The approach is understandable, as from the Scottish Government's perspective it makes it easier to create flexibility and adapt rules depending on how the system develops. However, it raises significant and legitimate concerns about scrutiny and accountability.

The Policy Memorandum accompanying the Bill states “taking this approach should improve Parliament's ability to scrutinise executive action” this seems entirely counter intuitive. In leaving the Bill as an enabling framework it means a significantly reduced opportunity for Parliamentary scrutiny of the actions and structures that the legislation will enable. This is concerning. Whilst we don't doubt the commitment of the Scottish Government to create a system which meets the expectations raised by the rhetoric used, we do have concerns that by not placing provisions in primary legislation that this could be eroded over time.<sup>6</sup>

75. Professor Mullen of Glasgow University took a similar line, arguing that Parliamentary scrutiny was the key issue at stake—

” The arrangements for scrutinising delegated legislation set out in the Bill will not provide for an adequate degree of scrutiny either of policy or the technical adequacy of social security legislation and, however valuable clarity in the terms of legislation may be, it cannot outweigh the principle that the Parliament must effectively scrutinise legislation.<sup>7</sup>

76. In contrast, the Law Society was content with the proposed split between primary and secondary legislation—

” The Law Society is broadly content that the Bill should provide the framework of the new system, with the rules for different types of assistance to be set out in regulations, which is the usual convention for such matters. We also note that the regulations will be subject to Parliamentary scrutiny, which is welcomed. We look forward to responding to consultation on the draft regulations in due course.<sup>8</sup>

77. Crohn’s and Colitis UK was also content for the detail to be in regulations and felt that—

” by setting out the detail of the new benefits within subordinate legislation, this will enable amendments or additions to be made to regulations easily and more speedily than changing primary legislation.<sup>9</sup>

78. Age Scotland set out both sides of the argument in its written evidence—

” We accept that this approach is more likely to achieve the Government's stated ambition of greater flexibility and the opportunity for more responsiveness to changes in circumstances. However, we believe this approach overlooks other factors such as consistency, certainty and accountability. We note that regulations made under Chapter 2 of the Bill would be subject to the affirmative resolution procedure (section 55(2)). However, even the affirmative resolution procedure affords far less opportunity for scrutiny and debate in practice than the Parliament's legislative procedure for public bills, especially in relation to the input from interested and informed external organisations. The history of the Parliament and its committees are that even regulations subject to affirmative resolution receive far less examination and are typically approved with minimal deliberation. The opportunity for amendment is also significantly curtailed. We therefore strongly disagree with the assertion in the Policy Memorandum (para. 12) that “the Scottish Government's view is that taking this approach should improve Parliament's ability to scrutinise executive action.”<sup>10</sup>

79. The Delegated Powers and Law Reform (DPLR) Committee examined the issue in some depth in its report on the Bill. The DPLR Committee came to the following conclusion—

” The Committee acknowledges the Scottish Government's suggestion that setting out the rules on eligibility and the assistance to be provided in regulations might allow social security legislation to be more easily understood and more accessible than setting those rules out partly in regulations and partly on the face of the Bill.

The Committee also acknowledges that providing for the detailed rules to be made in regulations may provide an important element of flexibility that is necessary to ensure that social security provision is responsive to the needs of users of the system.

However, while more understandable and accessible rules are important, parliamentary scrutiny may be hampered by the approach taken to the regulation making powers in sections 11 to 17 and such an approach may not provide the stakeholder community with the clarity it is seeking.

The Committee considers that the balance could be better struck in the Bill between the accessibility of the rules and parliamentary scrutiny. In particular, the Committee agrees with Citizens Advice Scotland that not all of the detail must be made in regulations. It also agrees with a number of the respondents to the Social Security Committee that more certainty and clarity in relation to the policy choices to be made is necessary for the stakeholder community.

Accordingly, the Committee calls for a “reasonable level of detail” to be set out on the face of the Bill on eligibility criteria and the assistance to be given. This could allow the Parliament to properly debate the policy options on a line by line basis while ensuring that the rules are clear and that there is an appropriate level of flexibility.<sup>11</sup>

80. The Minister, in her appearance before the Committee, set out her position with reference to paragraph 12 of the delegated powers memorandum, which was published with the Bill—

” “the Scottish Government is live to concerns about the effect of this approach on the opportunity for the Parliament to control the detail around the different types of assistance during the Bill’s passage. The schedules attached to ... sections 11 to 17 are a way of ensuring that ... members will be able to control what may ... be done using the power to make provision about a particular type of assistance. In this way, members will be able to exert just as much control ... as they would if ... the ... rules were set directly on the face of the Bill.”

We have therefore addressed by design the need to strike the right balance between primary and secondary legislation.

Source: Social Security Committee 02 November 2017 [Draft], The Minister for Social Security (Jeane Freeman), contrib. 2<sup>12</sup>

81. The Committee recognises the approach that the Scottish Government has taken and its wish to include the purposes of the 8 forms of assistance and rules on benefit eligibility wholly within regulations. However, the bulk of evidence that the Committee has received has suggested that more needs to be contained within the Bill itself.

82. The Committee has received considerable evidence suggesting that the balance between what is contained in primary or secondary legislation has not been appropriately struck. It believes that this is an issue that needs to be carefully addressed by the Scottish Government as the Bill proceeds.
83. A number of options have been suggested in evidence to respond to the current balance between what is incorporated in primary and secondary legislation and to ensure proper Parliamentary scrutiny of the entitlements:
- (a) the eligibility criteria for the 8 forms of assistance should be included in the Bill, or
  - (b) the eligibility criteria for the 8 forms of assistance for which policy has been developed should be included in the Bill and the remainder included in legislation in due course, and/or
  - (c) the super-affirmative procedure must be used for regulations under the Bill

### Eligibility criteria included in bill

84. The suggestion that the basic eligibility criteria for each benefit covered should be included in the Bill came from a wide range of organisations, including Inclusion Scotland—
- ” Inclusion Scotland appreciates that a balance has to be struck between what is contained in primary legislation and what is perhaps better left to regulations. Nevertheless in the current Bill that balance seems to be weighted in favour of Ministerial power over claimants’ rights. We believe that this could at least be partially resolved by the Schedule relating to disability benefits being amended to set out clear entitlement criteria.<sup>3</sup>
85. This approach was also supported, for instance, by Citizens Advice Scotland (CAS)—
- ” CAS is of the view that more detail around the eligibility and operation of the benefits should be included in the primary legislation.<sup>13</sup>
86. An alternative approach that has been suggested is that the purposes of each benefit be included in the bill. This was proposed by Stephen McAvoy of Enable in oral evidence—
- ” We would like to see some parts of the bill strengthened, particularly in order to make it clear that disability benefits are a cash transfer, non-means-tested benefit that has the specific purpose of covering the costs that arise through disability, and that carers allowance is an earnings-replacement benefit. The bill should set out clearly what the purpose of each benefit is.

Source: Social Security Committee 05 October 2017 [Draft], Steven McAvoy, contrib. 22<sup>14</sup>

87. A version of this proposal was made by the Poverty Alliance, suggesting that where the entitlements for benefits had already been decided by the Scottish Government,

they should be included now, with the rest being incorporated in legislation in due course—

” The Poverty Alliance therefore has some concerns regarding the fact that so much of this system will be established in regulations, rather than primary legislation. We believe that Parliament should have a greater role in establishing the new agency and developing the benefits that it will deliver. The decisions made will affect millions of lives in Scotland and they must therefore be subject to parliamentary scrutiny and debate to ensure that they are right from the start. We want a commitment for a review after three years and a requirement for Ministers to bring forward primary legislation in areas that will initially be covered by regulation, specifically related to entitlement criteria.<sup>15</sup>

88. The Committee invites the Scottish Government to reflect on the evidence that suggests that the eligibility criteria for the 8 forms of assistance should be included within primary legislation.

## Super-affirmative Procedure

89. The issue of utilising a 'super-affirmative' procedure for regulations under the Bill was one examined by the Delegated Powers and Law Reform Committee. It noted that there are a range of 'super affirmative' procedures, but in this context defined them as follows—

” The element common to most “super-affirmative” procedures is a requirement for a pre-scrutiny draft of the regulations to be laid before the Parliament. This would afford the Parliament an initial opportunity to comment on the proposed regulations.

The period for comments could be 40 or 60 days and could be accompanied by a requirement for the Scottish Government to formally consult publicly. The Government could be required to consider any comments made. A final version would then be laid before the Parliament for approval under the affirmative procedure.<sup>16</sup>

90. A 'super affirmative' procedure of this nature would allow considerably more Parliamentary scrutiny of regulations made under the bill and help to compensate for the baseline eligibility criteria for the benefits not being included in the Bill. There could also be a role for independent scrutiny at the draft regulation stage (see Independent Scrutiny below).

91. In reporting to the Social Security Committee, the Delegated Powers and Law Reform Committee took the following approach—

” The Committee considers that it would be premature at this stage to make a full recommendation to the Parliament until it has seen if the Bill is amended at Stage 2. After Stage 2 the Committee would have a clearer picture of the level of detail on the face of the Bill, the content of the schedules and the conclusions stemming from the “short-life” working group led by Dr McCormick.

The Committee therefore limits itself to drawing the Social Security Committee's attention to the availability of a “super-affirmative” procedure.

However, if the Bill remains in its current form the Committee considers that enhanced parliamentary scrutiny would be appropriate.<sup>17</sup>

92. The Social Security Committee welcomes the Delegated Powers and Law Reform Committee's contribution to the discussion on the issue.
93. In her evidence to the Committee, the Minister appeared to accept the case for a super-affirmative procedure for regulations under the Bill—

” We hope to adopt an affirmative approach in the majority of instances, adding elements that might be called super-affirmative—although I am conscious that there is more than one model of that—which will allow members to engage with and scrutinise draft regulations before they are laid. It should also ensure that stakeholder groups are consulted on draft regulations before they are laid.

Source: Social Security Committee 02 November 2017 [Draft], Jeane Freeman, contrib. 4<sup>18</sup>

94. The Committee believes that, in its current form, the Bill does not allow for adequate scrutiny as there is no provision for a super-affirmative procedure for, or independent scrutiny of, regulations produced under it. The Committee requests that the Scottish Government comes forward with further detailed proposals on these matters.

## Independent Scrutiny

95. Although the Committee did not ask a specific question on the issue on independent scrutiny, this was picked up by a many respondents to the written consultation. The Scottish Government has also requested the Committee's views on this issue. The most common specific suggestion in the written evidence was that scrutiny must be independent. By independent scrutiny most respondents appeared to mean expert scrutiny by a body independent of the Scottish Government and Parliament. Thirteen responses argued for a model similar to the Social Security Advisory Committee (SSAC), although other responses also mentioned statutory provisions for scrutiny of regulations without naming the SSAC itself.
96. Nine of the written responses highlighted the importance of involving experience panels explicitly, or those with experience of claiming benefits more widely. However, some of the same submissions argued that expertise in understanding

social security systems from other perspectives was also important. For example, Angus Independent Advocacy's view is that whilst-

” The expert panels that have been established should provide important lived experience ... there is also a need for technical expertise and scrutiny, which we believe a Committee and/or working groups, with the input of welfare rights advisers, academics and lawyers, for instance would provide. <sup>19</sup>

97. Overall, a slightly greater number of submissions (12) mentioned the importance of expert scrutiny than the role of users of the system in developing regulations.

98. The issue also recurred in oral evidence. Rob Gowans from Citizen's Advice Scotland was clear on the organisation's view—

” The bill should also make provision for independent scrutiny or independent scrutiny bodies that can play a similar role to that of the Social Security Advisory Committee at UK level, although there could slight differences in design. For example, it could report to Scottish Parliament committees to aid their scrutiny as well as to help the Scottish Government to design regulations.

Source: Social Security Committee 28 September 2017 [Draft], Rob Gowans, contrib. 84<sup>20</sup>

99. Enable Scotland was also clear in its analysis—

” Finally, we are concerned that the bulk of operational legislation being left to Regulations may lead to a potential lack of scrutiny. With this in mind, we will be suggesting amendments and additions to the Social Security (Scotland) Bill but also suggesting that a Scottish version of the Social Security Advisory Committee is created to independently scrutinise legislation. <sup>21</sup>

100. Professor Grainne McKeever, from the Ulster University Law Clinic was asked, when she gave evidence to the Committee, whether the proposed Scottish Social Security Committee should have a statutory basis—

” Things are always better protected when they are in statute rather than at the whim of a Government, so my instinct is that such a body should be statutory. It would be an arm's-length, independent body whose remit would in some ways be similar to that of the Social Security Advisory Committee; it would have a remit to review how social security works and to review draft legislation. Putting a body in statute protects its independence, because it is not subject to political whim in the same way.

Source: Social Security Committee 14 September 2017, Professor McKeever, contrib. 24<sup>22</sup>

101. She also suggested, in her research for the Equality and Human Rights Commission with Mark Simpson and Anne Marie Gray that the new body have a role in assessing the inter-action between the devolved and reserved social security systems—

” A Scotland-specific expert committee will be required to fill the gap, but leaves unresolved the problem of where an expert, impartial view on the interaction of Scottish and reserved benefits will come from. An early task for any new Scottish committee will be to grapple with this challenge along with the SSAC and the two governments. <sup>23</sup>

102. Professor McKeever provided the Committee with her paper for the [Journal of Social Security Law](#), which sets out some options for this. The Committee draws the Minister's attention to this work.
103. There has therefore been strong support from stakeholders in proposing the creation of a new body to undertake independent scrutiny of the new system and particularly the regulations for the new benefits - a Scottish Social Security Advisory Committee.
104. The Committee believes that scrutiny of the regulations under this Bill will be vitally important and that there is a role for a body, independent of Government and with a statutory basis, to be given this responsibility.
105. The Minister appears to share a similar view on independent scrutiny—
- ” Whatever resolution we come to—collectively, I hope—on that, it is my firm view that, in addition to the Parliament's committees having an important scrutiny role, we will have an independent body that is charged with scrutiny as part of its remit, which ministers should be required to consult in advance of making regulations or changing matters with respect to social security. That is very different from the current position of the Social Security Advisory Committee at the UK level, as there is no obligation or duty on ministers to engage in consultation with it prior to making their decisions.

Source: Social Security Committee 02 November 2017 [Draft], Jeane Freeman, contrib. 4<sup>18</sup>

106. The Committee supports the creation of an independent Scottish Social Security Advisory Committee with a role similar to the UK Social Security Advisory Committee (SSAC) and a statutory basis. The Scottish SSAC should have an initial focus on assessing the draft regulations produced under the Bill and Ministers should be obliged to consult it on them.

The Committee believes that Scottish Social Security Advisory Committee reports and recommendations should be public and that, if it disagrees with them, the Scottish Government must set out an explanation.

## Uprating of benefits

107. Seventeen of the written responses received by the Committee made reference to the Scottish Government's commitment to uprate devolved disability benefits annually. These included: Citizens Advice Scotland; Disability Agenda Scotland; the Church of Scotland's Church and Society Council; Rights Advice Scotland; Nourish Scotland; the Child Poverty Action Group in Scotland; Enable and COSLA.
108. The submission from the Church of Scotland's Church and Society Council was typical—
- ” All benefits should be unfrozen and uprated annually in line with the Consumer Prices Index (CPI).<sup>24</sup>

109. There were a range of views of how uprating should be included in the bill. For example, Glasgow City Council argued that provisions about uprating should be added to the schedules about the types of devolved assistance, whilst Rights Advice Scotland felt that one of the principles should be—
- ” a commitment to increasing the value of benefits annually in line with real costs face by those claiming the benefits.<sup>25</sup>
110. The most common view expressed was that uprating should be provided for in the bill without specifying exactly how and where. A few responses mentioned indexation, with three submissions mentioning Consumer Prices Index, two Retail Price Index, and one a “triple-lock” as an option.
111. COSLA referenced the current provisions in reserved legislation—
- ” The Bill as drafted does not require Scottish Ministers to consider uprating on a yearly basis. This would appear to be a situation which is less than satisfactory given the current legislation requires UK ministers to consider uprating on at least an annual basis.<sup>26</sup>
112. In response to questioning on this issue at Committee, the Minister did not appear to rule out including uprating within the Bill—
- ” I have read that evidence. We will continue to consider what we might do on that. We have made the commitment on uprating disability assistance. We will consider the other areas and what we might do in that respect.

Source: Social Security Committee 02 November 2017 [Draft], Jeane Freeman, contrib. 69<sup>27</sup>

113. The majority of the Committee supports the Scottish Government's commitment to uprate disability assistance. The Committee notes that the majority of those who gave evidence on this issue felt that uprating all forms of assistance should be included in the Bill. The majority of the Committee believes that the Bill should include an annual duty on Ministers to have regard to the impact of inflation on the value of assistance.

## Use of Private Contractors

114. The Scottish Government has made a commitment not to use private sector contractors for disability assessments within the Scottish social security system. A number of stakeholders have called for the Scottish Government's commitment to be included in the Bill and a number have sought a wider ban.
115. Ten written responses to the Committee mentioned the possibility of private sector involvement in assessments. All were supportive of the Scottish Government approach of not wanting to contract with the private sector for disability assessments. A number of these submissions called for provisions on the face of the bill to reflect this.
116. The Poverty Alliance's was a typical view in this respect-

” ...we are extremely disappointed that the bill does not rule out the use of private sector contractors in the delivery of social security in Scotland. This is something that has been highlighted by our activists repeatedly throughout the consultation process on social security, and particularly by those with disabilities. We do not believe using private sector companies is in line with the principles outlined in part 1 of the bill. <sup>15</sup>

117. The inclusion of a ban on the use of private contractors for disability assessments in the bill was also supported by the 'Your Say' group of claimants from whom the Committee took evidence.

118. Some organisations wanted a wider ban. In oral evidence the PCS union was asked whether it was opposed to the use of the private sector in other aspects of wider social security, such as employability programmes—

” Yes. We have spoken about that with the minister and the implementation colleagues who are involved in employability work. For context, I want to be clear that our opposition is not purely ideological; it is based on performance.

Source: Social Security Committee 28 September 2017, David Semple, contrib. 20<sup>28</sup>

119. In her evidence to the Committee, the Minister drew attention to some of the unintended consequences that including a ban on private sector contractors within the Bill might generate—

” We have said very clearly that we will not use the private sector for one-to-one health assessments for disability benefits. I do not want us to get into the situation where putting something like that in the bill means that we are constrained from accepting, for example, supporting evidence for an application that comes from a private sector organisation. Such evidence to support an individual's application may come from any of the private healthcare providers. I do not want us to be in a situation where we exclude the private sector from information technology contracts and so on.

Source: Social Security Committee 02 November 2017 [Draft], Jeane Freeman, contrib. 71<sup>29</sup>

120. The Committee understands this concern.

121. The Committee notes, and the majority supports, the Scottish Government's commitment not to involve private contractors in delivering health assessments for disability benefits. However, the majority believes that to include a formal ban on private sector contractors in the bill may lead to unintended consequences and does not therefore support this proposal.

## Residency and Cross-border Issues

122. One of the issues that has emerged during the course of scrutiny is the lack of a definition of residency in the Bill, i.e. who would be eligible for Scottish benefits, and issues for people who move cross border.

123. The issue was touched upon by COSLA in its oral evidence—

” From a local government perspective, we understand the rationale for much of the nuts and bolts being in the secondary legislation. That said, I agree with David Semple that some things, if they are to be applied consistently across the whole of devolved social security—things such as uprating and residency requirements—should be in the bill, and we were quite surprised that they were not included.

Source: Social Security Committee 28 September 2017 [Draft], Nicola Dickie, contrib. 26<sup>30</sup>

124. Professor Grainne McKeever, from the Ulster University Law Clinic was asked whether residency rules should be included in the bill—

” Ideally, the question would be dealt with in the heart of the bill, because the bill will provide the legal certainty that people will look for when it comes to dignity.

Source: Social Security Committee 14 September 2017, Professor McKeever, contrib. 30<sup>31</sup>

125. The issue of cross-border moves was also covered by Professor McKeever, in her evidence to the Committee-

” We have some experience in Northern Ireland of people moving geographically. Many of the regulations that the Social Security Advisory Committee scrutinises relate to the geography of the GB jurisdiction. The fact that there have to be mirror-image regulations for Northern Ireland means that a shortfall can arise in moving from Northern Ireland to GB. More often than not, that has been managed through an interdepartmental agreement whereby, if someone who has claimed a benefit in GB moves to Northern Ireland, their entitlement to that benefit will be maintained... There are interdepartmental methods of addressing that, which can be straightforward. They are straightforward in the sense that the benefit entitlement—the provision that is made and the criteria for the benefit—will be the same in both jurisdictions.

The situation becomes a bit more complicated when it comes to moving from Aberdeen to Southampton, and I am not sure that I know the answer to your question about how that interaction might work. If someone can receive the same benefits in the two countries, that will be fine, but if we are talking about two different sets of benefits, a protocol will have to be arranged to provide certainty for claimants and protect them if they move. It is probably advisable for that protection to be time limited. In that way, people could move for a short period and then return, or they could move for a short period and decide to stay but have time to make a new application, if that was required because the relevant benefit was a different benefit with different entitlement criteria and a different payment.

Source: Social Security Committee 14 September 2017 [Draft], Professor McKeever, contrib. 28<sup>32</sup>

126. On the issue of residency the Minister informed the Committee—

- ” We are still looking at that, but we are minded to follow the existing DWP approach, which is to operate on the basis of what is called “habitually resident”, a widely recognised term in the common travel area and the European Union. That would be the approach that we are most likely to take. That would be set out in the regulations for each of the benefits.

Source: Social Security Committee 02 November 2017 [Draft], Jeane Freeman, contrib. 57<sup>33</sup>

127. The Committee believes that it is important that a definition of residency is developed - who is eligible for the new Scottish benefits - and that this is included in the Bill or regulations.

128. On the issue of cross-border movements, the Minister informed the Committee—

- ” In terms of moving between different jurisdictions, we are in discussions with our colleagues in the DWP to resolve that so that it can be as simple and straightforward as possible. It is not new—we need to look at how it operates in other subject areas and whether that method is agreeable to the Scottish Government as well as to the DWP and the UK Government in the case of social security.

Source: Social Security Committee 02 November 2017 [Draft], Jeane Freeman, contrib. 57<sup>33</sup>

129. The Committee supports the work that the Minister is undertaking to seek agreement with the UK Government on reciprocal arrangements for people who move across the border.

## Automatic Assessment

130. Several witnesses and written submissions suggested that the new Scottish system could be made more pro-active, with assessments and payments of some benefits being made without application.

131. Enable and NHS Greater Glasgow and Clyde both suggested that there should be further provisions around automatic entitlements, whereby benefits are awarded and paid with no or minimum input from the recipient. NHS Greater Glasgow and Clyde’s written submission noted:

- ” Glasgow City Council has explored automatic payment of benefits and have successfully implemented this approach for school clothing grants by identifying eligible families. There is potential to use this approach for maternity grants and other child and family benefits

[...] Automation of payment may be easier once the child is born if in receipt of child benefit. During pregnancy we should look at whether it might be possible for IT systems in maternity services to interface with social security systems to alert of Automatic notification in pregnancy would also allow online completion of application and obviate need for health professional confirmation of pregnancy.

132. ENABLE Scotland's written submission said:

” [We] see an opportunity to ensure that the principle of automatic entitlement, introduced at s.35, is applied to passported entitlements to create streamline access to all entitlements.

# Part 1 of the Bill- Principles, Charter and Accountability

## The Existing Principles

133. There has been a universal welcome for the inclusion in the Bill of a set of principles on how the Scottish social security system should operate.

134. There is particular support for the third principle, that "respect for the dignity of individuals is to be at the heart of the social security system" and for adopting a human rights approach—

” The MS Society welcomes the focus on dignity and human rights. <sup>6</sup>

135. The Committee arranged a workshop, bringing together the 'Your Say' group of witnesses, all benefit recipients who had given evidence to the Welfare Reform Committee on their experiences. The group was asked to consider its views on the Social Security Bill and report to the Committee. In oral evidence to the Committee, speaking on behalf of the group, Norman Gray reported-

” As a group, we fully support the idea of including the principles in the bill. They should underpin how the new system runs. We particularly support the objective that states that

“respect for the dignity of individuals is ... at the heart of the Scottish social security system”

and that

“social security is ... a human right”.

Source: Social Security Committee 07 September 2017, Norman Gray, contrib. 10<sup>34</sup>

136. The Committee welcomes the innovative inclusion in the Bill of a set of guiding principles, especially that "respect for the dignity of individuals is to be at the heart of the social security system".

## Legal Basis

137. The lack of clarity on the legal status of the principles (and by inference the Charter) was however one of the main issues raised by stakeholders in the written evidence received by the Committee. It was raised by, amongst others: Prof Paul Spicker; Advocard; People First Scotland; the Chartered Institute of Housing; the Patients Advocacy Service; North Lanarkshire Council; HUG Action for Mental Health; Your Voice, Inverclyde Joint Care Forum; the Leonard Cheshire organisation; SAMH; Engender; Commonweal; Parkinson's UK and the RNIB.

138. Prof Tom Mullen set out in his written evidence the range of possible interpretation of the status of the principles—

” I am concerned that the Bill does not make it clear what the legal status or effect of the principles is. There are a number of possibilities including:

(i) The principles are rhetorical statements which have no effect on the rights and obligations of any persons and are not enforceable in any court or tribunal. Therefore, they impose only political and not legal obligations on the Scottish Government (other than the annual reporting requirement imposed by section 6).

(ii) The principles are enforceable by individuals who may claim in relevant court or tribunal proceedings that they have not been complied with, e.g. that the person's human right to social security has been denied or that their dignity has not been respected.

(iii) The principles do not confer rights or impose obligations on persons as such but may (or must) be taken into account by courts and tribunals interpreting the other provisions of social security legislation in cases brought before them.

(iv) The principles impose duties on the Scottish Ministers but they enjoy a very wide discretion in deciding what is required to implement them and a court would question the exercise of that discretion only in exceptional circumstances.

It is difficult to work out the intention behind section 1 of the Bill by reading its terms. It does not directly address the question of legal effects nor does it clearly imply a particular intention as to legal status or effect. Whilst the language used is different from that normally used to create enforceable legal rights and obligations, it would not be safe to conclude that a court would find the principles to be wholly devoid of legal effects.<sup>7</sup>

139. The Equality and Human Rights Commission also had concerns about the legal status of the principles—

” The Commission welcomes the concept of a set of Scottish social security principles and believes their value lies in both re-framing the way social security is viewed in Scottish public life and in underpinning the Scottish social security charter. That said, it should be noted that the principles are not standalone rights, and they cannot be directly enforced by individuals. As such, although they are to be welcomed, they cannot substitute for strong accountability and monitoring mechanisms and they must be clearly reflected in provisions throughout the Bill.<sup>35</sup>

140. In her evidence to the Committee, Professor Grainne McKeever of Ulster University Law Clinic, made reference to the research by Ulster University she had been involved in, commissioned by the Equality and Human Rights Commission. The research, on how to incorporate the right to dignity and respect within the law, sets out the following proposal—

” Primary legislation is therefore the best means of defining and protecting dignity and respect available to the Scottish Parliament. If access to social security and an adequate standard of living are crucial to the protection of dignity, then the incorporation of relevant provisions of human rights law into Scottish law forms a stepping stone towards a system based on dignity and respect. The UK’s Human Rights Act 1998 is the strongest model for protecting these rights. A similar Act could require public authorities to ensure their actions are compatible with and courts to interpret legislation in such a way as to be compatible with social rights provisions unless prevented from doing so by primary legislation. The Scottish Parliament itself would be expected, but not obliged, to ensure legislation complies with the same set of rights.<sup>23</sup>

Recommendation: That the Scottish Government considers incorporating the European Social charter and/or International Covenant on Economic, Social and Cultural Rights into domestic legislation modelled on the Human Rights Act 1998.

141. Professor Mullen in his written submission set out the difficulties that the current lack of clarity could cause—

” If the legal status of the principles is not clarified, citizens and their advisers may be unsure what their rights and the Scottish Government’s obligations under social security legislation are and there may be wasteful litigation to determine their meaning and effect. Also, if the principles are not intended to be legally enforceable, but this is not made clear, the legislation may raise expectations which are not subsequently satisfied, leading to public disillusionment and cynicism.<sup>7</sup>

142. The Committee believes that the current confusion on the legal status of the principles contained in the Bill is not helpful and that their status must be clarified.

143. The Committee recommends that the Scottish Government clarify the legal status of the principles contained in the Bill and where appropriate amends the Bill to achieve this clarity.

## New and Amended Principles

144. Written submissions to the Committee suggested a range of additional principles or the strengthening of the existing ones that the Committee has had to consider.

145. The Scottish Government appears open to some revision and extension of the principles. Its position paper on the social security principles and a rights based approach states—

” The evidence submitted to the Committee contains many thoughtful and worthwhile proposals to adapt or expand on the principles contained in the Bill. The Scottish Government is committed to working with the Committee, stakeholders and those with direct lived experience of social security to consider whether the principles identified through the previous consultation process can be improved in light of these proposals.<sup>36</sup>

146. The Committee is very supportive of the inclusion of a range of principles in the bill. However, it recognises that for these to have meaning they must not be too extended or disparate. It has therefore examined those suggestions for extension or amendment that attracted most support from stakeholders or it feels are particularly significant. It is suggesting a modest extension to the current set.

## Advocacy

147. Around a quarter of written submissions to the Committee referred to the need for a legal right to independent advocacy, including often advice, and as a way of securing a human rights approach. Many of these submissions were from advocacy groups, and the submission by Dumfries and Galloway Advisory Service is representative—

” We believe that social security is a human right and an adequate amount of social security will help people to achieve other rights. We believe the Bill must include a legal right for anyone accessing social security to be able to access independent advocacy.<sup>37</sup>

148. The submission from Advocard, an organization that supports those with mental health issues in the Edinburgh area, was similar—

” Along with basic rights, the Bill makes no provision for the right to access independent advice and advocacy that is vital for the vulnerable claimants reliant on social security. We feel that to leave the legislation, as it stands, is an erosion of human rights work that has been done previously with no protections for vulnerable individuals contained within the legislation.<sup>38</sup>

149. There was support for the inclusion of this principle from a number of other organisations, including North Lanarkshire Council's Corporate Welfare Reform Group—

” We would support the principle of ensuring people receive what they are entitled to, however, this should be strengthened to ensure that people have access to **independent advocacy**.<sup>39</sup>

150. The inclusion of a principle on the right to advocacy was also supported by the 'Your Say' group of claimants from whom the Committee took evidence.

151. In a similar vein, the right to advice was also advocated by a smaller number of organisations as a principle to be incorporated into the Bill. One of these was Citizen's Advice Scotland (CAS) who in their written submission stated—

- ” CAS believes that the Bill should include a duty on Scottish Ministers to make provision for access to free, confidential and independent benefits advice.

40

152. The Minister is aware of the evidence that the Committee has received. In her appearance before the Committee she stated—

- ” Similarly, we heard a great deal during stage 1 evidence about independent advocacy. As Inclusion Scotland has put it, advocacy

“is vital to ensure that the rights of those who cannot properly communicate their needs are upheld”

and

“helps people to access advice and services that they would otherwise be unable to engage with due to communication needs”.

I am grateful to Inclusion Scotland and others for their evidence on the matter—in particular, the clarification that advocacy does not mean

“mediation, giving advice ... or speaking up for someone when they are able to express themselves”.

I am happy to say that we will take steps to address that issue at stage 2.

Source: Social Security Committee 02 November 2017 [Draft], The Minister for Social Security (Jeane Freeman), contrib. 2<sup>12</sup>

153. The Committee shares the Minister's view.

154. The Committee supports the addition of a principle to the Bill to state that individuals will have the right to independent advocacy under and with regard to the Scottish social security system.

155. The Committee recognises that a similar case was made for the inclusion in the Bill of a right to advice and asks the Scottish Government to reflect on this.

## Duty on Scottish Ministers

156. Currently, the fourth principle in the Bill states that 'the Scottish Ministers have a role in ensuring that individuals are given what they are eligible to be given under the Scottish social security system'. A number of groups have suggested that this 'role in ensuring' should be replaced by a 'duty to ensure' on Scottish Ministers. These include: the Coalition for Racial Equality and Rights; the Child Poverty Action Group in Scotland; Enable; Support in Mind Scotland; the Disability Agenda Scotland and Age Scotland.

157. The Minister, when asked about amending the principle in this way, responded—

” Let me start with the last point. I am open to lodging an amendment to make that change. I understand why people want it. For me, the important part of that principle is the phrase

“eligible to be given under the Scottish social security system,”

because that makes clear what we would be responsible for. I think that that is fair enough.

Source: Social Security Committee 02 November 2017 [Draft], Jeane Freeman, contrib. 44<sup>41</sup>

158. The Committee supports the case for the amendment of this principle.

159. The Committee supports the amendment of the fourth principle in the Bill to introduce a duty on Scottish Ministers, rather than a role, to ensure that individuals are given what they are eligible to be given under the Scottish social security system.

## The Eradication of Poverty

160. Five submissions received by the Committee made the case for an additional principle that the social security system should contribute to the reduction of poverty in Scotland. The proposal has been led by the Poverty Alliance, which set out its case—

” For the Poverty Alliance, many of the recommendations we made around which powers should be devolved to Scotland were based on which powers could be effectively used to tackle poverty. We therefore would support adding an extra principle to the effect of the below: “Social security has a role to play in the eradication of poverty in Scotland”.

Social security was designed to be a safety net, but we believe it should go further than this to help lift people out of poverty. In recent years it has done the opposite of what it was designed to do and low levels of benefits have trapped people in poverty. <sup>15</sup>

161. This proposal was supported by, amongst others, the umbrella body the Scottish Campaign on Welfare Reform, and by Social Work Scotland—

” Social Work Scotland supports the call by the Poverty Alliance to add a principle to the effect that social security has a role to play in the eradication of poverty in Scotland. Social Security policy should be aligned to the National Outcomes and associated policies to address child poverty. <sup>42</sup>

162. The issue was not touched upon in the series of position papers published by the Scottish Government, or in the evidence session with the Minister.

163. The Committee supports the inclusion of an additional principle in the Bill that 'Social security has a role to play in the eradication of poverty in Scotland'.

## Other Principles

164. A number of other principles were suggested by stakeholders to be incorporated into the Bill. These included ones on anti-discrimination, transparency and accountability, as well as amending the second principle on human rights to link it to international law.

165. The Committee is supportive of the sentiments behind proposals to include principles on anti-discrimination, transparency and accountability, and to amend the second principle on human rights to link it to international law. However, it believes that they are already largely covered by the existing principles and that the way to make them effective is to develop them within the charter.

## Discrimination

166. A number of bodies have suggested that an anti-discrimination or equality principle should be included in the Bill. These included the Coalition for Racial Equality and Rights, Engender, the Scottish Women's Convention and Scottish Women's Aid. The Coalition for Racial Equality and Rights suggested the following in its written evidence—

” ...we call for the addition for an equality-focused principle such as, “Equality of outcome for groups facing discrimination, inequality, and disadvantage is to be embedded in the Scottish social security system.”<sup>43</sup>

167. Similarly, in its written evidence, Engender suggested that the Scottish Government should—

” Introduce a purpose statement and strengthen existing principles, including adding the principles of equality and non-discrimination on the face of the Bill<sup>44</sup>

168. There was also support for this position from the two groups of ethnic minority carers, Chinese and South Asian, that were organised for the Committee by MECOPP. The report back from the two sessions concluded—

” Both groups also agreed that in the current system, it can be extremely difficult for those who don’t speak English to access information on benefits or speak to officials over the phone. They lack the computer skills to make use of online facilities and are often reliant on support workers and family members to help them.

An additional principle regarding equity of access was therefore suggested i.e. equal access to information, advice, to be able to apply for benefits etc.

It was also suggested that there should be specific help and support made available for non-English speaking communities.

ref

169. The Minister does not appear to be averse to such an additional principle. In her evidence to the Committee she said—

” One of the suggestions that I understand have been made is on equality—ensuring that there is equality of access and treatment. I understand that principle and why people might want that and am open to it being included. I can see no reason why we would not want to do that.

Source: Social Security Committee 02 November 2017 [Draft], Jeane Freeman, contrib. 42<sup>45</sup>

## Transparency and Accessibility

170. A number of respondents felt that the new Scottish social security system should be as transparent and accessible as possible and believed that this should be an important guiding principle. They included the Scottish Council on Deafness, The Church of Scotland’s Church and Society Council, the Scottish Council on Learning Disability, the National Deaf Children’s Society and COSLA. This was also a view expressed by the ‘Your Say’ group of witnesses in oral evidence—

” There should be an additional commitment to providing information to people and making the application process as clear, understandable and transparent as possible. Meeting people’s individual needs should not be an afterthought, and a range of access methods should be available to reach people in the way that works best for them, as the Government has proposed.

Source: Social Security Committee 07 September 2017, Norman Gray, contrib. 10<sup>34</sup>

171. This is an issue that is of great significance to benefit claimants and the Scottish Government’s commitment to facilitate benefit applications through many channels - on-line, paper, telephone, face-to-face - has been broadly welcomed by their representatives. However, it could apply more broadly to the social security system as a whole.

## Human Rights

172. Whether the human rights principle in the Bill should be enhanced was one of the issues raised by stakeholders. They included a number of advocacy organisations

as well as the Scottish Refugee Council, Inclusion Scotland, See me Scotland, the Scottish Council for Learning Disability, the Child Poverty Action Group in Scotland, Parkinson's UK and the Scottish Council for Voluntary Organisation.

173. The Scottish Human Rights Commission welcomed the direction of travel of the Scottish Government, but believed that the Bill must be strengthened to fully reflect a human rights approach to social security. In particular it suggested that the third principle in the bill be amended to link it to international law on human rights as follows—

” Social security, as protected by Article 9 of the International Covenant on Economic, Social and Cultural Rights, is itself a human right and is essential to the realisation of other human rights. <sup>46</sup>

174. In her evidence to the Committee, Professor Grainne McKeever of Ulster University Law Clinic, made reference to the research by Ulster University she had been involved in, commissioned by the Equality and Human Rights Commission, which recommended that the European Social charter and/or International Covenant on Economic, Social and Cultural Rights be incorporated into Scottish legislation (see 'Legal Basis' above).

175. The Minister, in her evidence to Committee, felt that the Scotland Act already covered this issue, but was open to at least making this clearer in the Bill—

” I make the point that, as I have just touched on, the Scotland Act 1998 requires Parliament's legislation to be compatible with the ECHR. The Human Rights Act 1998 makes it unlawful for public authorities in Scotland to act incompatibly with the convention rights. Everything that we do is set in that context...

Our bill and our principles sit very firmly in that landscape. It may be that there is a case for making that clearer. I am not sure that we need to do more than make that clear, although people may come forward with propositions to suggest otherwise.

Source: Social Security Committee 02 November 2017 [Draft], Jeane Freeman, contrib. 42<sup>45</sup>

176. The Committee is supportive of this approach.

## The Charter

177. There has been a broad welcome for the concept of a Charter for social security to govern the way the system operates in practice, but concern about how to challenge if the system does not match up to the Charter.

178. The Committee believes that there is an important role for a Charter to set out in clear language what claimants can expect from the Scottish social security system and this is a welcome initiative by the Scottish Government.

## Redress

179. The issue of what redress would be available if the Charter was not adhered to was by far the main issue raised in regard to it. Of the 83 submissions received by the deadline that included a response to the question on the Charter, almost half (36) raised the issue. Some wanted it to be a legal document, able to be challenged in the courts, but all wanted a clear and effective method of redress.
180. Disability Agenda Scotland was typical in its comments—
- ” One issue with the Bill as drafted is it does not include any reference to recourse in the event that commitments (from the state) are breached. To have real meaning applicants should have an avenue to complain and have legal redress if commitments in the future charter are breached by the social security agency.<sup>47</sup>
181. The issue was also raised, amongst others, by Engender in its submission—
- ” Engender supports the Scottish Government's intention to use the charter to translate the principles of the social security system into a ‘format that can be easily understood’. At this time, however, there are a number of outstanding questions, including:
- What type of document will it be? Will it be legally binding?
- What redress mechanisms, if any, would be in place if and/or when there is a failure to comply with the charter?
- How will the Scottish Government ensure the charter is accessible to all?<sup>44</sup>
182. As the Social Security Agency will be an agency of the Scottish Government, the Scottish Public Services Ombudsman (SPSO) will have a role in handling general complaints against it. In its submission, the SPSO set out the role that it was anticipating in relation to the Agency and the Charter—
- ” We note the Committee is interested in the proposed charter. Our ability to take complaints would include the ability to take complaints about failings to meet the standards in the charter.<sup>48</sup>
183. The Scottish Government is aware of this issue. In its position paper on the social security charter and independent scrutiny it states—

” The Scottish Government is strongly committed to ensuring that meaningful redress is available to individuals where it is felt that that some element of the system is failing to live up to the charter. It has therefore paid close attention to the view, expressed by a number of stakeholders and Committee members, that the charter should be legally enforceable. The Scottish Government recognises the legitimacy of these arguments and accepts they are worthy of careful consideration in line with the rights based approach it is committed to delivering.

That said, there are also a number of potential disadvantages to a legally enforceable charter and it is important that these are also reflected in this conversation. For example, if the charter is to be a legal document there is a risk that it becomes necessary to draft it with legal precision, perhaps detracting from its original purpose as something more accessible than legislation.<sup>49</sup>

184. For this reason the Scottish Government has not yet arrived at a view on the method of redress that individuals would have if their treatment does not live up to the Charter. Its position statement on the charter and independent scrutiny states—

The Scottish Government has yet to arrive at a final position on the best model for achieving meaningful redress, in relation to the charter. Indeed this is likely to be one of the key matters to be considered during the co-design process.

185. The Committee notes this situation and the Scottish Government's rationale and is encouraged that consideration is already being given by the SPSO to its complaints process. However, it believes that a method of redress is so important to the credibility of the Charter overall that the basis for this should be included in the bill.

186. The Committee shares the view of stakeholders that there must be a clear and effective method of redress if the Social Security Agency does not live up to the standards of the charter. The basis of this process should be set out in the bill.

187. The Committee believes that there is a need for a robust mechanism for redress for individuals if they feel their treatment has not been compatible with the Charter. It believes that there is doubt currently over the legal status of the Charter and therefore what this process for redress would be. It recommends that the Scottish Government clarify what this process will be and where appropriate amends the Bill accordingly.

## Accessibility

188. As indicated in Engender's submission (above) there was a strong feeling amongst respondents to the call for views that the charter needs to be widely available and accessible. Twenty-six bodies in total made comments to this effect. They included that it should be available in a range of formats - easy read, audio files, Braille - and written in plain English. Some suggested that the Charter should be on the walls of the agency, GP surgeries, post offices etc.

189. The Royal Blind and Scottish War Blinded commented for instance—

” ...however the Charter needs to be accessible to all, including those with vision impairment and be clear in its language. Also consider the accessibility of the Charter for those with Learning Disabilities.<sup>50</sup>

190. The Scottish Government is alert to this issue. Its position paper on the Charter and independent scrutiny states—

” The Scottish Government's position, going in to the drafting process, is that the charter could: Provide a clear, plain English statement of what people are entitled to expect from the new system.

• 49

191. The Committee supports the view that the Charter should be accessible and widely available.

## Consultation

192. The Committee received considerable written evidence on who should be involved in the development of the Charter. Thirty-four responses referred to this, many listing specific groups. However, the most common call was for the Charter to be a 'co-production' between the Scottish Government and those that will be receiving the benefits covered by the Bill.

193. One Parent Families Scotland argued that the charter should—

” Be framed not only by officials, but by interaction with grassroots staff who will finally implement it and with people with direct experience of the social security system.<sup>5</sup>

194. The Scottish Commission for Learning Disability argued in similar terms—

” It is imperative that the charter is built upon meaningful, active and constructive dialogue and engagement with people who access the social security system including people with learning disabilities. As already mentioned we believe the Scottish Government needs to go beyond consultation to co-produce charter and its contents.<sup>51</sup>

195. Parkinson's UK in Scotland made the more general comment that it—

” ...welcomes the Principle that the system will be “designed with the people of Scotland”, but believes that it would be helpful to strengthen this principle throughout the document to make clear that the expectation is that the system will be co-produced with people who will use it.<sup>52</sup>

196. The Scottish Government has proposed in its position statement on the Charter and independent scrutiny that the charter—

- ” Be developed in close partnership with stakeholders and those with direct lived experience of the system.<sup>49</sup>

197. The Committee welcomes this approach.

## The Annual Report

198. Under the terms of the Social Security Bill, the Scottish Government must lay before Parliament an annual report, outlining the performance of the Scottish social security system and the way in which the expectations set out in the Charter have been met.

199. The Committee is supportive of the creation of an annual reporting procedure to Parliament on the social security system and believes it will contribute to the accountability of the new system.

# Part 2 of the Bill - Giving of Assistance by Scottish Ministers

## Types of assistance

200. Part 2 requires the Scottish Ministers to provide assistance to individuals who are entitled to it. It sets out eight types of assistance that are to be created and provides regulation-making powers prescribing rules on eligibility and what assistance is to be given.
201. Section 55 provides that all regulations for each form of assistance will be subject to the affirmative procedure. The appropriate level of scrutiny for the regulations that will follow for each type of assistance, is discussed earlier in this report.
202. The eight types of assistance are carer's assistance, cold-spell heating assistance, winter heating assistance, disability assistance, early years assistance, employment-injury assistance, funeral expense assistance and short-term assistance. Part 2 also makes provision in relation to applications for assistance, determinations of entitlement and appeals. In addition, it provides for the recovery of assistance given in error and various offences.
203. Schedules **1 to 7** of the Bill are connected to one of the types of assistance introduced in sections 11 to 17 (there is no schedule associated with section 18 (short-term assistance)). Each schedule sets out further details as to what the regulations for each type of assistance “may”, “must” and “may not” provide. It is notable that none of the schedules make mandatory provision about what assistance is to be given.
204. As noted earlier in this report, the Scottish Government's position is that this approach allows the Parliament to have "complete control" to decide what the regulations for each type of assistance "may", "must" or "may not" include by way of the schedules. In its [report](#), the Delegated Powers and Law Reform Committee (DPLR) noted—
- ” it is unusual for Parliament to be invited to insert appropriate controls on the scope of regulation-making powers.<sup>53</sup>
205. Illustrative regulations for the two forms of assistance which will be delivered initially (best start grant and funeral assistance) were made available. The illustrative regulations for funeral assistance were received after the conclusion of our evidence-taking.

206. The Committee recognises that this is a framework bill. As the bill stands, the detail for each form of assistance, including eligibility criteria, will be brought forward in regulations. Much of the evidence received related to substantive questions on the types of assistance. With the exception of short-term assistance, the Committee does not feel able, at this stage, to make recommendations on the substance of the specific forms of assistance. The

evidence received is summarised in an annex to this report and we invite the Scottish Government to reflect on it. There are a number of issues considered in the annex that the Committee anticipates will be returned to at stage 2, for example the definition of terminal illness.

207. The Committee recommends that the Scottish Government confirms whether, and if so when, illustrative regulations will be available for each of the forms of assistance. The Scottish Government is also asked to confirm when it plans to consult on draft regulations for each of the forms of assistance.

## Form of assistance

208. In respect of each of the eight types of assistance, the bill provides that the assistance may or may not take the form of money. This was questioned repeatedly in both our written and oral evidence. For example, Norman Kerr (Scottish Fuel Poverty Action), and Derek Young (Age Concern) both stressed the importance of choice in how assistance would be given. Derek Young explained—

” I do not think that any witness has suggested that there should be anything other than a system in which the potential recipient would have to elect first to receive a non-cash form of support rather than have it foisted upon them, which I do not think is anyone’s intention. That being the case, it would be helpful to have that clarified in the bill.

Source: Social Security Committee 26 October 2017 [Draft], Derek Young, contrib. 101<sup>54</sup>

209. During her evidence, the Minister addressed this point, telling the Committee—

” sections 11 to 17, in which the bill specifies that assistance may or may not be given in the form of money, do not say that the individual should always have a choice of whether or not to receive their assistance in any form other than cash. I believe that our policy memorandum makes it clear that we would wish the individual to have that choice. Indeed, our intention is that individuals should always have that choice, and I will make changes at stage 2 to make that clear.

Source: Social Security Committee 02 November 2017 [Draft], The Minister for Social Security (Jeane Freeman), contrib. 2<sup>12</sup>

210. The Committee welcomes the Minister's reassurance that an individual will always have the choice of whether or not to receive assistance in a form other than cash and that cash will be the default. We welcome the Minister's commitment to bring forward amendments at stage 2 to make that clear in this bill.

## New benefits

211. There is no provision in this bill to create new benefits beyond what is covered by the forms of assistance as detailed. This was mentioned in a number of written submissions most of which suggested it would be helpful for the bill to contain some provision to create new benefits.

212. For example, Bill Scott (Inclusion Scotland) said—

” It is an important power and I would like the Scottish ministers to take it up. There have been instances when people have been deprived of assistance that they should probably have received. I am thinking of kinship carers in particular. There could be another such instance in the future, and having the power in the bill would allow ministers to exercise it.

Source: Social Security Committee 05 October 2017 [Draft], Bill Scott, contrib. 75<sup>55</sup>

213. The Minister explained why the bill does not make such a provision. The Minister said it would not be consistent with principles of good scrutiny to include a power to create new benefits without setting out what the new benefits might be. She explained that inclusion of such a power could result in a new benefit being created by subordinate legislation. The Minister concluded that the bill as drafted means—

” Should the current Government or a future Government propose the creation of a new benefit, it would need to amend primary legislation to do that. Indeed, at stage 2, we will come with just such a proposition to overcome the difficulty that we have encountered with respect to housing benefit for 18 to 21-year-olds.

Source: Social Security Committee 02 November 2017 [Draft], Jeane Freeman, contrib. 36<sup>56</sup>

214. The Committee notes the Scottish Government's position. The Committee asks the Scottish Government to confirm that the social security principles and charter will apply to any provision in primary legislation to create a new benefit as they do to the forms of assistance set out in this bill.

## Short-term assistance

### Purpose of short-term assistance

215. Section 18 provides for short-term assistance. The policy memorandum (para 173) states that the primary aim is protection where an individual's entitlement to ongoing assistance is reduced or stopped. The Scottish Government's intention in providing short-term assistance is to ensure an individual is not discouraged from challenging a determination.

216. The eligibility rules and the specific type of assistance to be given will be set out in regulations. Unlike sections 11 to 17, there is no corresponding schedule setting out the scope of the regulation-making powers.

217. The bill does not indicate whether such assistance will be recovered from the individual if an appeal is eventually lost, as no limit is placed on the further eligibility conditions that may be set out in regulations.
218. The policy memorandum (paragraph 178) indicates that the effect of this assistance will be that an individual's income will not be reduced, although the bill itself does not make this explicit.
219. From the evidence, it is clear there was confusion about the circumstances in which this particular form of assistance would be available and whether it would be repayable.
220. For example, some of the written submissions assumed short-term assistance would be paid for the period *before* determination of a new application, or during the period for challenging a decision to stop or reduce a *reserved* benefit.
221. A number of submissions mentioned the possibility of using short-term assistance in connection with reserved benefits. Professor Spicker argued that this would be legally possible under the powers in the Scotland Act 2016, whilst the Chartered Institute of Housing and One Parent Families Scotland (OPFS) wanted to see short-term assistance extended to claimants of reserved benefits, but were sympathetic to the financial implications of this proposal for the Scottish Government.
222. David Semple (PCS) suggested this provision could be used to mitigate against sanctions and more broadly that the bill should include—

” a commitment to all devolved benefits having a payment pending appeal process, which is a step beyond what the bill includes at the moment.

Source: Social Security Committee 28 September 2017, David Semple (Public and Commercial Services Union), contrib. 4<sup>57</sup>

223. CPAG's written submission was the only one to suggest a completely different approach to short-term assistance. It argued for—
- ” an automatic run-on of carer's 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. <sup>58</sup>
224. The Minister confirmed that the intention is for short-term assistance to maintain the level of financial support. She advised—

” in our system, should the decision that I made in the first instance, which you disagreed with, reduce the financial support that you received, that reduction would not be made until the whole process had been concluded. Therefore, you would retain your original level of financial support until we had concluded the process...

Source: Social Security Committee 02 November 2017 [Draft], Jeane Freeman, contrib. 7<sup>59</sup>

225. The Committee welcomes the clarification from the Minister that short-term assistance will ensure that the level of financial assistance will be retained until any process of appeal has been concluded.

## Whether short-term assistance is repayable

226. The written submissions from NHS Scotland and COSLA both assumed that short-term assistance would have the effect of ensuring existing entitlements continued to be paid until a tribunal had confirmed the removal of the benefit. COSLA suggested clarity around exactly what the proposal would be helpful. NHS Health Scotland said its interpretation was—
- ” benefits being received are not reduced or stopped until appeal processes are exhausted and that no one would have to repay benefits that they receive if they lost the appeal. This should be made clearer in the wording in the Bill.
227. CPAG suggested that some people may be put off challenging a decision by the prospect of having to repay short-term assistance following an unsuccessful appeal, should it be recoverable.
228. Argyll and Bute Council appeared to assume that short-term assistance would not be recoverable. It was concerned at the possibility of creating “an incentive for everyone to challenge all decisions regardless of the merits of their case.”<sup>60</sup>
229. Social Work Scotland and Inverclyde Council were the only respondents to suggest specific circumstances in which short-term assistance *should* be recoverable. Both suggested that this should only happen if fraud was found to have been committed by the applicant.

230. The Committee seeks clarification from the Scottish Government on whether short-term assistance will be repayable.

## DPLR Committee view on scope of power

231. Unlike the other forms of assistance, section 18 does not have a corresponding schedule setting out the scope of the regulation-making powers in relation to eligibility criteria and what assistance is to be given. The DPLR Committee commented that the effect is to confer a very wide regulation-making power on the Scottish Ministers.
232. The DPLR Committee accepted the Scottish Government's position that the power to make regulations in section 18(5) was necessarily broad in order to deal with unexpected situations. The DPLR Committee drew this power to our attention in order to consider how best such broad powers could be subject to an appropriate level of parliamentary scrutiny.

233. The Committee notes the view of the DPLR Committee.

234. As the Scottish Government has made clear its policy intention on short-term assistance, it should amend the bill to reflect this; that the level of assistance will be maintained during any time an individual is challenging a decision to reduce or stop that assistance. The Scottish Government is asked to clarify, and set out in the bill whether, and if so in what circumstances, short-term assistance will be repayable.

## Applications and Determining Entitlement

235. Sections 19 to 35 concern the various stages of the process, following an application, for determining whether or not someone is entitled to assistance, including how to appeal decisions. There may be different forms of application dependent on the form of assistance. Regulations may also enable some forms of assistance to be paid without application, for example cold-spell or winter heating assistance.

236. An application is not treated as having been received, and the process of determination will not start, until an application is made in the required form and is accompanied by the required information.

237. There is nothing further in the bill about the required form of applications or any timescales within which the agency should make a determination. When being notified of a determination, an individual will also be informed about the right to request a re-determination and then the right (under section 27) to appeal to the First-Tier Tribunal, if the request for re-determination is unsuccessful, or not dealt with within the period allowed.

238. The policy memorandum says—

” The development of detailed operational procedures and systems that will support the application, determination and notification processes are ongoing. The Scottish Government also expects to involve stakeholders - such as those who have enlisted to take part in Experience Panels, the members of its Disability and Carer's Benefits Expert Working Group and the members of other advisory groups...<sup>61</sup>

239. Both Morna Simkins (MS Society) and Craig Smith (SAMH) mentioned that the bill does not set a timescale within which the agency must make a determination. The latter told the Committee—

” Although we are very positive about the approach that the Scottish Government is taking, we are concerned about future proofing, and that is why we would like to see a wee bit more in the primary legislation, including things such as timescales for awards. We welcome the fact that there is a timescale for redeterminations in the bill, but we think that that approach should be expanded to include other aspects of the system.

Source: Social Security Committee 05 October 2017, Craig Smith, contrib. 104<sup>62</sup>

240. John Dickie pointed out that in the current system, there can be disputes about whether an application has been made validly. He said—

” Without any provision to make regulations about what a valid application is, there will be no grounds for people to be able to challenge a decision about whether an application has been made validly. That can cause delay in people’s payments and the loss of money. There is an issue about making sure that more provision is made to ensure that regulations are in place that set out what would be a valid application.

Source: Social Security Committee 21 September 2017, John Dickie, contrib. 42<sup>63</sup>

241. The application process was mentioned in a number of written submissions with Gray, McKeever and Simpson describing the bill's provisions in relation to applications—

” as a statement of the obvious that tells the reader nothing about how the system will actually work.

242. The Poverty Alliance, the Scottish Council Voluntary Organisations (SCVO), CRER and MND Scotland emphasised the importance of a choice of application methods. Enable and NHS Greater Glasgow and Clyde suggested that there should be further provisions around automatic entitlements.

243. A number of written responses mentioned the bill's provisions allowing Ministers to require evidence from applicants. The most common specific point made, amongst others, by COSLA, CPAG and Social Work Scotland was that the bill should be amended to provide that if an applicant fails to respond to a request for information, a determination should be made on the available evidence.

244. Others commented that the bill places duties on applicants, but is silent on Ministers’ duty to seek evidence. NHS Health Scotland wrote—

” Individuals using the service should not be overburdened with providing information that is already held in the system or another public service system from which it is reasonable and legal to access, since this is likely to create further barriers to access which are unlikely to reduce health inequalities. <sup>64</sup>

245. The Committee notes the evidence calling for the Bill to include a timescale for making a determination and asks the Scottish Government to respond. The Committee is of the view that where a request is made by the agency for further information and it is not received, a determination should be made on the available evidence.

## Re-determinations and Appeals

246. Where someone disagrees with a determination, section 23 of the bill provides a right to challenge, initially by way of a re-determination. The period allowed for re-determination will be set out in regulations. The re-determination process is set out in the policy memorandum and also in a Scottish Government position paper, received during our evidence-taking—

” During the re-determination process, the initial decision by the social security agency will be put aside and will be a complete re-run of the decision process, carried out by an official in another part of the social security agency.<sup>65</sup>

In contrast to the UK system, if a determination reduces or removes an ongoing award, and the applicant challenges it, they may be eligible for "short-term assistance", pending the outcome of the challenge. Short-term assistance is discussed earlier in this report.

247. When being notified of the new determination, an individual will also be informed about their right, under section 27, to appeal to the First-Tier Tribunal. An appeal to the First-Tier Tribunal must normally be made within 31 days.

248. Much of our evidence, both written and oral, argued for the removal of the requirement for two applications to get to an independent tribunal. The view was that the proposed process replicates some of the perceived barriers in the current system.

249. A number argued for the removal of "mandatory" from the re-consideration stage and for an immediate right of appeal to the tribunal; although the agency could review its decision during this time. For example, Govan Law Centre argued—

” To place barriers on citizens seeking to ensure that their right to a fair hearing of their dispute appears to contradict the proposed principle of social security as a human right. Evidence has shown that the introduction of a two-tier system has led to less individuals pursuing their right to an independent hearing of their case.<sup>66</sup>

250. Jessica Burns, Regional Tribunal Judge, Social Security Chambers, agreed—

” On mandatory reconsideration, the mandatory aspect and the mandatory redetermination aspect should be taken away. People could have the option of asking the agency to think again about the decision, but it should not prevent them from making a direct appeal. There would be nothing to prevent the agency from revising its decision in the period before the appeal was heard.

Source: Social Security Committee 21 September 2017, Jessica Burns, contrib. 82<sup>67</sup>

251. This view was shared by Enable Scotland, CPAG and Poverty Alliance. CRER, the Poverty Alliance and Inclusion Scotland all argued that the time limit to appeal a decision should be extended to 90 days. The latter also argued for the same time limit to apply for requests for a re-determination.

252. Some felt that if a re-determination was unsuccessful, it should then be passed automatically to the tribunal. Nicola Dickie (COSLA) said—

” I am not advocating that the agency should not have the opportunity to do an internal review. If they do an internal review and do not change the decision to the customer's benefit, I am advocating that the case then proceeds to a tribunal. That system goes back a number of years, beyond the Welfare Reform Act 2012.

Source: Social Security Committee 28 September 2017, Nicola Dickie, contrib. 62<sup>68</sup>

253. The Minister responded to the concerns raised around the mandatory re-consideration and appeal process. She stressed mandatory re-consideration would involve the whole application being looked at afresh. She acknowledged calls for the mandatory element to be removed but explained why she felt it was necessary to retain it—

” If they disagree with a decision, it should be for them to choose whether they want to challenge it and not for the agency or Government to make that decision on their behalf.

Source: Social Security Committee 02 November 2017 [Draft], Jeane Freeman, contrib. 9<sup>69</sup>

254. The Minister advised consideration was being given to how best to minimise paperwork and form-filling throughout the process. In particular, she advised that discussions are taking place with the Scottish Courts and Tribunals Service about their requirements. The Minister indicated that the form of appeals and the process for re-consideration will be set in the agency's operational manual.

255. The Committee agrees that regulations should set a time limit within which the agency is required to complete the re-determination process.

256. The Committee acknowledges concerns about the two-stage appeal process and asks the Scottish Government what further assurances it can provide that this will not create barriers for those wishing to challenge a decision. Whilst acknowledging the concerns, the Committee accepts that the agency should have an opportunity to correct any mistake, before a case proceeds to an appeal. The Committee notes that re-determination means an application will be looked at afresh. A majority of the Committee agrees with the Minister that it should then be for an individual to decide whether to continue with a challenge to the First-Tier Tribunal.

## Recovery of assistance given in error

257. Chapter 4 of part 2 sets out when assistance given in error can be recovered by the Scottish Ministers. There are similarities to and important differences from the way the reserved social security system currently operates.

258. Section 36 provides that all overpayments, due to a mistaken decision, will be legally recoverable. This contrasts with the reserved system where the benefits to be devolved can only be recovered if the claimant is at fault, or the payment made does not match an award of benefit.

259. By way of clarification of the bill's provisions, the policy memorandum states—

” where overpayments are made as a result of agency error, they will not be pursued, unless under exceptional circumstances such as a very large and obvious overpayment. (para 259)

260. Amongst the new offences that this bill creates, is a failure to report a change of circumstances. This appears to be wider in scope than reserved benefit offences, which require an intention to deceive to be shown. Section 37 provides, when deciding whether to recover sums overpaid, that the Scottish Ministers must take into account the financial circumstances of the individual. Any action to recover an overpayment must be taken within 5 years.
261. In order to recover assistance given in error, a process is established, the first step of which is to establish a liability. A decision establishing a liability "will amount to a new determination of the individual's entitlement and will, therefore, be subject to the same rights of re-determination and appeal as any other determination."<sup>70</sup>
262. When recovery is to be made, the policy memorandum explains that where possible, and appropriate, this will be done using existing civil litigation avenues. It is emphasised that there is no intention to replicate the DWP's existing civil penalties regime as the Scottish Government "does not consider civil penalties to be consistent with its social security principles of with the need to have regard to the circumstances of the individual." (para 264)
263. John Dickie noted that, despite what is stated in the policy memorandum, the bill does not include any regulation-making power to set out the circumstances in which it would (or would not) be reasonable to recover overpayment or a maximum rate of recovery. He was concerned that this was being left to discretion or guidance. He said—

” the matter is a key example of the policy memorandum and what ministers have said about policy intent not being matched by the detail in the bill. It is clearly stated that the policy intent is not to recover overpayments that are the result of agency error, except in particular circumstances, but nothing in the bill will prevent recovery.

Source: Social Security Committee 21 September 2017, John Dickie, contrib. 69<sup>71</sup>

264. Both Bill Scott and Dr Jim McCormick agreed that the bill does not match the policy intent, the latter saying this is an area where he felt the balance of the bill was wrong and that re-thinking the approach is "one of the highest priorities in revising the bill".

265. The Committee welcomes the stated intention that overpayments resulting from official error will not normally be pursued, except in exceptional circumstances. The Committee draws the Scottish Government's attention to the evidence received on this point and asks it to consider whether the bill adequately reflects this policy.

## Offences and Investigations

266. In chapter 5, new criminal offences are created in the areas of giving false or misleading information to try to get a devolved benefit and failing to notify, or causing someone else to fail to notify, a change of circumstances. Included in the new offences, at section 40, is failure to report a change of circumstances. This

appears to be wider in scope than reserved benefit offences, which require an intention to deceive to be shown.

267. Section 31 requires that a person receiving assistance must report changes of circumstances if informed (1) what changes must be notified, (2) how those changes must be notified and (3) that a failure to report such changes may be an offence. A common feature between the reserved and devolved offences is that an individual may still commit an offence if a change in circumstances is notified but not in the correct way.
268. The policy memorandum states the approach in this bill draws a distinction between the criminal offence of fraud (if proved) and an unintentional error by an individual. For someone to be criminalised for providing false or misleading information, there must be an intention to do so. Providing false or misleading information, for example due to misunderstanding or genuine error, will not result in being criminalised.
269. The memorandum adds "the policy intention is not to criminalise genuine errors made by individuals" and that "the agency will fully consider the facts of any case and any mitigating factors before deciding if it should be passed to the Procurator Fiscal for prosecution". (paras 281 - 284).
270. Many of the written responses commented on the new offences created by the bill. Whilst most were supportive of the Scottish Government's stated policy intention, some felt this was not reflected in the bill's provisions. In written evidence, the most common specific point made was about the offence of a failure to report a change of circumstances. For example, Enable said—
- ” 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. <sup>21</sup>
271. A number of organisations made references to the sentences for offences set out in the bill, questioning whether they were in keeping with other Scottish Government priorities. Social Work Scotland was most explicit—
- ” Section 39 of the Act specifies sentencing limits. Social Work Scotland does not believe this should be written into the Bill at this stage given that the Scottish Sentencing Council has launched its first public consultation on the principles and purposes of sentencing and there is current public debate on ending jail terms of less than 12 months. <sup>42</sup>
272. Throughout our oral evidence sessions, witnesses including CAS, Rights Advice Scotland and the Scottish Association of Law Centres, queried whether the bill's provisions on the creation of offences reflected the Scottish Government's policy intention. They called for a clearer distinction between unintended actions or omissions and deliberate fraud.
273. Simon Hodge (Scottish Association of Law Centres) said he had concerns with this part of the bill. He explained—

” The problem is that the level of protection under section 40 is far too low. Our position—and the bottom line—is that, for someone to be given a criminal record, there ought to be criminal intent, and that ought to be in the bill. It is in section 39, but it should be in section 40, too.

Source: Social Security Committee 28 September 2017, Simon Hodge, contrib. 138<sup>72</sup>

274. Jessica Burns said she was surprised that failing to notify could result in someone being criminalised. She suggested the provision be looked at again, saying—

” it can be difficult for people with disabilities or with disabling illnesses who are in the recovery period to say at what point they have crossed back over the threshold to not qualifying for the benefit. It is intimidating; people who recover from severe mental health problems can wonder whether they are defrauding the system because they have not told someone. It is a stressful period for someone who is in that position.

Source: Social Security Committee 21 September 2017, Jessica Burns, contrib. 70<sup>73</sup>

275. The Committee supports calls for the bill to be clarified to ensure that genuine errors or misunderstandings will not result in someone being criminalised. It is the Committee's view that the bill does not reflect the Scottish Government's stated policy intention.

## Part 3 of the Bill - Supplementing assistance under other enactments

276. Part 3 grants the Scottish Ministers powers to provide for the top-up of benefits reserved to the UK Parliament. It includes various restrictions on the power, such as that financial assistance cannot be given for housing costs. Part 3 also provides for a supplement to be paid to individuals in receipt of carer's allowance.

### Top up of reserved benefits

277. The bill provides that top-up payments can be paid on an individual case by case basis or could provide on-going support to a specified group of people with an entitlement to a reserved benefit. They could also be paid to someone who is entitled to a reserved benefit who appears to need additional assistance for the purpose of that benefit. The top-ups cannot be used for housing costs or, unless there are exceptional circumstances, offset the impact of a benefit sanction.

278. There is no further detail in the bill or the accompanying documents as to how these powers might be used. In her evidence, Jessica Burns (Regional Tribunal Judge, Social Entitlement Chamber) observed—

” I know that there are the top-up powers, but it is not at all clear how they will work or how things will work across the border. I just want to express a warning and some concern about that.

Source: Social Security Committee 21 September 2017, Jessica Burns (Regional Tribunal Judge, Social Entitlement Chamber), contrib. 7<sup>74</sup>

279. Fourteen of the written responses received by the Committee commented on the lack of detail or absence of proposals for using these powers and five of them referred to potential complexity due to the interaction between the reserved and devolved systems. The most frequent suggestion for how this power could be used was to top-up child benefit.

280. During its consideration, the DPLR Committee noted this power is particularly wide with no provision setting out what existing reserved benefits the Scottish Government might seek to top-up. In [evidence](#) to the DPLR Committee, the Minister advised there are currently no plans to top-up existing reserved benefits but the bill has been drafted to take account of any changes that might be made to the UK benefits system.

281. In its [report](#), the DPLR Committee concluded—

” On balance, the Committee considers that any concerns the Scottish Government has about the parliamentary time that may be involved in updating references to existing UK legislation is outweighed by the benefits to parliamentary scrutiny of setting out the existing reserved benefits that are to be topped-up on the face of the Bill. Setting those benefits out on the face of the Bill would allow the Parliament to properly consider and debate the surrounding policy choices and to conduct full scrutiny on a line by line basis.

282. The DPLR Committee suggested an approach similar to that in section 53 or, possibly, a form of super-affirmative procedure.
283. The Scottish Government has said it does not intend, for now, to use these powers.

## Carer's allowance supplement

284. Section 47 creates a statutory requirement to pay a temporary supplement, twice-yearly, to people in Scotland in receipt of Carer's Allowance. The intention is that this supplement will increase the amount of allowance received by a carer to the level of job-seekers allowance (JSA). The first payments will be made in summer 2018 and will cover the period from April 2018. This provision will not be required once regulations, under Section 11 to provide Carer's Assistance, are made.
285. From the written evidence received by the Committee, there was clear support for this proposal. However many welcomed it as first step, feeling it did not go far enough in terms of adequacy.
286. National Carer's Organisations, COSLA, Parkinson's UK, Social Work Scotland and Marie Curie were amongst those who questioned whether JSA, normally a short-term benefit, was the correct benchmark to use. Gray, McKeever and Simpson and Inverclyde Council suggested that the rate of Employment and Support Allowance (ESA) for people in the support group (currently £109.65 a week) would be a better benchmark.
287. The Poverty Alliance pointed out—
- ” (JSA) is currently frozen at a UK level, and so there needs to be an additional commitment to the uprating of Carer's Allowance.
288. In relation to young carers, Children in Scotland asked about the link being made to JSA, as 18 to 24 year-olds receive that at a lower rate. Amy Woodhouse asked whether the supplement would be paid at the higher rate, irrespective of age.
289. There were concerns about the interaction between the supplement and other entitlements, for example that the supplement did not reduce entitlement to reserved benefits. The Low Incomes Tax Reform Group (LITRG) asked whether the supplement would be taxable, pointing out—
- ” Northern Ireland have introduced similar welfare supplementary payments (WSP) recently and the tax position is quite confusing for claimants. Put simply, where the benefit being replaced is taxable, the WSP is taxable.<sup>75</sup>
290. The Committee welcomes the Scottish Government's commitment to increase carer's allowance.

## Part 4 of the Bill - Discretionary Housing Payments

291. Part 4 of the bill allows local authorities to make payments to individuals to assist with housing costs. Various restrictions on this power are provided for, such as that financial assistance may not be given by way of a loan. Local Authorities are required to provide information on their rules for this form of assistance and must have regard to any guidance issued by the Scottish Ministers.
292. Discretionary housing payments (DHPs) are administered by Local Authorities. The Scottish Government has said it has no plans to make significant changes to the current DHP scheme. It is using this bill to simplify the relevant legislation and reframe it for a Scottish context.
293. Local authorities can choose whether or not to have a DHP scheme. All Local Authorities currently operate DHP schemes but having choice "builds in some flexibility for how discretionary schemes or support for housing costs may be delivered in the future." (policy memo para 328)
294. The evidence was generally supportive of the current system but many who responded to the call for written evidence said the scheme should be mandatory to ensure consistency of approach; that there should be a duty on Local Authorities to have a discretionary housing payment scheme. For example, CAS said—
- ” to ensure that a DHP system exists in every local authority as long as there is still a need for it, CAS would recommend adding a requirement for local authorities to operate a scheme as long as funding continues to be provided. <sup>13</sup>
295. A significant number of other responses referred to the need for consistency in decision making across Local Authorities with the view that guidance would assist with this. The Scottish Federation of Housing Associations told the Committee—
- ” We welcome the fact that local authorities will be required to deliver DHP according to Scottish Government statutory guidance and we look forward to being involved in designing this guidance. In the past there has been a lack of consistency in eligibility criteria and the approach taken to length of awards, which has caused problems for those facing housing hardship and their landlords and support workers. <sup>76</sup>
296. A number of written submissions mentioned the use of DHPs to mitigate various welfare cuts at UK level (including the under occupancy charge or bedroom tax, the benefit cap and changes to local housing allowance). Some commented on the budget pressures created by these mitigation measures.
297. In a statement to Parliament on 19 September 2017, the Minister advised that the Scottish Government had now agreed a proposal to fully mitigate the effect of the bedroom tax without funding being clawed back. The Minister indicated that an amendment would be lodged at stage 2. This has been welcomed.

298. During oral evidence, COSLA suggested that its reading of the bill pointed to Local Authorities not having DHPs, although it said was not aware of any Local Authority planning that. It sought clarity around funding for DHPs, pointing out that the bill does not require the Scottish ministers to provide funding. It drew a comparison with the Scottish welfare fund —

” If we look at the Scottish welfare fund, which is a similar fund but does something slightly different, there is a statutory requirement on local authorities to provide welfare funding as long as moneys are paid in by the Scottish ministers. Our members point out that it is imperative that we get clarity.

Source: Social Security Committee 28 September 2017 [Draft], Nicola Dickie, contrib. 71<sup>77</sup>

299. In its report, the DPLR Committee noted that the obligation in section 52 (1) for local authorities to have regard to any guidance issued by the Scottish Ministers, means the guidance is not binding. Scottish Ministers are required to lay a copy of the guidance before the Parliament. The DPLR Committee noted that equivalent UK provisions are set out in regulations. It also noted that matters referred to in section 52 (2) are ones that, in relation to other forms of assistance in this bill, are set out either on the face of the bill or in regulation-making powers, subject to either the affirmative or negative procedures.

300. The DPLR Committee has called on the Scottish Government to amend the bill at stage 2 to provide that the negative procedure applies to guidance issued under section 52 to allow for a more appropriate level of parliamentary scrutiny.

301. The Committee invites the Scottish Government to reflect on the evidence received about discretionary housing payments.

## Financial memorandum

302. The Financial Memorandum (FM) estimates the implementation costs for the Bill as £308 million for a four-year programme running to 2020-21. This comprises £190 million for IT implementation, £14 million for estates-related implementation costs and £104 million for staffing costs.<sup>78</sup>
303. The estimated cost for running the social security system is between £144 million and £156 million per year.<sup>79</sup>

## Finance and Constitution Committee consideration

304. The Finance and Constitution Committee issued a call for views on 18 August 2017 and received 8 responses. The Finance and Constitution Committee then took evidence from the Scottish Government Bill Team on 13 September 2017.<sup>80</sup> Following that session, the Scottish Government Bill Team provided supplementary evidence on 26 September 2017.
305. The Finance and Constitution Committee reported to the Social Security Committee in its letter of 4 October.<sup>81</sup>
306. The Finance and Constitution Committee highlighted the following issues:
- Budgetary risks
  - Scottish Social Security Charter
  - ICT implementation costs and administration cost estimates
  - Wider impact
  - Parliamentary scrutiny of the cost associated with the Bill

307. *Budgetary risks*

The Finance and Constitution Committee explored the implications of the demand led nature of social security benefits and the resulting uncertainty and risks for the Scottish Government in managing these budgetary risks.

308. The Bill Team acknowledged the additional risks to its budget associated where policy differentials and demographics could result in a greater growth in devolved benefits in Scotland compared with the rest of the UK. They confirmed that these differences would not be accounted for through the block grant adjustment and that the Scottish Government would make up any shortfall with its own resources through the spending review process and the annual budget process.

309. The Scottish Government is requested to provide further detail on arrangements it is putting in place to manage the new budgetary risks in its response to this report.

310. *Scottish Social Security Charter*

The Finance and Constitution Committee questioned the lack of costings in the FM associated with preparing, reviewing and enforcing the proposed Scottish Charter on social security rights. The Bill Team said that these costs would not be significant and would be met under the agency running costs outlined in the Financial Memorandum.

311. The Scottish Government is requested to provide further detail on the potential costs associated with the Charter in its response to this report.

312. *ICT implementation costs and administration cost estimates*

The Finance and Constitution Committee explored the costs associated with the implementation of social security benefit ICT systems, and raised concerns that costs have a tendency to spiral out of control.

313. The Committee asked for a breakdown of the £190 million for ICT set-up costs which is in the Financial Memorandum. In response, James Wallace, Head of Finance, Social Security Division, said—

” The figure of £190 million is based on a specific set of assumptions about our designing and building our own IT system for a social security agency in Scotland. That may not be the method by which we do it; we may reuse, as appropriate, or buy customisable off-the-shelf packages, which may push costs down.

To come to that figure, our colleagues within the social security programme scoped out exactly what system they would build—or possibly build—and wrapped costs around that. We then took the Treasury’s green book—“The Green Book: Appraisal and Evaluation in Central Government”—and applied the appropriate optimism bias to the cost figures that our colleagues presented.

Source: Finance and Constitution Committee 13 September 2017, James Wallace, contrib. 141<sup>82</sup>

314. The Committee also asked when the process of specifying the system requirements for Wave 1 benefits will start. In response, Chris Boyland, Bill Team Leader, said—

” ...the service and system design for wave 1, which is due in 2019, is on-going. The work is going into a discovery phase and it will go from that to the alpha build, the beta build and so on.

Source: Finance and Constitution Committee 13 September 2017, Chris Boyland, contrib. 160<sup>83</sup>

315. The Scottish Government is requested to provide a further breakdown of the £190 million figure and further detail on the system specification for Wave 1 benefits in its response to this report.

316. *Wider impact*

The Finance and Constitution Committee asked about the extent to which the Scottish Government intends to measure the additional value to the public purse of paying benefits through reducing demand on other public services.

317. In supplementary evidence, the Bill team told the Finance and Constitution Committee that ‘Ministers believe that the investment they are making in our new social security system will improve the outcomes for people living and working in Scotland now and in the future’.

318. The Scottish Government is requested to outline its view of the anticipated wider impact of spend on social security benefits in its response to this report.

319. *Parliamentary scrutiny of the cost associated with the Bill*

The Finance and Constitution Committee questioned the extent to which Parliament can scrutinise the costs associated with the Bill given that the detail will appear via secondary legislation.

320. The Scottish Government is requested to outline when and how Parliament will have the opportunity to scrutinise the costs associated with the Bill in its response to this report.

## Social Security Committee consideration - ICT implementation

321. The Committee raised the approach taken to Information and Communications Technology (ICT), and the development of the necessary systems, with the Auditor General at its meeting on 14 September 2017 and the Minister for Social Security on 2 November 2017.

322. The Committee asked the Auditor General about the ‘agile’ method for developing ICT systems, how the £190 million cost figure was arrived at, the expertise needed to deliver the ICT systems, whether the Government is working towards the Audit Scotland’s ‘5 principles for a digital future’<sup>84</sup>, and effective scrutiny of the ICT programme.

323. On how the £190 million cost figure was arrived at, the Auditor General said—

” Our audit work at the beginning of this year looked at the Scottish Government’s circumstances at that time. We did not consider that the modelling of cost was detailed enough for us to be able to comment on it and we recommended that the model needed to go further...we will be looking at it as part of our audit work and reporting back in May 2018.

Source: Social Security Committee 14 September 2017, Caroline Gardner, contrib. 69<sup>85</sup>

324. The Committee took evidence from the Minister and the Chief Digital Officer, Social Security, on 2 November 2017. The Committee asked for an update on ICT implementation and specifically on the integration with other UK systems.

325. The Minister said—

” ... the approach that we are taking is absolutely compliant with Audit Scotland’s key lessons learned from previous IT projects, both those that worked and those that have encountered difficulties, both those that worked and those that have encountered difficulties.

[...] Our approach is that the IT is the infrastructure that supports the overall objective of what we are delivering.

Source: Social Security Committee 02 November 2017 [Draft], Jeane Freeman, contrib. 47<sup>86</sup>

326. The Chief Digital Officer, Social Security, talking about the IT build, said—

” Members will have heard the term “agile delivery”. That brings a different methodology to the way in which projects are structured and the way in which technology is delivered. As the minister has outlined, it sets out a journey in which we have policy colleagues, legislation colleagues and delivery colleagues embedded in all the teams to ensure that users’ needs and respect for users are at the forefront of everything that we do and that citizens and users are engaged along that journey so that what we are building is fit for purpose and highly useable.

Source: Social Security Committee 02 November 2017 [Draft], Andy McClintock (Scottish Government), contrib. 48<sup>87</sup>

327. The Scottish Government have announced the first ICT contract award. The contract, for £8.3 million excluding VAT, was awarded to IBM UK Ltd.

328. The Committee recognises that ICT implementation costs will become clearer as work progresses and the importance of ongoing scrutiny.

329. The Scottish Government is requested to report to the Committee on ICT implementation on a 6 monthly basis.

# Conclusions and Recommendations

The Committee supports the general principles of the bill.

Whilst the Committee is supportive of the consultative approach that the Scottish Government has taken to create the new Scottish social security system, of which the Social Security Bill is an important part, it has some concerns in key areas.

The Committee has received considerable evidence suggesting that the balance between what is contained in primary or secondary legislation has not been appropriately struck. It believes that this is an issue that needs to be carefully addressed by the Scottish Government as the bill proceeds.

The Committee invites the Scottish Government to reflect on the evidence that suggests that the eligibility criteria for the 8 forms of assistance should be included within primary legislation.

The Committee believes that, in its current form, the bill does not allow for adequate scrutiny as there is no provision for a super-affirmative procedure for, or independent scrutiny of, regulations produced under it. The Committee requests that the Scottish Government comes forward with further detailed proposals on these matters.

The Committee supports the creation of an independent Scottish Social Security Advisory Committee with a role similar to the UK Social Security Advisory Committee (SSAC) and a statutory basis. The Scottish SSAC should have an initial focus on assessing the draft regulations produced under the bill and Ministers should be obliged to consult it on them.

The Committee believes that Scottish Social Security Advisory Committee reports and recommendations should be public and that, if it disagrees with them, the Scottish Government must set out an explanation.

The majority of the Committee supports the Scottish Government's commitment to uprate disability assistance. The Committee notes that the majority of those who gave evidence on this issue felt that uprating all forms of assistance should be included in the Bill. The majority of the Committee believes that the Bill should include an annual duty on Ministers to have regard to the impact of inflation on the value of assistance.

The Committee notes, and the majority supports, the Scottish Government's commitment not to involve private contractors in delivering health assessments for disability benefits. However, the majority believes that to include a formal ban on private sector contractors in the bill may lead to unintended consequences and does not therefore support this proposal.

The Committee believes that it is important that a definition of residency is developed - who is eligible for the new Scottish benefits - and that this is included in the bill or regulations.

The Committee supports the work that the Minister is undertaking to seek agreement with the UK Government on reciprocal arrangements for people who move across the border.

The Committee welcomes the innovative inclusion in the Bill of a set of guiding principles, especially that "respect for the dignity of individuals is to be at the heart of the social security system".

The Committee recommends that the Scottish Government clarify the legal status of the principles contained in the bill and where appropriate amends the bill to achieve this clarity.

The Committee supports the addition of a principle to the bill to state that individuals will have the right to independent advocacy under and with regard to the Scottish social security system.

The Committee supports the amendment of the fourth principle in the bill to introduce a duty on Scottish Ministers, rather than a role, to ensure that individuals are given what they are eligible to be given under the Scottish social security system.

The Committee supports the inclusion of an additional principle in the Bill that 'Social security has a role to play in the eradication of poverty in Scotland'.

The Committee is supportive of the sentiments behind proposals to include principles on anti-discrimination, transparency and accountability, and to amend the second principle on human rights to link it to international law. However, it believes that they are already

largely covered by the existing principles and that the way to make them effective is to develop them within the charter.

The Committee believes that there is an important role for a charter to set out in clear language what claimants can expect from the Scottish social security system and this is a welcome initiative by the Scottish Government.

The Committee believes that there is a need for a robust mechanism for redress for individuals if they feel their treatment has not been compatible with the Charter. It believes that there is doubt currently over the legal status of the charter and therefore what this process for redress would be. It recommends that the Scottish Government clarify what this process will be and where appropriate amends the bill accordingly.

The Committee supports the view that the charter should be accessible and widely available.

The Committee is supportive of the creation of an annual reporting procedure to Parliament on the social security system and believes it will contribute to the accountability of the new system.

The Committee recognises that this is a framework bill. As the bill stands, the detail for each form of assistance, including eligibility criteria, will be brought forward in regulations. Much of the evidence received related to substantive questions on the types of assistance. With the exception of short-term assistance, the Committee does not feel able, at this stage, to make recommendations on the substance of the specific forms of assistance. The evidence received is summarised in an annex to this report and we invite the Scottish Government to reflect on it. There are a number of issues considered in the annex that the Committee anticipates will be returned to at stage 2, for example the definition of terminal illness.

The Committee recommends that the Scottish Government confirms whether, and if so when, illustrative regulations will be available for each of the forms of assistance. The Scottish Government is also asked to confirm when it plans to consult on draft regulations for each of the forms of assistance.

The Committee welcomes the Minister's reassurance that an individual will always have the choice of whether or not to receive assistance in a form other than cash and that cash will be the default. We welcome the Minister's commitment to bring forward amendments at stage 2 to make that clear in this bill.

The Committee notes the Scottish Government's position. The Committee asks the Scottish Government to confirm that the social security principles and charter will apply to any provision in primary legislation to create a new benefit as they do to the forms of assistance set out in this bill.

The Committee welcomes the clarification from the Minister that short-term assistance will ensure that the level of financial assistance will be retained until any process of appeal has been concluded.

The Committee seeks clarification from the Scottish Government on whether short-term assistance will be repayable.

As the Scottish Government has made clear its policy intention on short-term assistance, it should amend the bill to reflect this; that the level of assistance will be maintained during any time an individual is challenging a decision to reduce or stop that assistance. The Scottish Government is asked to clarify, and set out in the bill whether, and if so in what circumstances, short-term assistance will be repayable.

The Committee notes the evidence calling for the Bill to include a timescale for making a determination and asks the Scottish Government to respond. The Committee is of the view that where a request is made by the agency for further information and it is not received, a determination should be made on the available evidence.

The Committee agrees that regulations should set a time limit within which the agency is required to complete the re-determination process.

The Committee acknowledges concerns about the two-stage appeal process and asks the Scottish Government what further assurances it can provide that this will not create barriers for those wishing to challenge a decision. Whilst acknowledging the concerns, the Committee accepts that the agency should have an opportunity to correct any mistake, before a case proceeds to an appeal. The Committee notes that re-determination means an application will be looked at afresh. A majority of the Committee agrees with the Minister that it should then be for an individual to decide whether to continue with a challenge to the First-Tier Tribunal.

It is the Committee's view that the bill does not reflect the Scottish Government's stated policy intention. The Committee supports calls for the bill to be clarified to ensure that genuine errors or misunderstandings will not result in someone being criminalised. It is

the Committee's view that the bill does not reflect the Scottish Government's stated policy intention.

The Committee welcomes the Scottish Government's commitment to increase carer's allowance.

The Committee invites the Scottish Government to reflect on the evidence received about discretionary housing payments.

The Scottish Government is requested to provide further detail on arrangements it is putting in place to manage the new budgetary risks in its response to this report.

The Scottish Government is requested to provide further detail on the potential costs associated with the Charter in its response to this report.

The Scottish Government is requested to provide a further breakdown of the £190 million figure and further detail on the system specification for Wave 1 benefits in its response to this report.

The Scottish Government is requested to outline its view of the anticipated wider impact of spend on social security benefits in its response to this report.

The Scottish Government is requested to outline when and how Parliament will have the opportunity to scrutinise the costs associated with the Bill in its response to this report.

The Scottish Government is requested to report to the Committee on ICT implementation on a 6 monthly basis.

# Annex A - Overview of evidence received on types of assistance

## Carer's assistance

330. Section 11 makes provision for carer's assistance to be provided to someone who has caring responsibilities for someone with a disability. The eligibility rules and the specific type of assistance to be given will be set out in regulations.
331. Schedule 1 of the bill gives further detail of what the regulations must include and what restrictions might apply. For example, the schedule requires that eligibility is dependent on someone "having provided regular and substantial care during that period to another individual to whom a disability benefit is normally paid". The schedule does not go on to define what that means. A definition will be set out in regulations and may set a threshold for the number of hours of care provided.
332. Currently, carer's allowance is paid by the DWP to a person who cares for someone who receives certain disability benefits and satisfies the following criteria: is aged over 16, spends at least 35 hours caring, does not earn more than £116 /week, is not in full-time education and meets residence requirements
333. The bill's policy memorandum details the commitments made by the Scottish Government; namely to increase carer's allowance to the level of jobseeker's allowance.; to consider a young carer's allowance, to increase carer's allowance for carers looking after more than one disabled child and to improve the application process.
334. In its position paper, received during our oral evidence-taking, the Scottish Government has said, by the end of the current Parliamentary term (May 2021) it will take over full control of carer's allowance, including the additional payment to carers of more than one disabled child.
335. The independent Disability and Carers Benefits Expert Advisory Group is considering carer's assistance over the longer-term.
336. Emma Rich (Engender) referred to the Welfare Reform Committee's 2015 [report](#) on its inquiry on women and social security. The report called on the Scottish Government to look at the gender impact of its policy decisions and to ensure that social security programmes are designed to overcome barriers to women's participation in the labour market. Emma Rich noted the majority of carers, and currently 75 per cent of the recipients of carers allowance , are women. In her view, this bill potentially replicates the status quo. She explained—
- ” whether a carer is in education, how many hours a week the carer spends caring and what employment they are in, and there is a risk that those things will still function as a barrier to carers getting into the workplace, developing their skills and capacity when they are on their carer journey and, therefore, being appropriately qualified or skilled when their care work ends.

Source: Social Security Committee 21 September 2017, Emma Ritch, contrib. 122<sup>88</sup>

## Young Carer Grant

337. The bill makes no separate reference to young carers but during stage 1, the First Minister announced a new Young Carer Grant - a form of assistance under this section of the bill. The grant will be an annual payment of £300 for young adults providing an average of 16 hours care per week, payable to 16 and 17 year old carers and 18 year old carers if still at school, and not eligible for carer's allowance. The Scottish Government is currently developing further detail with young carers through the experience panels.

338. Heather Noller raised concerns about the wider support available to young carers and potential inconsistencies between different pieces of legislation. She told the Committee—

” Under the Carers (Scotland) Act 2016, which is being implemented next year, young carers are defined as carers who are under 18 or who are 18 but are still at school, so there is potentially a bit of a mismatch with legislation that supports young people up to the age of 16. In the wider Scotland sphere of children and young people's policy, young people are quite often defined as people who are under the age of 26, so there are quite a lot of different levels there.

Source: Social Security Committee 26 October 2017 [Draft], Heather Noller, contrib. 27<sup>89</sup>

## Amount of carer's assistance available

339. Many written responses commented on carer's assistance, particularly the level of financial support available, and the interaction between this form of assistance and the reserved social security system.

340. Adequacy was raised too. Heather Noller told the Committee that overall she did not think carer's allowance was an adequate benefit. On increasing carer's assistance to the level of job-seekers allowance, she said—

” but substantial numbers of carers have been on carers allowance for more than five years and will never not receive the benefit while they are providing care. It is a long-term benefit that people need in order to survive. Therefore, further down the line, we will need to consider what is an adequate income replacement for people who provide substantial amounts of care.

Source: Social Security Committee 26 October 2017 [Draft], Heather Noller, contrib. 21<sup>90</sup>

341. Three written responses suggested a higher rate for those caring for more than one person. As well as making that point, Carer's Trust Scotland suggested more than one person should be able to get carer's assistance for looking after the same person and an individual carer should be able to add together the hours spent caring for different people to reach the entitlement threshold.<sup>91</sup>

342. CAS suggested a two-tier approach whereby some carers, for example those in full-time education or in work but earning less than the equivalent of 21 hours /week at the Scottish Living Wage, would receive a higher amount. In the CAS proposals,

carers in receipt of State Pension who did not qualify for Pension Credit, or carers who spend between 28-34 hours caring, would receive a lower level.

343. Children in Scotland said it was concerned that young people are currently disadvantaged in terms of financial support. Amy Woodhouse welcomed the announcement of the young carers grant but added—

” we have questions about how carers assistance and carers allowance will work for younger carers. We are interested in whether a pro rata approach would work—an approach that would recognise that many young carers mix significant caring responsibilities with being in school, for example.

Source: Social Security Committee 26 October 2017 [Draft], Amy Woodhouse, contrib. 14<sup>92</sup>

344. The contributors to the "Your say" workshop, called for changes to better enable adult carers to maintain employment, to make carer's assistance available beyond pension age and suggested that part of any assistance could be payable (particularly for young carers). Norman Gray, for the group, explained—

” Young carers are not looking for financial reward for caring; they need things such as respite care associations, because they miss out so much on life as they go through the caring system. They want a reward or payment in kind rather than a financial payment. That is very important.

Source: Social Security Committee 07 September 2017, Norman Gray, contrib. 20<sup>93</sup>

345. Moira Sinclair, for the group, added—

” We feel that carers allowance should be a passport to other assistance such as vouchers towards glasses and that kind of thing. More should be done to ensure that we look after the health of carers.

Source: Social Security Committee 07 September 2017, Moira Sinclair, contrib. 17<sup>94</sup>

## Link between carer's assistance and disability assistance

346. The Poverty Alliance, Engender and Alzheimer Scotland all said that the current link with the cared-for person's eligibility for disability assistance should be reconsidered. The latter argued—

” he new social security system must recognise and respect the individuality, distinct identity and needs of each person. However, at present, eligibility for Carer's Allowance is dependent on the cared-for person being in receipt of a 'qualifying benefit' linking the two benefits together; in cases where the cared-for person may not be eligible or may choose not to claim a qualifying benefit, the carer is left without monetary support, even if they otherwise meet the eligibility criteria for Carer's Allowance. (Alzheimer Scotland written submission)

347. Alzheimer Scotland went on to argue that attention should also be given to the effect on a disabled person's means-tested benefits if their carer claims carer's allowance. Scottish Care did not mention the link to disability assistance but said

"carers of people who are frail or have dementia" should have access to carer's assistance.

348. The Minority Ethnic Carers of People Project (MECOPP) raised issues around carers allowance and the state pension and the relationship between them once a claimant reaches state pension age (workshop report-back)
349. Carers Trust Scotland acknowledged the issues that regularly arose when speaking with carers. Heather Noller said the current link between carers allowance and qualifying benefits results in a straightforward application process. But added—
- ” the downside is that some people have significant caring responsibilities for people who do not receive a qualifying disability benefit. This is anecdotal but, for example, quite often people who look after frail elderly parents who are not eligible for attendance allowance—which has quite strict eligibility criteria—do not qualify.

Source: Social Security Committee 26 October 2017 [Draft], Heather Noller, contrib. 13<sup>95</sup>

350. Four responses to the call for written evidence argued that carer's assistance is an opportunity to remove the “overlapping benefit” rules that currently prevent payment of carer's allowance to some people who meet the entitlement conditions.

## Cold-spell heating assistance

351. Section 12 provides for a form of assistance to be given to people to help towards meeting heating costs. The eligibility rules and the specific type of assistance to be given will be set out in regulations. Section 55 provides that these regulations will be subject to the affirmative procedure.
352. Schedule 2 of the bill gives further detail of what the regulations must include and what restrictions might apply. In particular, the schedule sets out that regulations must provide a definition of a "home" and the circumstances in which an area is to be regarded as experiencing a cold spell.
353. Currently, the UK Government automatically provides a Cold Weather Payment to households in receipt of one of the prescribed reserved benefits, in circumstances when the temperature drops below zero for a consecutive week.
354. Six written submissions mentioned cold-spell heating assistance. The Poverty Truth Commission and the Church of Scotland both called for this assistance to be given to all families getting child benefit. Stirling Council and Energy Action Scotland (EAS) suggested that higher payments could be made for rural areas. EAS also made other suggestions, including consideration of wind-chill (whilst acknowledging the possible administrative cost and issues with lower take-up of any increased complexity), reducing the seven day qualifying period and increasing the amount paid.
355. On 8 November 2017, the Scottish Government launched a [consultation](#) on a new fuel poverty strategy for Scotland. In developing its proposals for cold-spell heating assistance, the Scottish Government has said it intends to consider the recommendations of the Fuel Poverty Strategic Working Group and the Rural Fuel

Poverty Task Force. It is not clear when specific proposals for cold-spell heating assistance will be brought forward.

## Winter heating assistance

356. Section 13 provides for a form of assistance to contribute towards heating costs. The eligibility rules and the specific type of assistance to be given will be set out in regulations.
357. Schedule 3 sets out a number of qualifying requirements that "may" be included in regulations about winter heating assistance but there is nothing in the schedule requiring that a particular provision "must" be included. Placing no requirements for the regulations to set any particular eligibility criteria is a different approach from that taken for other forms of assistance in this bill.
358. Currently, the UK Government makes an annual winter fuel payment to everyone of qualifying age. The payment is not dependent on temperature and is not means-tested.
359. In its manifesto, the Scottish Government made a commitment to extend winter fuel payments to families with disabled children in receipt of the higher rate of disability living allowance and make early payments to those living off the gas grid. (ref)
360. A number of written responses mentioned winter heating assistance. Age Scotland, Energy Action Scotland (EAS) welcomed the commitment to keep payments universal. Others suggested support for more targeting:
- The Church of Scotland and the Poverty Truth Commission argued that assessed need should replace age as the primary entitlement criterion.
  - Scottish Federation of Housing Associations argued that this assistance should be targeted on the fuel-poor and those on benefits, referencing the forthcoming Warm Homes Bill.
  - Stirling Council argued that, in addition to financial circumstances and age, disability, illness and how rural an area is should be considered, and that payments must go to those in most need.
361. The proposal to extend winter fuel assistance was welcomed. EAS suggested other groups, besides those living off the gas grid, who could be considered for early payment, such as people with a prepayment meter and those using unregulated fuels. A further suggestion from EAS, was for recognition of the higher charge per unit costs, faced by those served by the single electricity operator in the North of Scotland.
362. Age Scotland spoke about tackling fuel poverty and emphasised the importance of this form of assistance to older people. Derek Young explained—

- ” There is a good amount of evidence that winter fuel payments, as they currently are, put money directly in the hands of those in the age group that is most at risk of age-related illness and deaths.

Source: Social Security Committee 26 October 2017 [Draft], Derek Young, contrib. 107<sup>96</sup>

363. Suzanne Munday (MECOPP suggested consideration should be given to extending the present criteria, for example to people with disabilities and long-term conditions and their carers. She also highlighted the gypsy traveller community living on sites and told the Committee—

- ” the utility account is very often held by the local authority. That makes it problematic because people do not have individual accounts so they cannot shop around for the cheapest tariff. That increases fuel poverty for particular groups of people.

Source: Social Security Committee 26 October 2017 [Draft], Suzanne Munday, contrib. 100<sup>97</sup>

364. In its report, the DPLR Committee noted that schedule 3 makes no mandatory provision regarding the scope of winter heating assistance regulations. The view of that Committee is that there is minimal restriction placed on what winter heating assistance regulations can cover.

365. In her evidence to the DPLR Committee, the Minister explained that winter heating assistance is currently mostly paid to people of state pension age but she did not want to rule out the possibility that it could be extended in the future. This was the reason for the bill not setting the same limits for the rules on who might receive this form of assistance.

366. The DPLR Committee acknowledged the Scottish Government's position but concluded—

- ” The failure to make any mandatory provision in schedule 3 in relation to the eligibility criteria for winter heating assistance regulations appears to confer an inappropriately wide level of discretion of the Scottish Ministers and provides insufficient certainty to the stakeholder community.<sup>98</sup>

## Disability assistance

### General

367. Section 14 provides for a form of assistance to be given to someone with a disability, either physical or mental or someone with a terminal illness. The eligibility rules and the specific type of assistance to be given, will be set out in regulations.
368. Schedule 4 of the bill gives further detail of what the regulations must include and what restrictions might apply. For example, eligibility will depend on the physical or mental impairment having either "a significant and not short-term adverse effect on the individual's ability to carry out normal day-to-day activities" or causing "a significant and not short-term need". The bill provides no definition of "terminal

illness". A definition is to be provided in regulations. The schedule provides that disability benefit may be paid (in whole or part) to a third party.

369. Disability assistance currently covers four benefits; personal independence payment (PIP), disability living allowance (DLA), attendance allowance (AA) and severe disablement allowance (SDA). Entitlement to PIP, DLA and AA is a passport to other benefits, for example carer's allowance or the blue badge scheme.
370. PIP was introduced by the UK Government in 2013 and replaces DLA for people aged 16 - 65. There are care and mobility parts to PIP, both parts have a higher and lower award. Eligibility is based on a points-based assessment.
371. DLA is now only for children under 16 years of age and people over 65. DLA also has care and mobility parts. There are three rates to the care part and two rates for the mobility part.
372. AA is available to people over 65 with a disability or in ill-health to help with care. There are two different rates but no mobility part.
373. SDA is for people who cannot work due to long-term illness or disability and has been closed to new applicants since 2001. The Scottish Government has said it will maintain SDA as is and, other than uprate it, "it is unlikely that the Scottish Government will make material provision in regulations".<sup>99</sup> It is unclear whether the Scottish Government intends to use existing regulations for uprating.

## Definition of disability

374. Many of our written submissions commented on devolved disability assistance. Disability Agenda Scotland suggested that "disability" should have the same definition as that in the Equality Act 2010. Other respondents expressed concern about whether people with certain conditions would be able eligible. The Poverty Truth Commission (supported by the Church of Scotland) wanted regulations to clarify that people with neurological conditions, anxiety and developmental conditions could qualify. Crohn's and Colitis UK argued that "short-term" and "significant" should be defined, to ensure that people with inflammatory bowel disease could access disability assistance.
375. In his evidence, Craig Smith (SAMH) told us—
  - ” It is implicit in the bill and the policy memorandum that the Equality Act 2010 definition of disability is being used. We would like the bill to state that.

Source: Social Security Committee 05 October 2017, Craig Smith, contrib. 101<sup>100</sup>
376. The Committee notes that the definition of "disability benefit" must fall within the limitations provided by section 22 of the Scotland Act 2016. As set out in schedule 4, the definition in this bill refers to physical or mental impairment that has a significant and not short-term adverse effect on an ability to undertake day-to-day activities, or gives rise to another significant need. It also provides an exception to these criteria for terminally ill applicants.

## Assessment and eligibility

377. Much of our evidence called for changes to the current PIP assessment process and less face-to-face assessments, particularly for certain conditions. For example, RNIB said assessments for people with sight loss were unnecessary and SAMH said assessment should be paper based and only face to face where there is a real need. The Scottish Commission for Learning Disability's response reflected a number of points made in other submissions—

” The devolution of disability benefits provides the opportunity to substantially reduce the number of unnecessary medical assessments by making the best use of existing evidence. In assessing people's eligibility for disability benefits, much greater emphasis should be given to evidence from people who know the claimant, including health and other relevant professionals, carers and family members.

378. We heard repeated concerns about the reassessments when moving from DLA to PIP, mainly because of the different criteria used, and particularly where a lifetime award had previously been made under DLA. Bill Scott advised that the assumption with PIP is that awards are short but noted many disabled people have lifetime conditions. He added—

” If the new agency adopts regulations that include the possibility of longer awards, that should, we hope, improve things for disabled people.

Source: Social Security Committee 05 October 2017, Bill Scott, contrib. 41<sup>101</sup>

379. Moira Sinclair (Your say) told the Committee—

” On DLA and PIP, as we have mentioned, if a lifetime award is in place, that should transfer without the need for reassessment. A transitional process should be in place for those who lose the benefit. Links with other agencies, such as Motability, need to remain, and there should be a greater allowance for mobility issues. There should be more recognition of the fact that many disabled people work and contribute or have done so previously.

Source: Social Security Committee 07 September 2017, Moira Sinclair, contrib. 17<sup>94</sup>

380. Some, including Jessica Burns noted the difficulties presented by someone with fluctuating condition. She suggested a more graded or tapering approach to disability assistance, explaining—

” It is almost a disincentive for somebody to ever acknowledge that there has been an improvement in their condition, because they might be locked into dependence on a particular benefit and it would represent quite a reduction in their standard of living if they were to lose it.

Source: Social Security Committee 21 September 2017, Jessica Burns, contrib. 61<sup>102</sup>

381. Bill Scott (Inclusion Scotland) told us that disabled people are concerned about what the entitlement criteria will be. Due to the lack of detail in the bill, Inclusion Scotland had not been able to seek its members views on this. Bill Scott explained—

” We could already have had that consultation if the criteria were in the primary legislation. If we had had the proposed criteria over the summer, we could have done the consultation. Because they are not in the bill, we could not ask people whether they like the entitlement criteria or would prefer others. (5 Oct contrib 17)

Source:

382. Both CPAG and Disability Agenda Scotland were concerned about the provision enabling disability assistance to be paid to a third party.

## Terminal illness

383. Macmillan, Marie Curie, and MND Scotland all commented on the “special rules” for terminally ill claimants. All were in favour of a streamlined process for applications. The latter two also argued that the definition of “terminal illness” should not take account of life expectancy. The definition in the Welfare Reform Act 2012 is someone who “suffers from a progressive disease and the person's death in consequence of that disease can reasonably be expected within six months”.

384. We asked the Minister about the definition of “terminal illness”. She stated —

” At this point, I am not minded to move beyond what we currently have, but I am open to other representations. The reason why I am not minded to move is that there is significant disagreement among stakeholder groups and in our clinical community on the matter. (2 Nov contrib, 61)

Source:

## Assistance for over 65s

385. Age Scotland argued the current system discriminates against anyone over the age of 65 who acquires a disability and becomes eligible for financial support. Derek Young explained—

” the question whether their mobility needs are such that they would deserve a higher level of support is never even asked, because that level of support is simply not available. It does not matter whether the person would meet exactly the same test that they would have met a week, a month or a year before—that support is simply not available. We consider that to be a form of discrimination.

Source: Social Security Committee 26 October 2017 [Draft], Derek Young, contrib. 110<sup>103</sup>

386. Derek Young suggested an approach could be to abolish the distinction between attendance allowance and working age disability benefits but said it is not clear whether that is something the Scottish Government is considering.

## Scottish Government commitments

387. In a position paper, received during our oral evidence-taking, the Scottish Government set out the commitments already made, namely that that any child in receipt of DLA will be given an automatic award of that DLA to age 18 to allow for continuity for families (currently age 16); the introduction of automatic awards in certain circumstances; longer term or lifetime awards for people whose condition is unlikely to improve; and maintaining the level of the disability benefits paid to individuals and raising them annually by at least the rate of inflation.
388. The position paper also states that the assessment process will be fairer, the number of face-to-face assessments will be reduced and profit-making companies will not be involved in assessments. The Disability and Carer's Benefits Expert Advisory Group has been tasked with considering how assessments can be improved.
389. On the detail for disability assistance, the Minister said—
- ” There will be significant consultation on the regulations for the disability assistance benefits. That will take place in the drafting of the regulations and the discussions around their drafting.

Source:

## Early years assistance

390. The Sure Start Maternity Grant (SSMG) is a one-off payment by the DWP of £500, available to those in receipt of certain benefits, to help towards the cost of a first child. Except in the case of multiple births, it is only paid for the first child in a household. The Scottish Government consulted on its proposals to replace SSMG with a new Best Start Grant (BSG).
391. Section 15 provides for a form of assistance, given during the early years of their child's life, to families and carers. The eligibility rules and the specific type of assistance to be given, will be set out in regulations.
392. Schedule 5 of the bill gives further detail of what the regulations must include and what restrictions might apply. In particular, the schedule sets out that eligibility will depend on meeting one of the following four qualifying criteria; the individual:
- (a) is, or has been, more than a specified number of weeks pregnant,
  - (b) has a relationship of a specified kind to another individual who is, or has been, more than a specified number of weeks pregnant,
  - (c) is to, or has, become responsible for a child within a specified period of the child's birth,
  - (d) is responsible for a child when a specified event in the child's life occurs or has become responsible for the child within a specified period of the event.

393. The Scottish Government is using this power to introduce the new BSG. BSG will have a longer application window, increase the maternity payment for the first child from £500 to £600; pay £300 on the birth of the second and each subsequent child and pay £250 at around the time a child starts nursery and again when a child starts school.
394. None of this detail is contained in the bill. In their evidence, both John Dickie (CPAG) and CAS suggested that as the policy on BSG has been developed, it should now be included in this bill.
395. BSG is to be delivered by Summer 2019. For now, it is the only form assistance for which the Scottish Government has provided illustrative regulations. The Scottish Government has indicated that it is still developing its policy and some key decisions are still to be taken. Draft regulations will be consulted on in Spring 2018.
396. Engender, Close the Gap and Scottish Women's Aid had concerns that the eligibility criteria set out in schedule 5 could impact on a woman's financial autonomy. Engender explained—
- ” The proposed schedule for early years assistance includes the possibility that a partner could apply for the assistance. We strongly advocate for a social security system that recognises and addresses the imbalance of power in a many Scottish households. Income and other resources are often not shared or controlled equally, which is a significant factor in women's economic inequality.
- 44
397. Engender acknowledged that those who are responsible for a child, for example kinship carers, should be eligible but "this criteria should not come at the cost of women's financial independence."
398. More generally, NHS Greater Glasgow and Clyde pointed to its success in making automatic payments of some benefits. It noted the potential for a similar approach to be taken with early years assistance, maternity services IT systems and social security IT systems were able to link together.
399. In its report, the DPLR Committee drew this Committee's attention to schedule 5 (early years assistance regulations) which does not make any provision about what assistance is to be given.

## Employment-injury assistance

400. Section 16 provides for a form of assistance for someone who has been injured or contracted a disease at work. The policy memorandum states this will be no-fault compensation to recognise health and safety failings at work and it will negate the need for someone to take legal action against their employer (Para 154). The eligibility rules and the specific type of assistance to be given will be set out in regulations.
401. Schedule 6 of the bill gives further detail of what the regulations must include and what restrictions might apply. The Scottish Government has said, at the point of transition, it will not make any changes to current eligibility but it acknowledges

there is scope for improvement. The Scottish Government has said it will deliver this form of assistance by the end of the parliamentary term (2021)

402. Currently, the industrial injuries scheme (IIS) provides non-contributory no-fault benefits for disablement as a result of an accident at work or contracting one of the prescribed employment-related diseases. A number of different benefits are payable under IIS. Some existing benefits are open to new claimants whereas others, such as unemployability supplement and industrial death benefit are now closed to new claimants
403. The Industrial Injuries Advisory Council (IIAC) is responsible for monitoring scientific evidence and providing advice to UK Ministers on prescribed diseases . The Scotland Act 2016 prevents the IIAC from providing advice to the Scottish Ministers. The Scottish Government is considering how to replicate that expertise in Scotland. The Disability and Carer's Benefits Expert Advisory Group has been asked to consider and make recommendations.
404. Three written responses commented on employment-injury assistance. Glasgow City Council and Rights Advice Scotland both said if assistance is paid as a lump sum, care would be required around the interaction with reserved benefits. Currently, a claimant's household is exempt from the benefit cap whilst a payment under IIS is being made. The submissions pointed out that any new arrangements would need to ensure no household would be worse off.
405. In its written submission, SAMH argued that the question of whether Post-Traumatic Stress Disorder should be regarded as an industrial disease should be re-visited. It also made a range of other recommendations around how industrial injuries benefits could better support people with mental health conditions.
406. Hugh Robertson of the IIAC explained that the existing system is 71 years old and had been set up for a different purpose, for a different workforce. He advised that the approach taken by the IIAC to mental health issues is based on available epidemiological research. Commenting on whatever new arrangements are put in place for Scotland, he said—

” The initial issue is having two parallel committees looking at exactly the same issues. In the long term, it is a question of the Scottish Government deciding what kind of system it wants to evolve for the modern Scottish workplace and having a group that is appropriate to that.

Source: Social Security Committee 05 October 2017, Hugh Robertson, contrib. 114<sup>104</sup>

407. In its position paper, received during our oral-evidence, taking the Scottish Government states—
- ” We will protect employment-injury assistance to ensure that it remains non means tested, no-fault and non-contributory. The Scottish Government has committed to maintaining the level of employment-injury assistance paid to individuals and raising it annually by at least the rate of inflation. <sup>105</sup>
408. The position paper also responded to the calls for employment-injury assistance to consider mental health issues. In it, the Scottish Government noted the difficulties in establishing causation but stated—

- ” we are aware that a few European countries do have provision within their schemes for mental health conditions to be considered, and this is something that would be considered when the Scottish equivalent of the Industrial Injuries Advisory Council has been established <sup>105</sup>

## Funeral expense assistance

409. Section 17 provides for a form of assistance to be given to people on low incomes to help with organising the funeral of a relative or close friend. The eligibility rules and the specific type of assistance to be given, will be set out in regulations
410. Schedule 7 gives further detail of what the regulations must include and what restrictions might apply. For example, the schedule sets out that regulations must define "funeral". More generally, the schedule provides that eligibility may depend on the location of the funeral, an individual's relationship to the deceased, the value of the deceased person's estate, residence and presence of the individual, the financial circumstances of the individual or having an entitlement to another form of assistance.
411. Currently, Funeral Expenses Payment is available to someone on benefits with a low household income, responsible for arranging a funeral and with a specified relationship with the deceased person. Currently, the cost for the purchase of a grave, burial and cremation fees is uncapped. There is an additional sum of up to £700 available towards other associated costs
412. In August 2017, the Scottish Government published its Funeral Costs Plan including its commitment to provide the new funeral expense assistance by summer 2019. The policy memorandum states the aim of this form of assistance is —
- ” a benefit which will be more predictable and transparent and which can be paid out more easily following a less intrusive process. <sup>106</sup>
413. In evidence, the main message from a number of respondents was that people who apply for the existing funeral expenses payment are experiencing difficulties with the time taken to establish eligibility and then to process payment. For example, Suzanne Munday (MECOPP) told us—
- ” When somebody has passed away, the burial of the body has to take place within a set time period. We have had situations where communities have had to fundraise in order to pay funeral costs up front before people have been able to establish whether they can get assistance with the costs.
- Source: Social Security Committee 26 October 2017 [Draft], Suzanne Munday, contrib. 68<sup>107</sup>
414. The bill's policy memorandum says that in recognition of the stresses caused by delays in being notified of an award, the Scottish Government will aim to process applications within ten working days of receipt of application and that payments will be made "as soon as practicable thereafter". The Committee welcomes the commitment to process applications within ten days and, in due course, expects the agency to publish performance targets for making payments.

# Annex B - Extracts from the minutes

## Extracts from the Minutes of the Social Security Committee meetings and associated written evidence

### 9th Meeting, 2017 (Session 5), Thursday 27 April 2017

**Social Security Bill and work programme (in private):** The Committee agreed its approach to its timetable for the Social Security Bill and work programme.

### 11th Meeting, 2017 (Session 5), Thursday 18 May 2017

**'Your Say' Event (in private):** The Committee agreed to hold a 'Your Say' workshop and evidence session as part of its consideration of the forthcoming social security bill.

### 14th Meeting, 2017 (Session 5), Thursday 29 June 2017

**Social Security (Scotland) Bill (in private):** The Committee received a briefing on the Bill from—

Trudy Nicolson, Legislation and Operational Policy Unit Head, Chris Boyland, Legislation Team Leader, Colin Brown, Senior Principal Legal Officer, Miriam Craven, Head of Local Delivery, John-Paul Liddle, Social Security Service Design Manager, and James Wallace, Head of Operational Finance, Scottish Government.

**Social Security (Scotland) Bill (in private):** The Committee agreed a call for evidence and witnesses for the oral evidence sessions. The Committee also agreed to review evidence in private, to consider its draft Stage 1 report in private and to consider witnesses or other bill consideration activities in private.

### 15th Meeting, 2017 (Session 5), Thursday 7 September 2017

**Social Security (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from 'Your Say' witnesses—

Norman Gray;

Brian Hurton;

Moira Sinclair.

**Social Security (Scotland) Bill:** Pauline McNeill and Ruth Maguire reported back to the Committee on the Inclusion Scotland event they attended on 16 August.

**Social Security (Scotland) Bill (in private):** The Committee reviewed the evidence heard earlier in the meeting.

**Social Security (Scotland) Bill (in private):** The Committee agreed to invite additional witnesses to give evidence on the Social Security (Scotland) Bill.

## Written evidence

['Your Say' workshop](#)

## 16th Meeting, 2017 (Session 5), Thursday 14 September 2017

**Decision on taking business in private:** The Committee agreed to take item 7 in private.

**Social Security (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Professor Grainne McKeever, Ulster University Law Clinic.

**Social Security (Scotland) Bill:** Ben Macpherson reported back to the Committee on the MECOPP workshop he attended on 29 August.

**Social Security (Scotland) Bill:** Alison Johnstone reported back to the Committee on the Coalition of Carers event she attended on 30 August.

**Social Security (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Caroline Gardner, Auditor General for Scotland;

Mark Taylor, Assistant Director, and Morag Campsie, Audit Manager, Audit

Scotland.

**Social Security (Scotland) Bill (in private):** The Committee reviewed the evidence heard earlier in the meeting.

**Social Security (Scotland) Bill (in private):** The Committee reviewed the written evidence.

### Written evidence

[Professor Grainne McKeever](#)

[Legislative Scrutiny, Co-ordination and the Social Security Advisory Committee: From System Coherence to Scottish Devolution - Professor Grainne McKeever](#)

[Equality and Human Rights Commission Research Report - Social security systems based on dignity and respect - Simpson, McKeever and Gray](#)

**Social Security (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

John Dickie, Director, Child Poverty Action Group in Scotland (CPAG);

Peter Kelly, Director, The Poverty Alliance;

Dr Jim McCormick, Associate Director Scotland, Joseph Rowntree Foundation;

Jessica Burns, Regional Tribunal Judge, Social Security and Child Support;

Jatin Haria, Executive Director, Coalition for Racial Equality and Rights (CRER);

Chris Oswald, Head of Policy, Equality and Human Rights Commission;

Emma Ritch, Executive Director, Engender;

Judith Robertson, Chair, Scottish Human Rights Commission.

**Social Security (Scotland) Bill (in private):** The Committee reviewed the evidence heard earlier in the meeting.

**Written evidence**

[Child Poverty Action Group in Scotland](#)

[The Poverty Alliance](#)

[Coalition for Racial Equality and Rights](#)

[Equality and Human Rights Commission](#)

[Engender](#)

[Scottish Human Rights Commission](#)

**18th Meeting, 2017 (Session 5), Thursday 28 September 2017**

**Social Security (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Nicola Dickie, Policy Manager, COSLA;

David Semple, PCS Chair of Scotland Committee, PCS Union;

Paul Smith, Member of Administrative Justice Committee, Law Society of Scotland;

Richard Gass, Chair, Rights Advice Scotland;

Rob Gowans, Policy Officer, Citizens Advice Scotland;

Simon Hodge, Solicitor, Scottish Association of Law Centres.

Ben Macpherson indicated that he is no longer a non-practising member of the Law Society of Scotland and declared an interest as being on the roll of Scottish Solicitors.

**Social Security (Scotland) Bill (in private):** The Committee reviewed the evidence heard earlier in the meeting.

**Written evidence**

[COSLA](#)

[PCS Union](#)

[Law Society of Scotland](#)

[Rights Advice Scotland](#)

[Citizens Advice Scotland](#)

**19th Meeting, 2017 (Session 5), Thursday 5 October 2017**

**Decision on taking business in private:** The Committee agreed to take item 4 in private.

**Social Security (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Bill Scott, Director of Policy, Inclusion Scotland;

Morna Simpkins, Scotland Director, MS Society;

Steven McAvoy, Senior Welfare Rights Adviser, ENABLE Scotland;

Craig Smith, Policy Officer, Scottish Association for Mental Health (SAMH);

Peter Hastie, Campaigns, Policy & Public Affairs Manager, MacMillan Cancer Support;

Hugh Robertson, Industrial Injuries Advisory Council.

George Adam declared an interest as a member of the MS Society.

Jeremy Balfour declared an interest as a former personal independence payment (PIP) tribunal member and indicated that he is also a recipient of PIP.

**Social Security (Scotland) Bill (in private):** The Committee reviewed the evidence heard earlier in the meeting.

**Social Security (Scotland) Bill (in private):** The Committee agreed not to take any further action to give it increased time to consider the Social Security (Scotland) Bill.

### **Written evidence**

[Inclusion Scotland](#)

[MS Society Scotland](#)

[ENABLE Scotland](#)

[SAMH](#)

[Macmillan Cancer Support](#)

### **20th Meeting, 2017 (Session 5), Thursday 26 October 2017**

**Social Security (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Heather Noller, Policy and Parliamentary Officer, Carers Trust Scotland;

Amy Woodhouse, Head of Policy, Children in Scotland;

Derek Young, Senior Policy Officer, Age Scotland;

Norman Kerr, Vice Chair, Scottish Fuel Poverty Forum;

Suzanne Munday, Director, MECOPP.

Jeremy Balfour indicated that he is a recipient of the higher rate of Personal Independence Payment (PIP).

**Social Security (Scotland) Bill (in private):** The Committee reviewed the evidence heard earlier in the meeting.

### **Written evidence**

[Carers Trust Scotland](#)

[Children in Scotland](#)

[Age Scotland](#)

[Norman Kerr](#)

[MECOPP](#)

### **21st Meeting, 2017 (Session 5) Thursday 2 November 2017**

**Social Security (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Jeane Freeman, Minister for Social Security, Chris Boyland, Legislation Team Leader, Colin Brown, Senior Principal Legal Officer, Andy McClintock, Chief Digital Officer, Social Security, and James Wallace, Head of Finance, Social Security, Scottish Government.

Jeremy Balfour declared an interest as a former Personal Independence Payment (PIP) tribunal member and indicated that he is also a recipient of the higher rate of PIP.

**Social Security (Scotland) Bill (in private):** The Committee considered an issues paper.

### **23rd Meeting, 2017 (Session 5) Thursday 23 November 2017**

**Social Security (Scotland) Bill (in private):** The Committee considered a draft Stage 1 report and agreed to consider a revised draft at its next meeting.

### **24th Meeting, 2017 (Session 5) Thursday 30 November 2017**

**Social Security (Scotland) Bill (in private):** The Committee considered a revised draft Stage 1 report. Various changes were agreed to, and the Committee agreed to consider a further revised draft at its next meeting.

### **25th Meeting, 2017 (Session 5) Thursday 7 December 2017**

**Social Security (Scotland) Bill (in private):** The Committee considered a revised draft Stage 1 report. Various changes were agreed to, and the report was agreed for publication.

# Annex C - Other written evidence

## Other written evidence

[AdvoCard](#)

[Alzheimer Scotland](#)

[Angus Independent Advocacy](#)

[Anonymous 1](#)

[Anonymous 2](#)

[Anonymous 3](#)

[Argyll and Bute Council](#)

[Borders Independent Advocacy Service](#)

[Burns, Jessica](#)

[Buxton, Anthony](#)

[Camphill Scotland](#)

[Carers Scotland](#)

[Ceartas Advocacy](#)

[Chartered Institute of Housing Scotland](#)

[Child Poverty Action Group in Scotland - additional submission](#)

[Church of Scotland Church and Society Council](#)

[CLIC Sargent](#)

[Close the Gap](#)

[Coalition for Racial Equality and Rights, Engender and Scottish Women's Aid](#)

[Common Weal](#)

[Crisis](#)

[Crohn's and Colitis UK](#)

[Disability Agenda Scotland](#)

[Dumfries and Galloway Advocacy Service](#)

[Edinburgh Voluntary Organisations' Council \(Recovery Essentials report\)](#)

[ENABLE Scotland](#)

Energy Action Scotland

Engender - additional submission

Falkirk Council

Fraser, Joan

Gray, Professor Ann Marie, McKeever, Professor Grainne and Simpson, Dr Mark

Glasgow Centre for Population Health

Glasgow City Council

Glasgow Disability Alliance

Glasgow Homelessness Network

Gordon, Carol

Govan Law Centre

Health and Social Care Alliance Scotland (the ALLIANCE)

HIV Scotland

HUG (Action for Mental Health)

Inclusion Scotland - additional submission (draft amendments)

Independent Advocacy Perth and Kinross

Information Commissioner's Office

Inverclyde Council

Justice Scotland

Kirkwood, A J

Leonard Cheshire Disability

Learning Disability Alliance Scotland

Life Changes Trust

Link Housing Association Ltd

Low Incomes Tax Reform Group

Marie Curie

MND Scotland

Mullen, Professor Tom

Mydex Community Interest Company

National Carers Organisations  
National Deaf Children's Society  
NHS Ayrshire and Arran  
NHS Borders  
NHS Greater Glasgow and Clyde  
NHS Health Scotland  
NHS Lothian Public Health and Health Policy  
North Lanarkshire Council Corporate Welfare Reform Group  
NHS Tayside  
Nourish Scotland  
One Parent Families Scotland  
Parkinson's UK in Scotland  
Patient's Advocacy Service  
People First Scotland  
Poverty Truth Commission  
Reform Scotland  
Renfrewshire Council  
RNIB Scotland  
Royal Blind and Scottish War Blinded  
Scottish Care  
Scottish Council on Deafness  
Scottish Council for Voluntary Organisations  
Scottish Commission for Learning Disability  
Scottish Federation of Housing Associations  
Scottish Independent Advocacy Alliance  
Scottish Labour Party  
Scottish Public Services Ombudsman  
Scottish Refugee Council  
Scottish Unemployed Workers' Network

[Scottish Women's Aid](#)

[Scottish Women's Convention](#)

[SCoWR](#)

[See Me Scotland](#)

[Shetland Islands Council](#)

[Social Work Scotland](#)

[Spicker, Professor Paul](#)

[Stirling Council Advice Services](#)

[Straker, Scott](#)

[Support in Mind Scotland](#)

[Trussell Trust](#)

[Your Voice Inverclyde Community Care Forum](#)

[Volunteer Edinburgh and Queen Margaret University](#)

[Volunteer Glasgow](#)

[Wheatley Housing Group](#)

## **Scottish Government Policy Position Papers and Illustrative Regulations**

[Agency Implementation](#)

[ICT Implementation for Social Security](#)

[Social Security Principles and a Rights Based Approach](#)

[Social Security Charter and Independent Scrutiny](#)

[Re-determinations and Appeals](#)

[Social Security Fraud and Offence Provisions](#)

[Disability Assistance and Employment-Injury Assistance](#)

[Early-Years Assistance \(Best Start Grant\) Illustrative Regulations and Policy Narrative](#)

[Support for Carers](#)

## **Informal Committee Event Notes**

[Inclusion Scotland event \(Glasgow, 16 August 2017\)](#)

[MECOPP workshops \(Edinburgh, 29 and 31 August 2017\)](#)

[Coalition of Carers in Scotland event \(Perth, 30 August 2017\)](#)

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