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Dr Jim McCormick
Chair: Disability and Carers Benefits Expert Advisory Group
c/o Scottish Government

3 Septemebr 2020

Dear Jim,

Thank you for your letter of 14 August 2020 regarding appointees in the Scottish social security system.

Firstly let me thank you and other group members for agreeing to meet with officials to formulate this advice at such short notice, and for providing it so quickly in difficult circumstances. This is greatly appreciated in the context of the Bill the recommendations will inform, which is making its way through the Scottish Parliament as I write.

I am pleased to hear of your constructive discussions with officials and welcome your feedback. I have considered all of your recommendations and am pleased to confirm that I broadly support most of them. While some of your recommendations will affect the Bill, others will require consideration over a longer timeline. I have indicated in my response where that is the case.

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.*

I am happy to accept this recommendation. While it was always our intention to publish detailed guidance on our approach to making, reviewing and terminating appointments, I recognise that it would provide greater reassurance if our commitment to publish that guidance, and the principles we will follow in doing so, are included in the Bill.

I recognise the point you have made in relation to the ongoing Scottish Mental Health Law Review being led by John Scott QC and the potential for change to the Adults with Incapacity (Scotland Act) 2000. We will look to amend the 2018 Act to include a set of principles, drawn from Art 12 UNCRPD, that Ministers will have regard to in preparing and revising their guidelines governing their decision-making on appointments, with one exception.

I am unable to commit to '*regular review by a competent, independent and impartial authority or judicial body*'. I recognise that that is one of the functions of the Office of the Public Guardian Scotland (OPGS) in relation to financial Guardians. In that context the oversight is funded through fees paid by the adult themselves which would not be appropriate here.

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We understand there are far fewer Guardians than there will be appointees in Scotland and I consider that in this setting this type of supervision would be disproportionately burdensome for appointees, clients, and Social Security Scotland. We believe our proposals for periodic review, accompanied by a right to request a review and the introduction of an independent dispute mechanism in the form of a tribunal, which I will discuss later in this letter, will provide sufficient checks and balances.

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.*

And:

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

I agree wholeheartedly with these recommendations. The 2018 Act is already underpinned by principles that require Social Security Scotland to put the needs of those who require assistance first, and advance equality and non-discrimination. Sections 4, 5, 6 and 10 of the 2018 Act underline our commitment to inclusive communications, accessible information and the importance of independent information, advice and advocacy.

It may be useful to note that officials commissioned research with Experience Panels in parallel with this advice, which has now been published. This research has indicated that there may be a lack of awareness that existing policies allow third party representatives to help a client to complete the documentation, make online applications, receive copies of correspondence, etc, it should be possible to do more to promote this kind of support ahead of the use of an appointee.

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.*

I am happy to accept this recommendation. A policy has already been developed and is in use by Social Security Scotland where explicit consent from a client is unavailable. This was developed with significant input from a wide range of stakeholders and takes into account our legal obligations under GDPR. This is the first iteration of that policy which will continue to be reviewed and improved over time as we receive further feedback from clients and stakeholders, and as we begin to deliver recurring and more complex benefits.

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.*

I fully accept the premise of this recommendation, that support should be provided to clients and their carers to interact with the benefits system. That is why ‘Our Charter’ already sets out our commitment to inclusive communications and design principles. In the financial year 2020-21, the Scottish Government is investing almost £4.5 million in grant funding specifically to support welfare advice services. A number of provisions have already been

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made in the 2018 Act that can be seen as contributing towards this, including a commitment to £5m per annum to support people's right to advocacy support, with an interim service having commenced on 30 June 2020. In addition there has also been significant investment to ensure that there is local delivery support from Social Security Staff, pre-application advice and help. Taken together, these measures already provide significant extra resource and a tiered approach to support to meet varying degrees of need.

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.*

And:

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

These recommendations are consistent with the views of Experience Panels mentioned above, who favoured circumstance specific reviews. Given that many clients who will transfer to Social Security Scotland in various age groups will have an existing appointee, and relatively little is known about that caseload at this time, I agree that in as far as possible, we should take this opportunity to take stock of the arrangements already in place.

I am happy to confirm that we plan to introduce a formal periodic review. I agree that it would be beneficial for us to take a flexible approach, in which we could carry out further analysis with a view firming up that policy based on evidence, as we learn more. In any case, however, it is my intention that a review should be undertaken no less than every five years.

In addition we will introduce a right for the client (and others with an interest in their welfare) to request that Social Security Scotland carry out a review when they consider this necessary.

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.*

I am happy to confirm that I accept this recommendation. We have sought to amend the Bill to allow for an application to be made to the First-tier Tribunal where there is a dispute about an appointment decision. I understand there was some deliberation about what the dispute mechanism should be. I am grateful for the examples provided and the detailed advice around how these might operate.

Given that tribunals are a familiar process for Social Security Scotland, clients and representatives, and the Scottish Courts and Tribunal Service already hear devolved social security appeals, I believe this is the most appropriate method and simpler to set up than an ombudsman or other type of arbitration.

We will work with stakeholders including Scottish Courts and Tribunal Service to develop the procedural rules and composition of the panel to ensure they have the appropriate skills and

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experience for each of the different types of appointment i.e. children, adults with capacity, adults without capacity and the deceased.

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.*

I agree that in the making of any appointment, Social Security Scotland staff should aim to deal sensitively with these often complex situations to avoid conflict. It is also clear that staff will need to be supported with appropriately detailed guidance and training. On the specific recommendation of a specialist team within the agency, I am not able to commit to this at this time as a decision about exactly how resources for this will be structured will require further consideration. I therefore partially accept this recommendation.

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.*

I am grateful to the group for highlighting this issue, which had not been raised to date. Corporate appointees are most often already regulated bodies such as the local authority, a registered social care provider or a charity, and are usually put in place as a last resort where there is no family member or friend willing or able to act on behalf of an individual.

They are largely funded to support clients with a range of matters including with their money, bills, bank accounts and it would be a duplication of funding to pay them twice for that activity.

While it is reasonable that Scottish Ministers clearly set our expectations of appointees at the outset, an appointment under section 58 of the 2018 Act is made for the explicit and limited purpose of acting on behalf of an individual in connection with the determination of entitlement to assistance, and receiving that assistance on their behalf.

I therefore do not agree that it would be appropriate or workable to impose specific duties on individual corporate appointees that are not imposed on any other client, or individual acting on behalf of another person. Income replacement benefits are currently administered by DWP or HRMC and this would also make it impractical to measure or enforce.

Scottish Ministers have a duty under Section 3 of the 2018 Act to keep under consideration what steps they could take to ensure that individuals are able to access all that they are eligible to be given through the Scottish social security system. I will consider further whether and how we might engage with corporate appointees to promote income maximisation as part of our broader take-up strategy and our duty to inform clients (and by extension anyone acting for them) about possible eligibility to other forms of assistance.

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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.*

I fully understand the rationale behind this recommendation, and the potential benefits of this approach, in deciding whether or not a client requires an appointee. However, Social Security Scotland would have to have access to significant quantities of information. They would also have to share information with a range of organisations and third parties involved with that client.

I am mindful of what has been said in recommendation 11 about balancing administrative delays and other burdens, and consider that implementing this recommendation could build in significant delay.

It would also be reliant on the appropriate data sharing agreements being in place to share a client's personal and health information with third parties.

As part of the package of changes we propose to make to the Bill we will include a principle that that, in so far as reasonably practicable, before decisions are made persons who may be affected are consulted and due account taken of their views. This may already go some way to meeting the wider aim of this recommendation. However, the feasibility of this on a number of levels will require further detailed consideration and I am therefore not able to accept it in full at this time.

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.*

I accept this recommendation. The main purpose of the introduction of the new provision for appointees for adults deemed to have capacity within this Bill, was to protect and improve the application process for clients with a terminal illness. Ensuring any process minimises the burden on clients and does not cause delay is therefore a priority in instructing the Bill provisions. All service design relating to this form of appointment and any regulations in this regard will take account of this concern.

Finally, my officials asked the Group to consider the proposal from SAMH, that appointee agreements for adults with capacity are certified by third party. I note the Group's support for additional safeguards, provided they do not lead to delays or an additional burden for the client. I can confirm that the Bill will include provision to provide this as an option for adults with capacity. This will provide a more proportionate safeguard for clients with an existing relationship with professionals, including those who are terminally ill. I intend to consult on who can certify such agreements and to ensure that this does not cause a barrier to clients who cannot, or do not wish to use this option, this will include Scottish Ministers. This will allow clients to access other methods of vetting provided by the agency.

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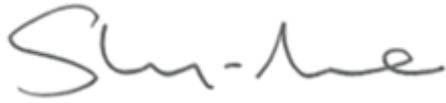
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Once again, I would like to take this opportunity to thank you for your continued support as we work toward creating a social security system that is reflective of our ethos of dignity, fairness and respect.

Yours sincerely,



SHIRLEY-ANNE SOMERVILLE

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