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I am writing to you regarding the Disability and Carers Benefits Expert Advisory Group (DACBEAG) short-life workstream on scrutiny, and the report that was produced in December 2017. I would like to thank yourself, Judith Paterson, and everyone else involved in the working group who managed to produce this report in such a short timescale.

As I am sure you are aware, the Social Security Committee referred to the working group's findings in its Stage 1 report¹, published on 11 December 2017, and the Scottish Government published its response to that report on 15 December 2017². While our position on some of the recommendations made in the DACBEAG scrutiny report is therefore contained within our response, I wanted to write to you directly to provide a fuller explanation and to outline where we are proposing to take action at Stage 2.

To that end, please see the attached **Annex A**, which addresses the seven primary recommendations made by the report (used as headings to aid readers in navigating the text). However, please be assured that we will be examining all of the more detailed advice as we develop the independent body (should the amendments be approved by Parliament).

¹ See: <https://digitalpublications.parliament.scot/Committees/Report/SC/2017/12/11/Stage-1-Report-on-the-Social-Security--Scotland--Bill>

² See: <http://www.gov.scot/Publications/2017/12/2026>

I want to see the creation of a robust and independent scrutiny body that works with the Scottish Government and the Scottish Parliament to ensure that the Scottish social security system remains one that is centred on dignity, fairness and respect. I believe that our amendments set out the framework for this, and should they be implemented, the considerations of your short-life working group will play a key role in improving outcomes for people using the social security system.

Kind regards

JEANE FREEMAN

There is a need for a body to undertake independent, expert scrutiny.

1. The Scottish Government agrees with this recommendation. The amendments it has lodged at Stage 2 (17 January 2018, amendments 13, 15, 16, 17, 49, 53, and 54, as well as being a part of amendments 55 and 56³) give clear and unequivocal effect to the commitment to introduce a statutory independent scrutiny body, to be called the Scottish Commission on Social Security (“SCoSS”). As well as responding directly to this recommendation from the DACBEAG short-life working group, these amendments also address the recommendations made by the Social Security Committee, and also deliver on commitments made by the Minister for Social Security, both when she appeared before Committee on 2 November 2017 and during the Stage 1 debate on 19 December 2017.

2. They also address feedback received from a wide range of stakeholders. The issue of independent scrutiny was raised in evidence given to the Committee by groups and organisations such as: Age Scotland, Alzheimer Scotland, Carers Scotland, Carers Trust Scotland, Child Poverty Action Group, Citizens Advice Scotland, Coalition for Racial Equality and Rights, COSLA, Disability Agenda Scotland, Engender, the Equality and Human Rights Commission, Inclusion Scotland, MND Scotland, MS Society Scotland, NHS Health Scotland, North Lanarkshire Council, One Parent Families Scotland, Parkinson’s UK in Scotland, Poverty Alliance, Scottish Council on Deafness, Scottish Independent Advocacy Alliance, Scottish Refugee Council and Scottish Women’s Aid.

3. The amendments make provision for the establishment of the SCoSS. It is intended that the SCoSS should be a small, focussed organisation with scope and flexibility to bring in expertise where it needs to. It is therefore proposed that the body will have a chair and two to four members. Members would be appointed by Scottish Ministers, subject to the need to ensure that the body has the right mix of knowledge and expertise, including knowledge of the effects of disability and of policies elsewhere in the United Kingdom (see amendment 16, paragraph 14(3)(a)).

4. It is proposed that the SCoSS will have certain specific functions (with the power for Scottish Ministers to confer additional functions on the SCoSS via regulations):

- to scrutinise proposals for regulations about assistance;
- to prepare and submit to the Scottish Ministers a report on any matter, relevant to social security, that the Ministers request;
- to prepare and submit to the Scottish Parliament a report on any matter, relevant to social security, that the Commission is requested to report on by the Parliament;
- to prepare and submit to the Ministers and the Parliament, from time to time, a report containing—
 - (i) an assessment of the extent to which any or all of the expectations set out in the Scottish social security charter are being fulfilled, and
 - (ii) recommendations for improvement where the assessment is that those expectations are not being fulfilled.

5. All reports prepared by the SCoSS must be published, to ensure transparency. The Scottish Government also, with one exception, agrees with the DACBEAG working group’s recommendation that there should be no exceptions to scrutiny (while noting that deviates from the existing Social Security Advisory Committee provision, which lists the exceptions that

³ See: [http://www.parliament.scot/Social%20Security%20\(Scotland\)%20Bill/Daily_List_17_January_2018.pdf](http://www.parliament.scot/Social%20Security%20(Scotland)%20Bill/Daily_List_17_January_2018.pdf)

currently apply at section 173 and schedule 7 of the Social Security Administration Act 1992). The one exception proposed is that regulations which simply consolidate previous such secondary legislation should be exempt.

6. The DACBEAG working group have also suggested that the role of the scrutiny body could be filled on an interim basis, until the statutory body is established. However, the Scottish Government's view is that scrutiny arrangements are already in place for the benefits which will be taken forward while the SCoSS is being established (these are referred to as 'Wave 1' benefits and include the new Best Start Grant and Funeral Expense Assistance). The Scottish Government has produced and consulted on draft illustrative regulations for these benefits during the Bill's progress, and it intends to carry out further consultation, including with the appropriate reference groups and people with experience of these benefits.

The role of scrutiny of regulations and that of expert advice based on scientific and medical research should be separated.

7. The specific role and remit of the SCoSS beyond the scrutiny of assistance regulations has yet to be decided (and should the relevant amendments to set up the body be approved by the Scottish Parliament). The Scottish Government agrees with the working group's recommendation that there is value in having employment injury assistance regulations scrutinised by the same body as other such legislation and proposes that the SCoSS would undertake this function. The Scottish Government will continue to explore the best ways of obtaining the appropriate scientific advice and recognises the need for good working relationships with organisations, such as the IIAC, to optimise information sharing. The Scottish Government has therefore not lodged any amendments to set up a Scottish equivalent of the Industrial Injuries Advisory Council (IIAC) at this time.

Beyond its statutory role in scrutinising regulations, a scrutiny body should also perform a general advisory role to Scottish Ministers and by extension to Parliament.

8. As noted in paragraph 4 above, the proposed amendments to establish the SCoSS establish a duty on the body to report on any matter relating to social security as requested by either Scottish Ministers or the Scottish Parliament.

We are persuaded of the need for some proportionate scrutiny of guidance. We recommend that a scrutiny body should have a formal role in considering guidance.

9. As mentioned at paragraph 7 above, the specific role and remit of the SCoSS beyond the scrutiny of assistance regulations has yet to be decided. That said, the scope of what is proposed in the amendments (as lodged) would allow for the SCoSS to scrutinise guidance as part of any consultation process which the Scottish Government takes forward with individuals and stakeholders. It would also allow the Scottish Parliament to request that the SCoSS prepare and submit to them a report on any matter, relevant to social security, that it so wished.

There is a need for independent, expert scrutiny of the interactions between Scottish and UK social security systems.

10. The Scottish Government believes that, as the devolved Scottish system will initially form only a small part of the overall social security assistance functioning in Scotland (with the remainder still reserved to the UK-level Department for Work and Pensions), establishing a good working relationship with both the Social Security Advisory Committee and the IIAC will be vital in ensuring that individuals who receive social security assistance get what they are

entitled to (and in a manner that treats them with dignity, fairness and respect). The Scottish Government will continue to explore ways to achieve this with all relevant groups (subject to Parliament accepting the amendments) and recognises that the development of appropriate governance arrangements will be critical to achieving this. The existing cross-Governmental Ministerial and official structures, built around the existing Joint Ministerial Working Group on Welfare, will also have a role to play in this regard.

There is a need for independent oversight of performance and standards.

11. The Scottish Government agrees with this recommendation, especially in so far as it pertains to the social security charter. The charter will be co-designed in partnership with the people of Scotland, which the Scottish Government strongly believes is itself an important form of accountability. As DACBEAG correctly observe, the charter will be a crucial component of the new system and will set out the specific actions that Scottish Ministers and the agency will take to ensure that the principles of dignity, respect and human rights directly influence the front line delivery of services. It is therefore right that the extent to which this is being realised in practice should be subject to robust and independent scrutiny.

12. That is why the amendment set out at paragraph 4 above makes clear that the SCoSS would have a role in protecting people's rights at a systemic level by reporting to Parliament on the extent to which the system is delivering on the expectations to be set out in the charter. In this regard, the SCoSS would have the ability to report whenever it chooses, providing scope for it to report on more specific issues as and when these may arise. In carrying out this function, the Scottish Government expects that the SCoSS would wish to consider relevant performance data generated by the agency, including the rates and nature of complaints, and any user feedback that may be collected.

13. The SCoSS's strategic oversight of performance against the charter will be further bolstered by the provision that allows stakeholders, especially those directly supporting and advising people using the system, to submit evidence to the SCoSS for investigation where they have grounds for believing the system is falling short of the standards to be set out in the charter. In effect, this can be seen as almost akin to a whistle-blowing function that empowers expert organisations to play their role in protecting rights by offering a means of formally challenging the system.

14. Section 5 of the Bill also places a requirement on Scottish Ministers to review the charter within 5 years of first publication, and thereafter within 5 years of the previous review. In doing so, Ministers must consult people who have received assistance from the Scottish system and lay a report before Parliament outlining and explaining any changes. To ensure independent oversight of this work, as well as any other potential charter alterations, the Scottish Government has lodged a further amendment (number 13⁴) that adds a further layer of protection by placing an additional duty on Scottish Ministers to consult the SCoSS prior to making any changes to the charter.

15. Crucially, the amendments the Scottish Government proposes would also place a legal duty on the SCoSS to have regard to relevant human rights instruments in the exercise of all its functions. This is a very significant step that would mean that the performance of the Scottish system would be independently evaluated against, and held to account for meeting, international human rights standards.

⁴ See: [http://www.parliament.scot/Social%20Security%20\(Scotland\)%20Bill/Daily_List_17_January_2018.pdf](http://www.parliament.scot/Social%20Security%20(Scotland)%20Bill/Daily_List_17_January_2018.pdf)

16. The Scottish Government has also lodged a separate amendment (number 18⁵) that would provide people with the right to seek individual redress from an independent body if they feel that their personal treatment constitutes a breach of the charter. While the amendment leaves open the question of which body should investigate these complaints, it may be helpful to note that the Scottish Government has held productive initial discussions with the Scottish Public Services Ombudsman with a view to them undertaking this role.

17. Finally, as the DACBEAG report acknowledges, Audit Scotland will have a duty to provide independent assurance that the very substantial investment of public funds in social security is being spent properly, efficiently and effectively.

18. Taken together, and in combination with the Bill's existing requirements for Ministers to report to Parliament on performance, the Scottish Government believes that these measures represent a powerful means of realising and protecting people's rights at both an individual and systemic level.

Primary reporting should be to Scottish Ministers as the most appropriate line of accountability for the scrutiny/advisory function.

19. As stated at paragraph 5 above, the Scottish Government amendments propose that all reports prepared by the SCoSS must be published. This will ensure complete transparency of the work conducted by the SCoSS, and reinforce the independence of the body. Additionally, both Scottish Ministers and the Scottish Parliament will be able to ask the SCoSS to produce reports on relevant topics (see paragraph 4 above). It should also be noted that the amendments propose a general power for the SCoSS to carry out work that it would deem necessary or expedient for the purposes of, or in connection with, the performance of its functions. This could include pro-active work, if the SCoSS deems it necessary.

20. The Scottish Government's response to the Social Security Committee's Stage 1 report makes it clear that it accepts that an enhanced level of Parliamentary scrutiny for regulations is required. It has therefore lodged amendments (17 January 2018, numbers 55 and 56⁶) which introduce a requirement to apply a form of super-affirmative procedure to regulations for social security assistance made under part 2, chapter 2 ('Types of assistance to be given') and section 45 ('Power to provide for top up') of the Bill.

21. These amendments would require Scottish Ministers to take a series of actions prior to being able to lay any regulations – to which this section applies – before Parliament. These are:

- Publish their proposals for draft regulations;
- Refer the proposals to the SCoSS and notify the Parliament of that fact;
- The SCoSS must then prepare a report on the proposals that sets out any observations and recommendations they would wish to make. The report must take into account the Scottish social security principles and any relevant international human rights instruments; and
- Scottish Ministers have a duty to respond to the report, which should be submitted to Parliament when the draft regulations are laid. The response must set out where the regulations differ from the report (and why), what Scottish Ministers have done to address any comments and/or recommendations made in the report, and/or detail if they disagree with any of the report's conclusions.

⁵ See: [http://www.parliament.scot/Social%20Security%20\(Scotland\)%20Bill/Daily_List_17_January_2018.pdf](http://www.parliament.scot/Social%20Security%20(Scotland)%20Bill/Daily_List_17_January_2018.pdf)

⁶ See: [http://www.parliament.scot/Social%20Security%20\(Scotland\)%20Bill/Daily_List_17_January_2018.pdf](http://www.parliament.scot/Social%20Security%20(Scotland)%20Bill/Daily_List_17_January_2018.pdf)

22. The amendments have been drafted to give the Scottish Parliament as much scope as possible to decide its own role, on a case-by-case basis. This aligns with the aim the Scottish Government has in ensuring the overall scrutiny system is as flexible as possible. For example, should there be good reason for a proposed regulation to be scrutinised within a short timeframe so as not to unnecessarily delay delivery of benefit payments to individuals.

23. Together with the proposals for independent scrutiny, the Scottish Government believes this will provide the enhanced levels of scrutiny required, and will address any concerns that the balance between primary and secondary legislation has not been appropriately struck.

Scottish Government
Social Security Directorate
24 January 2018