

Disability and Carers Benefits Expert Advisory Group: Appointees

To: Shirley-Anne Somerville, Cabinet Secretary for Social Security and Older People
By e-mail

14 August 2020

Dear Shirley-Anne,

Appointees

Thank you for your request to provide advice on appointees ahead of stage 2 of the Social Security Administration and Tribunal Membership (Scotland) Bill 2020. We are pleased to offer our advice on this matter below.

We welcome the commitment by the Scottish Government to ensure safe and secure delivery of the newly-devolved benefits, and to improve the claiming process for all recipients. We understand that our advice may incur risks, implications and challenges for the Scottish Government. These will be made explicit in this advice note and we aim, where possible, to signpost a proposed solution.

We have worked with officials to ensure that our advice is informed by information available at this time and relevant to the current policy landscape. We met with officials on 15 July 2020 to discuss this issue. We would like to especially thank the officials who worked with us on this policy area. Their input was clear, concise, and greatly aided us in focusing this advice.

Clearly, information and the current policy landscape may change in ways that cannot be foreseen at this time, so the advice we give now is with the caveat that this too may change in light of developments.

We set out below some issues and recommendations arising from our discussions to which we wish to draw to your attention. Our recommendations are summarised at the end of this letter.

Safeguarding Principles

We believe safeguarding principles should be enshrined in law as opposed to being simply reflected in administrative guidance. We would therefore welcome the addition of safeguarding principles to the Social Security Administration and Tribunal Membership (Scotland) Bill 2020 (the Bill).

It is important that these rights are codified in law as opposed to guidance, as guidance carries less weight and is therefore less useful in a legal challenge. What these rights are should be in statute in order to protect these rights, while how they are to be realised should be in guidance.

When deciding what those principles should be, we suggest the rights espoused in the UN Convention on the Rights of Persons with Disabilities (UNCRPD) should be

preferred to those in the Adults with Incapacity (Scotland) Act 2000 (the Act) as they are more consistent with our views of the rights of disabled people. We also note that the Act is currently under review and there is a consensus among stakeholders that the Act is not currently consistent with the UNCRPD.¹ As this review could result in substantive changes to the Act, aligning safeguarding principles with the UNCRPD carries fewer risks to the longevity of the principles in the Bill.

Recommendation 1: Safeguarding principles should be enshrined in law. How they are realised should be set out in guidance. These principles should be drawn from the UN Convention on the Rights of Persons with Disabilities.

What exactly these rights should be and what the legal implications of enshrining these in law would be are outwith our area of expertise so we are not be able to be specific here, especially given the short timescale set for this advice. We would be happy to discuss these issues further with officials in future.

Supported Decision Making

We are concerned at the disparity between the number of appointees in Scotland compared to the number of legal guardianships. We understand that there are an estimated 80,000-100,000 Department of Work and Pensions (DWP) appointees in Scotland but only 18,651 active Guardians registered with Office of the Public Guardian (Scotland). This suggests that appointments are being over utilised.

We believe at least some of this disparity can be explained by administrative expediency. It is certainly simpler and less expensive for the DWP to appoint someone to claim and maintain the benefits of a disabled person who needs extra support than it would be to design the social security system in a more accessible way and offer adequate support to those disabled people who need it so they can manage their own award.

This approach can lead to undesirable results, some of which this Bill is seeking to address. For example, if young disabled people are never given the opportunity to manage their own award, they may never have the opportunity to understand whether or not they can maintain it, and possibly their wider finances, themselves. This makes it more likely that an appointee, who may have been necessary at one point in the claimant's life, will maintain their role longer than necessary.

This is a situation many members hear about in their daily work. We also heard about this problem from young disabled people themselves when we conducted some stakeholder engagement for our advice on Disability Assistance for Children and Young People (DACYP) in which we explained,

Decisions about who manages benefits at age 16 can result in someone having rights over all decisions for the rest of another person's life. This can lead to young disabled people who do have capacity to manage their affairs -

¹ 117/141 of those consulted answered yes to "Do you agree we need to amend the principles of the AWI legislation to reflect Article 12 of the UNCRPD?", Adults with Incapacity (Scotland) Act 2000, Summary and analysis of consultation responses, August 2018, p. 2. (<https://consult.gov.scot/health-and-social-care/adults-with-incapacity-reform/>)

with support - being held back in terms of fulfilling their potential to lead independent lives therefore undermining human rights – for privacy, for home and family life as adults, for their own adequate standard of living through work or benefits and across the whole range of life opportunities.²

It is also important to note that capacity can sometimes fluctuate, especially with regards to mental health, so that in normal circumstances a person is able to manage their benefits but during some period may require additional support to do so.

With these points in mind, we suggest there should be a larger focus on supported decision making - supporting disabled people to apply for and maintain their social security awards on their own - with appointments being recommended only where it is clearly the most appropriate arrangement. This approach would be more consistent with the UNCRPD principle that safeguards should “be proportional and tailored to the person’s circumstances” and could limit the problems discussed above.³

Recommendation 2: Supported decision making should be the preferred method of supporting disabled people to claim social security and maintain their awards. Appointments should be made only where it is clearly the most appropriate arrangement.

This will require making sure social security is administered in a way that is accessible to all. Allowing benefit advisers and support workers to discuss their client’s case with Social Security Scotland (the Agency) via “implicit consent”⁴ as opposed to “explicit consent” will make it far easier for disabled people to maintain an award with the right support.

Recommendation 3: To allow for supported decision making, social security administration must be appropriately accessible.

Recommendation 4: The concept of “implicit consent” should be integrated into staff guidance to allow the Agency to discuss a claimant’s social security claim with the people who are supporting them without undue barriers.

It will also be important to ensure adequate support is available to disabled people who need it. This will likely require further funding to increase capacity of organisations that support disabled people directly as well as those that offer support to their families and carers. It will also require further investment to ensure that carers and family members are equipped to take on this supporting role. We find that families are often encouraged via social work to think along the route of guardianship

² Disability and Carers Benefits Expert Advisory Group, Advice on Disability Assistance for Children and Young People, July 2019. pp. 11-12. (<https://www.gov.scot/publications/disability-and-carers-benefits-expert-advisory-group---dacyp-advice/>)

³ Article 12.4 of the UNCRPD. (<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-12-equal-recognition-before-the-law.html>)

⁴ Referred to as “an alternative enquiry” in Working with Representatives: guidance for DWP staff, updated April 2019. (<https://www.gov.uk/government/publications/working-with-representatives-guidance-for-dwp-staff/working-with-representatives-guidance-for-dwp-staff>).

and being an appointee rather than how they can support their family member to make their own decisions. A better approach would be to make sure that families and carers are given the resources and tools necessary to understand and empower supported decision making.

Recommendation 5: Disabled people, their families and carers should be provided with the increased resources and tools necessary to understand and empower supported decision making. Organisations that provide this support directly must also be provided these resources.

Reviews

For those that do require or request an appointee, we believe regular independent reviews must be built into the system. Not only will this help safeguard disabled people from potential abuse, but it will offer opportunities for them to reflect on their capacity and reduce the potential for deskilling or “institutionalisation in the home”. It will also offer an opportunity for carers and families to reflect in a similar way and be supported to help the disabled person to make decisions and manage their own social security benefits.

While a blanket approach may be easier to administer, it is important to remember that capacity is not black and white. There are “shades” of capacity that may change over time and each individual will be different. We therefore suggest a mix with a more tailored method would be more proportional and more consistent with the safeguarding principles discussed above.

To do this, a risk assessment could be used to identify claimants who might be especially vulnerable to inappropriate appointments. An analysis of common trends amongst claimants who dispute requiring an appointee could reveal warning signs that might trigger a review, or a shorter timescale between reviews. Looking at where guardianships have been unsuccessful could be another source of information for this sort of analysis.

For example, such an analysis might reveal that issues arise more frequently in cases where appointees have the social security payment paid into the same account as their other income. In these instances it might be appropriate to have more regular reviews than someone who puts the payments into a distinct account only used for the claimant’s awards. Similarly, younger claimants, who are ostensibly more susceptible to an inappropriate appointment, may benefit from more regular reviews. These reviews could also serve as an opportunity to engage with young people and their carers before moving from CDP to DAWAP, to raise awareness and link to support around gearing up for the future. Those with corporate appointees, who may not receive the attention of someone with an individual appointee, are another group of people for whom more frequent reviews might be appropriate.

It would also be prudent to tailor review dates to an individual’s capacity, especially where there is evidence that their capacity may fluctuate. For example, a decision where a finely balanced decision was originally made may benefit from more regular reviews than one in which a more clear-cut, long-term decision is able to be made.

Additionally, reviews should be scheduled at specific points of transition in a claimant's life. For example, when they turn 16 or move from child disability payments to disability assistance for working age people at 18.

A combination of these two strategies - review dates set according to risk factors and points of transition in the claimant's life - may be the best way to ensure reviews are appropriately consistent but still tailored to each individual.

Recommendation 6: Appointee reviews should be conducted at major transition points in a claimant's life. Ad-hoc reviews, and frequency of further reviews, should be tailored to each claimant's individual situation.

Dispute Resolution

When there is a dispute about an appointment we believe there should be a formal independent dispute resolution mechanism of some kind. We do not have a strong view as to what this mechanism should look like, as long as the rights, needs and wishes of disabled people are protected. In our view this necessarily entails a process that minimises any barriers to access. For example, the claimant and the appointee should not incur any financial costs and neither should require representation. A full tribunal or other judicial arrangement may not be necessary considering the resource implications and what we understand the frequency of these sorts of disputes have been in the current system. However, we are in no way opposed to a tribunal being implemented if it is felt this will best protect the rights of disabled people. If this is the chosen method, the Additional Support Needs Tribunal has been highlighted as a model of good practice. We would suggest a Social Security Tribunal would not be an appropriate model, as their training and culture is inquisitorial - to determine facts in relation to fairly detailed criteria - and not aimed at resolving disputes. That said, we believe something more akin to an ombudsman review, an administrative solution involving independent social work, or something like the children's panel may be similarly effective. Like a more judicial arrangement, these models are independent, easily accessible, and ensure the rights of individuals are upheld, but may be less costly and administratively heavy. Whatever model is decided upon, it will be important that it does not feel confrontational or intimidating, so individuals and families feel comfortable when accessing it.

Recommendation 7: A formal independent dispute resolution mechanism should be put in place to address disagreements in the appointments process. We do not have a strong view on what exactly this process should look like, so long as any barriers to access it are minimised and the rights, needs and wishes of the disabled person are protected.

Equally important to having an independent dispute resolution mechanism will be creating a system that proactively avoids disputes in the first place. As we discuss above regarding reviews, a tailored risk analysis could be used to identify high risk appointments and address any issues before a dispute arises.

Essential to this sort of approach will be giving claimants a safe space to discuss appointments with the Agency or independent support. This will be especially important where domestic violence or other abuse may be present in the relationship

between the claimant and the appointee. It is also important to recognise that abuse can emerge in caring relationships and there is scope to reduce or prevent the day to day strains of caring turning into abuse, especially if it is given attention at an early stage. When having these discussions, it will be important for the Agency to make it clear that having or not having an appointee will not affect a claimant's award.

We understand that in the DWP system, agents will not speak with claimants if they have an appointee. This makes it hard for claimants to flag issues with an appointment to the DWP. This must not be mirrored in the Scottish system.

Training staff in identifying these risks will be an important part of ensuring they are picked up on quickly and appropriate actions are taken to safeguard the claimant. Another useful tool in recognising risks early will be to build in standard questions aimed at identifying these issues in the initial interviews with claimants and appointees. A specialist team who focuses on these issues should be created and maintained to lead on this.

Recommendation 8: The administration of appointees should be designed in a way that proactively avoids disputes. Identifying high risk appointments early and giving claimants a safe space to discuss concerns with Agency and other support staff will be key to this approach. A specialist team should be created and maintained to lead on this.

With regards to how best to ensure the voices of children are heard in a dispute, we suggest a combination of social work services and third sector agencies may be best placed to provide advice or model processes. We do not feel we have the existing expertise or time necessary to consult young people on this issue.

Corporate appointees

An issue that does not appear to have been given much focus is corporate appointees – where an organisation as opposed to an individual takes on the responsibility of being an appointee. We have concerns about this process that we suggest merit further investigation and consideration at this stage.

There seems to be little to no external oversight ensuring these organisations are equipped to be an effective appointee. For instance, we have heard that some organisations acting as corporate appointees may not be able provide benefit advice, nor have clear referral pathways for staff to get benefits advice on behalf of their appointees, so they are unable to maximise the incomes of their clients. While we understand individuals who are appointees may not have a requirement to maximise the incomes of claimants, we suggest organisations playing this role might be held to a higher standard. This would make corporate appointees more like individual appointees who may proactively seek to maximise the disabled person's income as they have a connection with the disabled person, or they may have contact with another agency (GP, advice agency) who may recommend a benefits check. Moreover, our understanding is that Social work or other agencies often become an appointee because no other person is available to take on this role when it is needed. This creates a further resource implication for agencies who are already stretched. The key here is that where there is a corporate appointee, there is often

no individual looking out for the needs of the client. Imposing a higher standard on corporate appointees would recognise and partially mitigate this difference.

Ensuring corporate appointees provide income maximisation advice, or at least ensure clients receive such advice regularly, would certainly benefit many claimants and would support the principle of benefit uptake espoused in the Social Security (Scotland) Act 2018. This is only one example of an obligation that could be put on corporate appointees. Other potential obligations include: providing regular opportunities for claimants to learn how to take control of their own finances, or regularly conducting internal reviews with claimants to see if the appointment is still appropriate in their view.

Recommendation 9: The Scottish Government should consider whether corporate appointees should have specific obligations, like ensuring their client receives regular income maximisation advice, defined and monitored as part of their role. Guidance should be provided that clearly sets out what these obligations are and how they should be met. Any new requirements must be coupled with the financial resources necessary to implement them.

Other support

An additional point we would like to address is the place of other formal support in the context of appointees. It is important that these other supports, including for example social work, other local authority support services, and third sector support services, play a role in the decision of whether or not an appointee is appropriate.

The Agency must have a thorough understanding of the support an individual currently has and should use this information throughout the appointee process. When the initial appointment decision is made, these other supports should be consulted to determine whether supported decision making would be more appropriate. When determining how often appointments are reviewed and when the reviews take place, these agencies should again be consulted so a picture of the claimant's capacity and available support is well understood.

Where the Agency feels an appointment would be appropriate but is unable to identify relevant supports, we suggest the local delivery model should be utilised to connect claimants to appropriate locally available support.

Recommendation 10: Appointment decisions should be made with a thorough understanding of the other support the claimant is engaged with. Where the agency identifies further support may be beneficial, referrals to local support services should be made.

Prescribed persons

Regarding the proposal to add the requirement for a "prescribed person" to witness any appointment: we support in principle any additional safeguard to the well-being of disabled people. However, such safeguards must be carefully balanced against creating undue administrative delay or other burdens. We suggest that allowing only specifically named persons and professions to serve as a witness may create an

undue barrier in requiring the disabled person and potential appointee to find and secure the time of such a person. This is an issue that will need to be carefully considered. Any administrative burden on applicants should be minimised.

How this proposal would work with corporate appointees will also need to be considered.

Recommendation 11: Safeguarding processes must be carefully balanced against administrative delays and other burdens. If the proposals for requiring a prescribed person to witness an appointment are accepted, they should be implemented in a way that minimises administrative burden on applicants.

Finally, we believe it is important that whatever process is introduced should be subject to a “test and learn” approach, including a formal review. We are encouraged by the Scottish Government’s clear desire to create a more claimant focused appointee process, and understand that it is doing so in a distinct legal framework, which includes different legal duties from the reserved system. We also understand that there is a relative lack of information about how well the appointee process in the reserved system is working, which makes comparative analysis difficult. For these reasons, it will be imperative that any approach initially implemented is viewed as a test phase that will be subject to different iterations if analysis of new evidence collected suggests it would be beneficial. Only by taking this approach can the Scottish Government ensure that the appointee process is as good as it can be.

Recommendation 12: The Scottish Government should take a “test and learn” approach to the newly implemented appointee process, including committing to a formal review.

Conclusion

Ensuring disabled people are properly safeguarded is of the highest importance. While some will require an appointee, our experience suggests the vast majority of disabled people are able to make informed decisions about many aspects of their lives, including about their social security, if they are provided with the correct support. This should be the principle that underlies the Scottish Government’s approach to appointees.

Throughout the appointee process, the key will be to carefully balance the safety of the claimant against their right to make independent decisions. This will mean tailoring the process to each individual as far as practicable. These changes may require further resources than the process currently used in the reserved system, as is to be expected when designing and delivering a social security system that best promotes dignity, fairness and respect.

We are encouraged by the steps taken so far to ensure disabled people in Scotland are listened to and safeguarded in the new social security system. The new appointee process is an opportunity to advance that trend.

Recommendations

Please see below our key recommendations.

Recommendation 1: Safeguarding principles should be enshrined in law. How they are realised should be set out in guidance. These principles should be drawn from the UN Convention on the Rights of Persons with Disabilities.

Recommendation 2: Supported decision making should be the preferred method of supporting disabled people to claim social security and maintain their awards. Appointments should be made only where it is clearly the most appropriate arrangement.

Recommendation 3: To allow for supported decision making, social security administration must be appropriately accessible.

Recommendation 4: The concept of “implicit consent” should be integrated into staff guidance to allow the Agency to discuss a claimant’s social security claim with the people who are supporting them without undue barriers.

Recommendation 5: Disabled people, their families and carers should be provided with the increased resources and tools necessary to understand and empower supported decision making. Organisations that provide this support directly must also be provided these resources.

Recommendation 6: Appointee reviews should be conducted at major transition points in a claimant’s life. Ad-hoc reviews, and frequency of further reviews, should be tailored to each claimant’s individual situation.

Recommendation 7: A formal independent dispute resolution mechanism should be put in place to address disagreements in the appointments process. We do not have a strong view on what exactly this process should look like, so long as any barriers to access it are minimised and the rights, needs and wishes of the disabled person are protected.

Recommendation 8: The administration of appointees should be designed in a way that proactively avoids disputes. Identifying high risk appointments early and giving claimants a safe space to discuss concerns with Agency and other support staff will be key to this approach. A specialist team should be created and maintained to lead on this.

Recommendation 9: The Scottish Government should consider whether corporate appointees should have specific obligations, like ensuring their client receives regular income maximisation advice, defined and monitored as part of their role. Guidance should be provided that clearly sets out what these obligations are and how they should be met. Any new requirements must be coupled with the financial resources necessary to implement them.

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Recommendation 11: Safeguarding processes must be carefully balanced against administrative delays and other burdens. If the proposals for requiring a prescribed person to witness an appointment are accepted, they should be implemented in a way that minimises administrative burden on applicants.

Recommendation 12: The Scottish Government should take a “test and learn” approach to the newly implemented appointee process, including committing to a formal review.

I hope this is helpful. I look forward to your response and we would be pleased to discuss this further with officials.

With best wishes,

Dr. Jim McCormick
Chair