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Social Security Bill: initial response

The advisory group met on 30 June 2017 for a first consideration of the Social Security Bill. Thank you for meeting us prior to that to explain the principles behind the Bill. Our discussions have also been supported by very helpful input from key Scottish Government officials.

There is much to welcome in the Bill and we look forward to offering advice on its various aspects. We wanted to offer an initial response at this stage, raising matters where we believe revisions will be needed. Although this is partial and reflects the main discussion points so far, we will reflect on other issues at subsequent meetings.

Safeguarding rights: balance of primary and subordinate legislation

The Bill sets out a broad legislative framework with detailed rules left for subordinate legislation. This decision fits with the challenging timetable for delivering social security powers in Scotland. It maximises government's ability to be responsive as circumstances change, an approach consistent with one of the key social security principles of continuous improvement.

However, it is not clear that full consideration has been given to how this approach provides sufficient safeguards for people who will receive social security assistance or to the implications for other key principles - notably that social security is a *human right* and that *respect for the dignity* of individuals is at the heart of the system. To ensure the optimum balance between rights and flexibility, we would encourage Ministers to:

- consider whether the primary legislation is sufficiently detailed to uphold the principles of social security as a human right and the dignity and respect of individuals;
- consider whether an approach weighted heavily towards the use of regulations would ensure robust scrutiny and accountability; and
- ensure the potential impacts of the various provisions in the Bill are fully considered and reported.

We are mindful that even when upholding rights is on the face of legislation, for example with Self-Directed Support, this may still not be realised in practice.

We would encourage the Scottish Government to set out its thinking on the use of primary legislation and subsequent regulations at an early stage of Bill scrutiny.

Right to cash or alternative assistance

An example of where the balance between rights and flexibility requires careful consideration is in the form of assistance, whether financial or alternative. With the choice left to subordinate legislation, it would be within the power of government to remove a cash benefit entirely in favour of in kind support should it choose to do so, without the usual scrutiny that accompanies primary legislation. This is not a power that currently exists within GB social security (with the exception of such support as free vitamins). We recommend further reflection on this particular flexibility, with consideration given to more limited application in primary legislation or alternative ways to build in flexibility. For example, a person currently entitled to Personal Independence Payment (PIP) mobility component has a straightforward right to payment of benefit. If they prefer to lease or buy a car, DWP arranges for their benefit to be paid to the Motability scheme. In this way, entitlement remains to financial support, but there is flexibility for government to offer an alternative and personal choice over whether to take up support in cash or in kind.

A degree of choice is one route to underpinning dignity and respect. Conversely, to remove that choice runs counter to the ethos of co-production and the person-centred approach, and it could undermine the intention that the system be rights-based. Choice underpins the approach being taken for payment flexibilities to households receiving Universal Credit in Scotland and one we believe can be extended further.

We are also of the view that the legislation should have explicit due regard to ensuring accessibility and the provision of support, so no-one loses out on their entitlement due to lack of these.

Recovery of overpaid assistance

The Bill allows the new agency to recover any overpaid assistance from an individual, regardless of who or what caused the overpayment. This is similar to the current power that HMRC has to recover tax credit overpayments. The tax credits system is characterised by the use of HMRC discretion on whether or not to recover, and the use of guidance rather than law. There is no right of appeal as applies generally for GB social security benefits. This places a considerable responsibility on claimants, presents particular challenges for people in vulnerable circumstances, such as those experiencing poor mental health, and has led to extensive hardship. While we appreciate the desire for a simpler proportionate response, it is not clear that the current approach will work well for individuals. The consequences of having to repay could be dire for people

already on very low incomes. We would like to see a system with incentives for good decision making and getting it right first time, with the onus on bearing the consequences of any errors itself. We recommend a more detailed appraisal of options that strike a better balance between the rights of individuals and costs to the public purse.

Phasing

In all major processes of change, matters of purpose and function should ideally be resolved before questions of form. We need to draw upon insights from Experience Panels and other sources of expertise, and analysis with recommendations, before designing the infrastructure in detail.

For example, a system of assessment and appeals can only be decided when the function of a social security payment is determined. Interaction with advice and independent advocacy services will be critical to ensuring a consistently accurate, high uptake among people who are eligible, and consideration should be given to putting right of access to these services in primary legislation.

There is also a desire to ‘future-proof’ systems and processes as far as possible, to allow continuous improvements in policy and practice. While the group welcomes this principle, flexibility needs to be pursued in ways that do not cause detriment to rights. The group will consider this further in subsequent advice.

Operational culture

The group has also welcomed an early discussion about the new agency. Our main reflections at this stage are: (i) the significance of getting the operational culture right, including multiple communication channels and ensuring the public avoids being passed from ‘pillar to post’; (ii) expressing the principles of Scottish social security as values and performance objectives; (iii) ensuring the standards written into the Charter are tested regularly through feedback from the public and frontline staff.

The group are aware of the need to address negative experiences of the current system, especially among disabled people, and concerns that things will not change. To some extent this may be addressed by creating a system which both users and staff have an end to end understanding of. It is clear that staff cannot be focused on one aspect of the system without a proper appreciation of how it fits into the overall user journey and experience.

Research and analysis

The group has welcomed input from officials on research and analysis, including engagement with Experience Panel members. The Scottish Government’s commitment to improving knowledge of people’s experiences and expectations, with the guidance of research professionals as guarantors of high ethical standards and transparency, is an essential element for better decision-making and to gauge impact. The group is keen that this role is pursued consistent with principles of co-

production as far as possible. We think there is a major opportunity here to build capacity for independent support to Experience Panels, in partnership with disabled people's organisations and carers' networks – for example, to develop indicators around dignity and respect.

We also think there is a broad public interest at stake – those with little or no experience of the social security system may need to use it in future, and we would encourage Ministers to engage widely with the public.

Other issues

- The issue of legislative scrutiny is one we intend to address shortly.
- We will consider the findings of a new report on dignity and respect by a team of law experts at Ulster University, commissioned by EHRC Scotland.
- Although technically outside the scope of the group, we are aware that social security decisions will interplay with other devolved areas (e.g. social care, employment programmes) and GB reserved matters (e.g. the recent Green Paper on disability, health and work). We will keep these in our sights and offer advice where capacity allows.

I would be pleased to discuss these points further.

A handwritten signature in black ink that reads "Jim McCormick". The signature is written in a cursive style and is positioned above a faint horizontal line.

Jim McCormick
Chair – Disability and Carers Benefits Expert Advisory Group