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# Social Security (Scotland) Bill: Consideration prior to Stage 3

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The Social Security (Scotland) Bill will be debated at Stage 3 on 25 April 2018. This briefing summarises the key issues arising during the passage of the bill to date, and the amendments brought forward at Stage 2.

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# Summary of Parliamentary Consideration

The [Social Security \(Scotland\) Bill](#) <sup>1</sup> ("the bill") was introduced in the Scottish Parliament on 20 June 2017 by the Cabinet Secretary for Communities, Social Security and Equalities, Angela Constance MSP. [SPICe briefing SB17-57](#) <sup>2</sup> explains the provisions of the bill at introduction.

The Social Security Committee was appointed lead committee for consideration of the bill. Table 1 lists key dates for parliamentary consideration of the bill. Links to the relevant documents are included in the table. Many of these are also collected on [the Scottish Parliament's bill homepage](#) or [the Social Security Committee's bill homepage](#).

**Table 1: Summary of Parliamentary Consideration**

Stage	Date
Bill homepage (with the bill at introduction)	<a href="#">20 June 2017</a> <sup>3</sup>
<b>Stage 1 consideration</b>	
Social Security Committee	<a href="#">7 September 2017</a> , <sup>4</sup> <a href="#">14 September 2017</a> , <sup>5</sup> <a href="#">21 September 2017</a> , <sup>6</sup> <a href="#">28 September 2017</a> , <sup>7</sup> <a href="#">5 October 2017</a> , <sup>8</sup> <a href="#">26 October 2017</a> , <sup>9</sup> <a href="#">2 November 2017</a> <sup>10</sup>
Social Security Committee stage 1 report published	<a href="#">11 December 2017</a> <sup>11</sup>
Delegated Powers and Law Reform Committee	<a href="#">3 October 2017</a> <sup>12</sup>
Delegated Powers and Law Reform Committee stage 1 report published	<a href="#">31 October 2017</a> <sup>13</sup>
Finance and Constitution Committee	<a href="#">13 September 2017</a> , <sup>14</sup> <a href="#">4 October 2017</a> <sup>15</sup>
Finance and Constitution Committee letter to the Convener re the financial memorandum to the bill	<a href="#">4 October 2017</a> <sup>16</sup>
Stage 1 debate	<a href="#">19 December 2017</a> <sup>17</sup>
<b>Stage 2 consideration</b>	
Additional evidence session on independent scrutiny	<a href="#">25 January 2018</a> <sup>18</sup>
Stage 2 Social Security Committee consideration of amendments	<a href="#">1 February 2018</a> , <sup>19</sup> <a href="#">8 February 2018</a> , <sup>20</sup> <a href="#">22 February 2018</a> , <sup>21</sup> <a href="#">1 March 2018</a> <sup>22</sup>
Bill as amended at stage 2	<a href="#">6 March 2018</a> <sup>23</sup>
<b>Stage 3 consideration</b>	
Stage 3 debate	<a href="#">25 April 2018</a>

## Other documents produced by the Scottish Government during the bill's passage

During stage 1, the Scottish Government produced a number of policy position papers to give more detail of its plans. These are listed below.

- [Social Security agency implementation](#) (20 September 2017) <sup>24</sup>
- [Social Security ICT implementation](#) (20 September 2017) <sup>25</sup>

- [Social Security Charter and independent scrutiny](#) (20 September 2017)<sup>26</sup>
- [Social Security principles and a rights based approach](#) (20 September 2017)<sup>27</sup>
- [Social Security \(Scotland\) Bill policy position paper: re-determinations and appeals](#) (6 October 2017)<sup>28</sup>
- [Social Security \(Scotland\) Bill policy position paper: fraud and offence provisions](#) (6 October 2017)<sup>29</sup>
- [Disability and employment injury assistance: position paper](#) (27 October 2017)<sup>30</sup>
- [Support for carers: social security position paper](#) (30 October 2017).<sup>31</sup>

A letter from the Minister for Social Security ("the Minister") to the convener of the Social Security Committee during stage 2 included a further position paper on scrutiny of regulations. At the time of writing this had only been published on the Social Security Committee's website:

- [Scrutiny of social security regulations](#) (28 February 2018)<sup>32</sup>

The delegated powers memorandum to the bill as introduced stated that:

“ Ahead of Stage 2, the Scottish Government will produce illustrative drafts of regulations, including some drafts in relation to types of assistance. This will give members an opportunity to see how the primary and secondary legislation will fit together and, if they wish, inform the development of the regulations.”

Social Security (Scotland) Bill [as introduced] Delegated Powers Memorandum, SP Bill 18-DPM, 2017<sup>33</sup>

Two sets of illustrative draft regulations were produced during stage 1, each accompanied by a policy narrative:

- [Social Security \(Scotland\) Bill Policy Paper: Early Years Assistance \(Best Start Grant\) Illustrative Regulations and Policy Narrative](#) (21 October 2017)<sup>34</sup>
- [Social Security \(Scotland\) Bill policy paper: funeral expense assistance illustrative regulations and policy narrative](#) (6 December 2017).<sup>35</sup>

On 26 March 2018, the Scottish Government launched [a public consultation on an updated draft of the best start grant regulations](#).<sup>36</sup>

At stage 2, the Scottish Government produced papers outlining its own amendments, or responding to opposition amendments. These were published by the Social Security Committee on its website:

- [Letter from Minister for Social Security and overview of Scottish Government Stage 2 amendments](#) (17 January 2018)<sup>37</sup>
- [Letter from Minister for Social Security and overview of Scottish Government Stage 2 amendments](#) (6 February 2018)<sup>38</sup>

- [Minister for Social Security to Convener on terminal illness definition](#) (8 February 2018) <sup>39</sup>
- [Minister for Social Security to Convener on inalienability of assistance and information sharing amendments](#) (28 February 2018) <sup>40</sup>

Updated versions of some of the documents that accompanied the bill at introduction have been published following stage 2:

- [supplementary financial memorandum](#) (15 March 2018) <sup>41</sup>
- [supplementary delegated powers memorandum](#) (15 March 2018). <sup>42</sup>

Supplementary explanatory notes are also expected to be published in advance of stage 3.

# Main areas of debate and change to the bill

The following sections of this briefing summarise the main areas of debate on the bill at stages 1 and 2. This section covers aspects also touched on in the Social Security Committee's [stage 1 report on the bill](#),<sup>11</sup> but does not aim to recreate its level of detail in relation to the evidence received at stage 1. Its focus is on changes made to the bill at stage 2.

The full list of recommendations in the Social Security Committee's stage 1 report and Scottish Government responses to them is at [Annexe 1 to this briefing](#). Whilst a number of amendments are also discussed below, the full list of [amendments made at stage 2](#) is collated in a separate section of this briefing.

## Detail in primary and secondary legislation

The [policy memorandum to the bill](#) as introduced described it as "a legislative framework".<sup>43</sup> The Scottish Government's view is that the law will be more accessible if a single set of regulations tells the whole story of entitlement to a type of devolved assistance.

The Delegated Powers and Law Reform (DPLR) Committee did not accept this argument. Its [report on the bill](#) called for "a reasonable level of detail" to be set out on the face of the bill.<sup>13</sup>

The majority of respondents to the Social Security Committee's call for views commenting on this issue argued that more detail should be placed on the face of the bill.<sup>44</sup> This was also discussed during oral evidence sessions at stage 1, with a similar balance of views.

The Social Security Committee's stage 1 report concluded that it had:

“ 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. ”

para 82 Scottish Parliament Social Security Committee, 2017<sup>11</sup>

The Scottish Government response to the report highlighted the role of enhanced scrutiny of regulations made under the bill in scrutinising policy decisions. It did not make a general commitment to providing more detail of the types of devolved assistance on the face of the bill.

A number of stage 2 amendments have added further detail to the types of devolved assistance to be introduced under the bill. These are discussed in the sections looking at [types of devolved assistance below](#). Government amendments have introduced a form of "super-affirmative" procedure for some regulations made under the bill, explained in the following sections.

## Scrutiny of regulations

Since the bill was introduced, the Scottish Government has been clear that it is open to introducing a bespoke procedure for scrutiny of some regulations made under it. It explicitly requested the views of the Social Security Committee and the Delegated Powers and Law Reform Committee on what other oversight beyond the affirmative procedure might be required.<sup>33</sup> The Scottish Government's Disability and Carers Benefits Expert Advisory Group (DACBEAG) was also asked to give its views on independent scrutiny during stage 1. [The report of its scrutiny workstream](#) was published in December 2017.<sup>45</sup>

The Social Security Committee took oral evidence from current members of the [Social Security Advisory Committee](#)<sup>46</sup> (SSAC) at stages 1 and 2. This body has a role in the scrutiny of reserved social security regulations, but cannot provide advice to Scottish Ministers.

Professor Gráinne McKeevor (a member of SSAC) gave oral evidence at stage 1. She argued that an independent scrutiny body should ideally be created in statute, should have a diverse range of expertise (including technical expertise) and should not involve MSPs themselves,

“ so there is no ideological objective that dominates or has an influence.”

Social Security Committee 14 September 2017, Professor McKeevor, contrib. 26<sup>47</sup>

The DPLR Committee's view at stage 1 was 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. ... 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.”

Scottish Parliament Delegated Powers and Law Reform Committee, 2017<sup>13</sup> paras 53-55

The Social Security Committee's stage 1 report requested that the Scottish Government come forward with detailed proposals for enhanced scrutiny of regulations. It also recommended that a body similar to SSAC be created on a statutory basis and proposals for a super-affirmative procedure be brought forward.<sup>11</sup> Government amendments agreed at stage 2 responded to these recommendations by creating an independent Scottish Commission on Social Security (SCoSS). This is discussed [below](#).

### The Scottish Commission on Social Security

Government amendments agreed at stage 2 create (s.6A) and confer functions on (s.6B) a new independent advisory body - the Scottish Commission on Social Security (SCoSS). The new body also has a statutory role in the scrutiny of Scottish Government proposals to make regulations under some of the delegated powers in the bill, before they are laid (s.55A).

SCoSS will have a chair and between two and four other members (Sch. A1 para 13). It will be able to draw in additional expertise by establishing committees including non-commission members (Sch. A1 para 5). Elected politicians (including councillors), Ministers and civil servants are ineligible for appointment to SCoSS, as are members of



the House of Lords (Sch. A1 para 17). Opposition amendments have added members of the First-tier and Upper Tribunals to this list, although the Minister suggested that the Scottish Government will seek to:

“ tidy up the wording at stage 3 to avoid any confusion that the reference to tribunal members refers to both Scottish tribunals and the equivalent bodies in England and Wales. ”

Social Security Committee 08 February 2018, Jeane Freeman, contrib. 49<sup>48</sup>

The functions of SCoSS are:

- scrutiny of some regulations made under the bill (see further discussion [below](#))
- producing reports on matters relevant to social security in response to requests from:
  - the Scottish Ministers
  - the Scottish Parliament, following a resolution to request a report
- ad-hoc reporting on whether the expectations in the social security charter are being fulfilled, and if they are not, recommending improvements
- such other functions as may be conferred by regulations.<sup>i</sup>

SCoSS would have to consider reporting on the charter if it received evidence suggesting “that the expectations set out in the Charter are frequently not being fulfilled” (s.6B(4)).

SCoSS reports must be made publicly available (s.6B(3)). In exercising its functions, SCoSS may have regard to “international human rights instruments”, including in particular the International Covenant on Economic, Social and Cultural Rights (s.6B(2)). However, in scrutinising proposed regulations, SCoSS **must** have regard to these instruments, and the principles set out in s.1 of the bill (s.55A(4)).

The DACBEAG report had recommended that Ministers should be able to request advice, but should avoid commissioning it as a requirement.<sup>45</sup> The functions of SCoSS as set out in the bill require it to respond to such requests. DACBEAG members giving evidence at stage 2 felt that, whilst independence from Ministers is critical:

“ you probably do not need to pin that down in legislation. It is about culture. Because we are setting the system up from scratch and building relationships from scratch in Scotland, we have a chance to set the tone and get the culture right from the beginning. Doing that would ensure that the commission is able to give its expert input to Parliament and ministers in the most helpful way and not get tugged in unhelpful directions—which could happen, because the bill is written fairly openly.”

Social Security Committee 25 January 2018, Judith Paterson, contrib. 39<sup>49</sup>

DACBEAG had also recommended a role for independent scrutiny of official guidance. The DPLR Committee also considered this issue, focussing on the fact that the detail of the discretionary housing payment (DHP) scheme will be set out in guidance rather than regulations. (DHPs are delivered by local authorities, and are not part of the “Scottish social security system” as it is defined by s.7 of the bill.)

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<sup>i</sup> Before conferring any additional functions on SCoSS, the Scottish Government must consult it about the proposed changes to its functions (s.55(5)).

The DPLR Committee recommended that the Parliament should:

“ amend the Bill at Stage 2 so that the negative procedure applies to the guidance issued under section 52 to allow for a more appropriate level of parliamentary scrutiny.  
”

Scottish Parliament Delegated Powers and Law Reform Committee, 2017<sup>13</sup>

No amendments proposing scrutiny of DHP guidance were brought forward at stage 2. The bill as introduced already contained a requirement on Scottish Ministers to consult with local authorities in preparing DHP guidance (s.52(4)).

The Minister's evidence at stage 2 was that:

“ It is fair to consider whether something can be done on proportionate scrutiny of guidance. The point was well made that a great deal of guidance can be produced, although we do not intend to replicate the DWP's approach, so there will be some guidance that does not require significant scrutiny and other guidance that does. I am happy to reflect on what was said on that.”

Social Security Committee 25 January 2018, Jeane Freeman, contrib. 117<sup>50</sup>

### *Regulations subject to scrutiny by SCoSS*

Government amendments have introduced a bespoke procedure for scrutiny of some regulations made under delegated powers in the bill (s.55A). DACBEAG had recommended that all regulations under the bill should be subject to enhanced scrutiny.<sup>45</sup> An opposition amendment, which would have made all regulations made under the bill subject to enhanced scrutiny (as well as regulations amending the Scottish welfare fund) was disagreed at stage 2. The Minister pointed out that, as drafted, the amendments would have required a bespoke procedure even for commencement regulations (normally subject to no Parliamentary scrutiny at all).

As the bill stands, regulations made under delegated powers in:

- chapter 2 of part 2 (setting the entitlement conditions for types of devolved assistance)
- section 45 (topping up reserved benefits)

require additional scrutiny (unless they simply consolidate previous regulations). Regulations setting eligibility for the early years or funeral expenses assistance are **not** subject to a statutory requirement for additional scrutiny, if they are made before SCoSS is ready to start work (s.55B).

The Scottish Government has in fact already begun [a public consultation](#) on the best start grant regulations.<sup>36</sup> A [letter from the Minister to the convener of the Social Security Committee](#) highlighted the level of engagement that has already happened in developing the policy, and offered the opportunity to suggest other methods of ensuring expert scrutiny during the consultation period.<sup>51</sup> Once the consultation period ends the regulations will be finalised, and then laid under the affirmative procedure.

The exercise of other regulation-making powers in relation to the devolved social security system is not subject to scrutiny by SCoSS, no matter when the regulations are made. These include regulations making provision for:

- the time limit to request a re-determination, or for the agency to carry out a re-determination
- the form of applications for assistance (a delegated power inserted by an opposition amendment at stage 2)
- determinations without an application
- agency arrangements to deliver housing assistance
- eligibility for discretionary housing payments for claimants of other reserved benefits.
- the procedure for fraud investigations - which may create new criminal offences.

The current policy intention in relation to the first two bullet points above is touched on in the ongoing consultation on the best start grant regulations.<sup>36</sup> But the draft regulations themselves contain no such provisions. Should provision of the types above be made in separate regulations, it will not be subject to scrutiny by SCoSS. But if it is contained in the same set of regulations as the entitlement conditions for devolved assistance, then it may be considered by SCoSS.

Concerns were raised at stage 2 about the ability of SCoSS to disapply the enhanced scrutiny provisions in relation to some types of regulations, if it felt this was unnecessary (s.55A(9)(b)). The Scottish Government position paper on scrutiny of regulations states that:

“ if the Parliament's preference is to rule out the possibility of the Commission excusing itself from having to look at certain kinds of proposals, the Government is entirely willing to bring forward a Stage 3 amendment to give effect to that. ”

Freeman, 2018<sup>32</sup>

### *The process for additional scrutiny*

Before laying regulations made under the powers set out [above](#), Ministers must notify the Scottish Commission on Social Security (SCoSS) and the Parliament of their proposals, and also make them public (s.55A(2)). SCoSS has a power (but not a duty) consult on the proposals (s.55A(4)(b)). If consulting, SCoSS itself would decide who to consult, and the length of the consultation. There is no statutory requirement for a public consultation.

Whether it runs a consultation or not, SCoSS has a duty to produce a report, to send it to both Ministers and the Parliament, and to publish it (s.55A(3) and (6)). Draft regulations will then be laid alongside either a response to this report, or an explanation of why they were laid before SCoSS had reported on them (s.55A(7)). Commenting on the fact that regulations can be laid before a report is published, the Minister confirmed that the Scottish Government would:

“ look to reach an agreement with the commission about how long it needs to do the job that it is being asked to do. ... However, it may well be that, having reached an agreement with us that it has six weeks, eight weeks or whatever to respond and produce a report, the commission does not meet the timeframe. Scottish ministers may feel that the draft regulations are of such import that they require to lay them, even though the commission has not met the agreed timeframe to respond.”

Social Security Committee 25 January 2018, Jeane Freeman, contrib. 117<sup>50</sup>

The draft regulations will be subject to the affirmative procedure once laid - so could not come into force unless approved by a resolution of the Parliament.

In response to a request from the Social Security Committee, the Delegated Powers and Law Reform (DPLR) Committee provided its thoughts on the government amendments during stage 2.<sup>52</sup> Concerns raised included:

- the lack of a minimum time for consultation in the bill
- that the consultation with SCoSS need not be in the form of draft regulations
- the fact that any parliamentary scrutiny would be "an adjunct to the work of the Commission".

The Scottish Government has produced a policy paper responding to these points, and those raised in oral evidence at stage 2.<sup>32</sup> Whilst acknowledging that there is no specific role set out in the bill for committees, the Minister stressed that:

“ it is not for the Scottish Government to tell parliamentary committees how to conduct their business.”

Social Security Committee 25 January 2018, Jeane Freeman, contrib. 92<sup>53</sup>

It would be possible for a committee which wished to do so to comment on the draft proposals, take evidence, or request advice from SCoSS,<sup>ii</sup> either before or after proposed draft regulations were laid. The Scottish Government's position paper argues that the flexibility given by not having a fixed period for scrutiny before regulations can be laid is preferable to fixing a period in primary legislation.<sup>32</sup>

The Minister's view of the importance of Parliament's role in scrutiny under the proposed procedure is that:

“ At the end of the day, the most powerful body is the Parliament, because it will say yes or no to regulations that are laid before it, and it is as entitled to say no as it is to say yes. ... [I]f the commission and the committee were critical of regulations, it would be a daft Government that did not listen but pressed ahead nonetheless. That Government should, reasonably, expect to lose.”

Social Security Committee 25 January 2018, Jeane Freeman, contrib. 123<sup>54</sup>

In light of references from Committee members to the concerns raised by the DPLR Committee, she suggested that she would be:

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ii Such a request could only be made following a resolution of the whole Parliament (s.6B(1)(c)).

“ willing to reflect on them and to have further discussions with Mr Tomkins and other committee members, if they so wish, in advance of stage 3 to see whether we can reach a view that provides additional reassurance not only to this committee but to the DPLR Committee with regard to the Parliament’s role in these matters.”

Social Security Committee 08 February 2018, Jeane Freeman, contrib. 53<sup>55</sup>

## The role of the Industrial Injuries Advisory Council

There is currently a separate statutory scrutiny body for industrial injuries benefits: the [Industrial Injuries Advisory Council](#) (IIAC).<sup>56</sup> This cannot provide advice to Scottish Ministers. The Social Security Committee took evidence from Hugh Robertson, a member of IIAC at stage 1. Asked whether there was a need for a separate devolved equivalent of IIAC, he replied that:

“ The reality is that occupational diseases in Scotland will not be different from those in England. In the initial period, when Scotland will be mirroring the scheme in England and Wales, reports on issues will be coming from the IIAC in England and Wales. We cannot really advise you on whether Scotland should just accept those reports and put them into Scottish regulation, or whether it should set up its own specialist committee. ... However, we can say that, because those reports are meant to be evidence-based academic ones, problems would arise if the two committees looked at the same things and reached totally different conclusions. That should not happen. Is it a useful use of Scotland’s resources to duplicate the committee’s work? That is your decision, I am afraid.”

Social Security Committee 05 October 2017, Hugh Robertson, contrib. 116<sup>57</sup>

The Disability and Carers Benefits Expert Advisory Group suggested that a single body consider all regulations. Its view was that, initially, the Scottish Government could rely on the work of the existing IIAC. However, it recommended that:

“ As policy in Scotland on employment injury assistance diverges from that in the rest of the UK, there will be a need for independent medical and scientific advice beyond that available from IIAC. Options include commissioning ad hoc reports, or setting up a panel of experts. ”

Disability and Carers Benefits Expert Advisory Group, 2017<sup>45</sup>

The bill as amended only sets up a single scrutiny body, leaving unclear how medical and scientific advice might be commissioned in the future, should policy diverge from that of the UK Government.

## The principles, charter and duties on Scottish Ministers

The bill introduces a set of principles which will underpin the Scottish social security system (s.1). These are to be reflected in a social security charter (s.2). The charter will set out what is expected of:

- Scottish Ministers (in developing the system)

- individuals applying for social security assistance.

The principles and charter were the subject of significant debate at both stages 1 and 2. The following sections look at some of the main areas of debate, and how the bill has changed.

## Additional and amended principles

Responses to the Social Security Committee's call for views generated a large number of suggestions for additional and amended principles. These included making reference to specific human rights instruments, a principle of accountability and advancing gender equality, amongst others.<sup>44</sup>

In its stage 1 report,<sup>11</sup> the Social Security Committee noted the range of suggestions. It singled out the principles of a right to advocacy, and that the social security system has a role to play in reducing poverty, as useful additions. It also recommended that the Scottish Ministers' role in promoting take-up should be strengthened to a duty, which had been suggested by several organisations giving evidence at stage 1. The Committee recommended that other suggestions would be better developed within the charter.

In the event, the right to advocacy has been included as a new section of the bill. Similarly, Ministers' role in promoting take up has been removed from the principles and added as a freestanding section of the bill. These new duties are discussed further [below](#).

Two other principles were agreed to by division at stage 2. The principle that the Scottish social security system has a role to play in reducing poverty (s.1 (ca)) was a recommendation in the Social Security Committee's stage 1 report. The other new principle is that the delivery of social security is a public service (s.1(ba)). During the stage 2 debate, Conservative members argued that these amendments would exacerbate a lack of clarity around the legal effect of the principles (see [below](#)).

## Legal effect of the principles and charter

Evidence received at stage 1 suggested that witnesses felt that the legal status of the principles and charter was unclear. Opposition amendments agreed to at stage 2 have added new sections (s.1A and s.5A) to the bill. providing that:

- courts and tribunals may take into account the principles and charter were they are relevant
- breach of either the principles or charter is not of itself grounds for legal action.

In relation to the charter, the amendment was agreed to without division. The Scottish Government is also consulting on draft social security tribunal rules which would require tribunals to "have regard to" the charter as part of their "overriding objective". This is described by the consultation document (para 27) as ensuring that:

“ the individual’s experience at tribunals is consistent with the Scottish Ministers’ aspirations of treating people with dignity and respect. ”

Scottish Government, 2018<sup>58</sup>

However, SNP members argued that there was no need to clarify the status of the principles in this way. As the Minister put it:

“ it is neither necessary nor appropriate for judges to look behind the charter to the principles. By doing so, they would be substituting the views expressed through the charter with their own views about what the principles mean.”

Social Security Committee 01 February 2018 [Draft], Jeane Freeman, contrib. 46<sup>59</sup>

This appears to refer to the provision permitting courts and tribunals to take into account the principles (s.1A(1)), rather than the fact that the principles are not grounds for legal action in themselves (s.1A(2)). The amendment was agreed to by division.

A further amendment brought forward at stage 2 would have required Ministers to have regard to the principles when exercising their functions under the bill. The amendment was not moved, in light of the fact that:

“ how it is drafted could have unintended consequences and... there is a potential for payments to claimants to be stopped as a result of a court decision. I will not be moving the amendment at this point because of those unintended consequences, and before stage 3 I hope to explore further with members and the Government how we can go about closing that accountability gap in relation to placing a duty on ministers to abide by the principles.”

Social Security Committee 01 February 2018 [Draft], Mark Griffin, contrib. 41<sup>60</sup>

As such, it appears that further amendments to similar effect may be brought forward at stage 3.

## **New duties in part 1 of the bill**

At stage 2, a number of new duties on Ministers were proposed in relation to the "Scottish social security system" as a whole. Some of these arose from the evidence taken at stage 1 suggesting amendments to the principles. Broadly, the changes made relate to:

- [the charter](#)
- [advice and advocacy](#)
- [take-up and income maximisation](#)
- [inclusive communication and accessibility of information.](#)

These areas are considered separately below.

Due to the definition of the "Scottish social security system" (s.7), none of the additional duties apply to discretionary housing payments, the Scottish welfare fund, the exercise of shared powers over some aspects of universal credit.

An opposition amendment at stage 2 sought to extend the definition in s.7 to include some other devolved responsibilities, including those listed above, council tax reduction and free school meals amongst others. It was withdrawn after the Minister argued that it would:



“ put in place a perverse system of accountabilities, in which people would be accountable for the delivery of certain things that they have no hand in delivering, yet the people who deliver those things would not be accountable for that.”

Social Security Committee 08 February 2018 [Draft], Jeane Freeman, contrib. 79<sup>61</sup>

It is possible that further amendments may be brought forward at stage 3 which:

“ will seek to achieve the ambition in the amendment, which is to link some of the positive changes that we have already made with regard to the take-up of benefits, income maximisation and automation of assistance.”

Social Security Committee 08 February 2018 [Draft], Mark Griffin, contrib. 80<sup>62</sup>

Another opposition amendment sought to extend the definition, to ensure that any new benefits created under other primary legislation would be part of the Scottish social security system. This was also disagreed to by division.

Further opposition amendments which were not agreed to sought to create a number of further duties on Ministers, including:

- a duty to have regard to the right to social security in exercising functions connected to the bill
- a duty to set a target for the percentage take-up of benefits
- duties to carry out an annual review of:
  - the act
  - the charter
- a duty to carry out an annual survey of users of the system.

### **The charter**

At stage 1, debate around the charter focused on its visibility and accessibility to those using the Scottish social security system.

A number of opposition amendments at stage 2 have added requirements to consult additional groups in preparing the first charter. These added consulting:

- people getting child benefit (s.3(3)(a)(va))
- organisations working with groups with protected characteristics, as defined by the Equality Act 2010 <sup>63</sup> (s.3(3)(b))
- people with both physical and mental impairments who get disability and industrial injuries benefits (s.3(2A)).

A government amendment has clarified that any consultation carried out before s.2 comes into force can be taken into account in meeting the duty to consult (s.3(4)).

Following creation of the Scottish Commission on Social Security (SCoSS - discussed further [above](#)), it must be consulted as part of the 5-yearly review of the charter (s.5(2)). Whilst this was a government amendment, an opposition amendment requires that



organisations working with groups with protected characteristics are also consulted (s.5(3)).

Opposition amendments which were not agreed would have required the charter to be set out in regulations. The Minister argued that the legal precision required in regulations would not be appropriate for a document aiming to clearly set out rights, and be accessible to users of the system. She offered to work towards a stage 3 amendment that would give the Parliament a role in approving the charter, but without placing the document itself in legislation.

A government amendment which would have established a new system of charter-based complaints was not moved by the Minister. The Scottish Public Services Ombudsman had given evidence, when asked if the existing legislation allowed her to investigate individual complaints, that:

“ That ability is already there because [the social security agency] will be part of the Government.”

Social Security Committee 25 January 2018, Rosemary Agnew, contrib. 53<sup>64</sup>

This will not extend to investigating complaints about SCoSS without amendment to her powers. As SCoSS is named in the bill it (unlike the social security agency) is a distinct legal person to the Scottish Ministers.

### **Take-up and income maximisation**

Following evidence to this effect at stage 1, the Social Security Committee's stage 1 report suggested that the principle that Ministers have a role in promoting take-up (s.1(d) of the bill as introduced) should be strengthened to a duty. Government amendments agreed at stage 2 have removed this principle, and inserted a new section in the bill which places a duty on the Scottish Ministers to promote take-up up of devolved assistance (s.1B). The Minister argued that this placed the duty:

“ in a distinct, legally enforceable position in the bill, in a manner that requires Scottish Ministers to continuously consider what more can be done as part of on-going policy improvement.”

Social Security Committee 01 February 2018 [Draft], Jeane Freeman, contrib. 29<sup>65</sup>

Opposition amendments to this amendment were disagreed to by division. The argument that (if amended) the new section would have better reflected the recommendations in the Social Security Committee's stage 1 report and given Ministers a role in encouraging take-up of reserved benefits was not accepted.

A further new section created by a government amendment requires that in fulfilling their duty to promote take-up of devolved benefits, Ministers must have regard to the role that independent advice and advocacy can play (s.1E). For further discussion of substantive duties in relation to advice and advocacy, see [below](#).

Opposition amendments (supported by government members) have created a duty to publish an income maximisation strategy:

“ designed to to encourage individuals to apply for the social security assistance that they are entitled to be given.”

s.1H Social Security (Scotland) Bill [as amended at Stage 2]. SP Bill 18A, 2018<sup>23</sup>

The effectiveness of the strategy must be reviewed within two years of its publication, and thereafter it must be reviewed at least every five years (s.1I). The strategy and any revisions to it must be laid before Parliament. Those consulted in preparing the strategy must include people receiving social security assistance.

Social security assistance is defined as the "Scottish social security system" created by the bill, and social security schemes which remain reserved to Westminster. As such, the strategy does not apply to devolved responsibilities delivered by local authorities, such as discretionary housing payments, the Scottish welfare fund and other financial support which is outside the social security system. The strategy must set out (s.1H(2)):

- the types of assistance for which targets will be set
- the target for take-up of each of these types of assistance
- an overall target for take-up of social security assistance in Scotland.

The supplementary financial memorandum (para 26) states that the costs resulting from a (successful) strategy "may be significant". It highlights that once benefits have been devolved, unless uptake also increases elsewhere in the UK, these costs will be borne solely by the Scottish budget. It does not attempt to estimate the scale of the costs. <sup>41</sup>

Discussing another opposition amendment (which was withdrawn following the debate) which sought to place targets for take-up of devolved benefits in regulations, the Minister argued that lack of DWP data would make such targets impossible to assess. She also raised:

“ the question of what target would be set. Given that I am sure that all of us would set a target of 100 per cent, amendment 14 would not take us much further forward.”

Social Security Committee 01 February 2018 [Draft], Jeane Freeman, contrib. 29<sup>65</sup>

Debating an opposition amendment (later withdrawn) which would have ensured that those receiving assistance had a right to ask for that assistance to stop, the Minister suggested that such provision would sit better as a modification to Ministers' duties in relation to take-up of assistance. The specific concern raised was that it might be financially beneficial to transfer entitlement to carer's assistance to someone else where two people would qualify and reserved benefits would be paid at different rates, depending who received it.

## **Advice and advocacy**

A number of independent advocacy organisations submitted similar responses to the Social Security Committee's call for views, arguing that there should be a right to independent advocacy included in the principles. <sup>44</sup> Some of these also made reference to the importance of advice, as a concept distinct from advocacy. The Social Security Committee's stage 1 report recommended a right to advocacy be included in the bill, and

asked the Scottish Government to reflect on the case for a similar right to advice made by some witnesses.

A government amendment creates a right to independent advocacy for people with a "mental disorder" (s.1G). Mental disorder is given the same meaning as in the Mental Health (Care and Treatment) Act 2003.<sup>66</sup> This is defined as having a mental illness, personality disorder or learning disability, however it is caused. But an individual does not have a mental disorder solely due to:

- sexual deviancy
- transsexualism
- transvestism
- dependence on, or use of, alcohol or drugs
- behaviour that causes, or is likely to cause, harassment, alarm or distress to any other person
- acting as no prudent person would act.

The Minister was clear that this is a starting point and she would be:

“ open to further discussion with regard to developing the definition in advance of stage 3.”

Social Security Committee 01 February 2018 [Draft], Jeane Freeman, contrib. 56<sup>67</sup>

An alternative opposition amendment which would have given a universal right to advocacy was not moved, with the caveat that it may be brought back at stage 3 if agreement cannot be reached with the government about how exactly the definition above should be extended.

An opposition amendment, agreed to by division, creates a right to independent information and advice for those accessing the devolved social security system (s.1F). Ministers can delegate these functions. Questioned on the financial implications of the new duty, Jeremy Balfour MSP argued that the costs would not be substantial, as:

“ The Scottish Government, through local authorities and other means, already funds citizens advice bureaus, advice shops in some cities, and so on.”

Social Security Committee 01 February 2018 [Draft], Jeremy Balfour, contrib. 74<sup>68</sup>

The Minister argued that this duty was overly prescriptive, and its costs uncertain.

The supplementary financial memorandum (paras 16-20) only estimates additional costs arising from the right to advocacy. It estimates the cost for disability assistance advocacy at £122 million per annum, but describes this figure as "highly uncertain".<sup>41</sup> However, the right to advocacy extends to all forms of devolved assistance under the bill, not just disability assistance. It is unclear what additional resources might be needed for advocacy in relation to other types of devolved assistance.

## **Inclusive communication and accessibility of information**

A new section of the bill requires that, in considering how to promote take-up of devolved assistance (see [above](#)), Ministers must have regard to the importance of inclusive communication (s.1C). During the debate it was confirmed that this would include providing information in Braille where relevant. This amendment was agreed without division.

It was debated alongside an opposition amendment which requires certain information to be provided in an accessible form where practical, including the charter, official guidance, notices of determinations and application or appeal forms (s.1D). During the debate, SNP members suggested that the two amendments were seeking to achieve the same effect, whilst opposition members argued that they complemented each other.

The Minister suggested that there may be other ways in which the agency may wish to communicate with applicants in the future, and that the amendment risked undermining the role of the experience panels in developing the system. The amendment was agreed to by division.

## **Devolved social security assistance**

The following sections look at debates around the types of assistance to be created under the bill. It does not explain all of the types of devolved assistance, but concentrates on the areas where amendments were made or brought forward. A large amount of the detail of who will be eligible for devolved assistance will be set out in regulations.

### **Assistance in a form other than money**

As introduced, the bill contained a statement (for each type of devolved assistance) that it "may or may not take the form of money". The policy memorandum stated that the intention was that this would be a choice for applicants to make.<sup>43</sup> A number of respondents to the Social Security Committee's call for views were concerned that the power to provide assistance in forms other than cash was broader than necessary to achieve the policy aim.<sup>44</sup>

Government amendments at stage 2 have provided further detail in the schedules to to bill, providing that:

- payments in a form other than money can only be made if the applicant has agreed to this
- such agreement can be withdrawn at any time.

See for example Sch.1 paras 10A and 11(b) of the bill. Similar provision applies to all other types of social security assistance created by the bill. The wording in Schedules 8 and 9 (themselves added at stage 2) is different, but their effect appears to be the same.

However, deductions can still be made to recover an overpayment of social security assistance without the applicant's consent, if they have unreasonably refused to agree to such a deduction (see [below](#)).

Opposition amendments which sought to modify the government amendments, requiring that cash was offered before any other kind of assistance, were not moved. The Minister had argued that they did not actually change the legal effect of her own amendments.

## Annual uprating of devolved assistance

The Scottish Government had committed before the bill was introduced to uprating disability assistance to account for inflation. But the bill, at introduction, contained no specific duty to uprate devolved assistance, or consider its value over time. The bill included a power to set the amount of devolved assistance in regulations, which the [policy memorandum](#) stated gave:

“ the Scottish Ministers... the power to vary the rates of assistance, which can be used to deliver the Government’s commitment to uprate disability and employment-injury assistance in line with inflation. ”

para 94 Social Security (Scotland) Bill [as introduced] Policy Memorandum, SP Bill 18-PM, 2017<sup>43</sup>

Following concerns raised in the Social Security Committee's stage 1 report, government amendments at stage 2 introduced a new chapter 6 in part 2 of the bill. This creates a duty to annually consider the effects of inflation (s.44A). It is for Ministers to decide which measure of inflation to use. Government amendments required that disability assistance and employment-injury assistance would then be uprated for inflation if prices had increased (s.44B). An opposition amendment, supported by the Minister, added carer's assistance to this list.

Carer's assistance will only be uprated once it is being fully delivered by the social security agency. The bill also introduces a carer's allowance (CA) supplement which will increase the amount of the existing CA to the level of jobseeker's allowance (JSA) (s.47(4)). The level of JSA is currently frozen until 2021.

Other opposition amendments (disagreed on division) sought to:

1. require that all types of devolved assistance were uprated annually for inflation, or a statement made to Parliament setting out why they had not been uprated
2. require that regulations set out an uprating framework, and create a bespoke procedure to scrutinise these regulations.

In relation to the latter group, the Minister argued that the process set out to consider such regulations would be unwieldy. In relation to the former, she argued that:

“ my amendments... clearly commit ministers to uprate disability and employment-injury assistance as well as, with Mr Griffin’s amendments, carers assistance. Amendment 2 would not require ministers to do that.”

Social Security Committee 01 March 2018 [Draft], Jeane Freeman, contrib. 21<sup>69</sup>

The Minister also argued that the government amendments better met the recommendation in the Social Security Committee's stage 1 report. This report had also noted (but without making a firm recommendation):

“ that the majority of those who gave evidence on this issue felt that uprating all forms of assistance should be included in the bill.”

Scottish Parliament Social Security Committee, 2017<sup>11</sup>

## Residence conditions

The bill, as introduced, simply stated that regulations setting out the types of devolved assistance could prescribe residence and presence conditions for them. Giving oral evidence at stage 1, Professor Gráinne McKeevor felt that:

“ Ideally, the question [of residence conditions] would be dealt with in the heart of the bill.”

Social Security Committee 14 September 2017, Professor McKeevor, contrib. 30<sup>70</sup>

A few responses to the Social Security Committee's call for views had also commented on the issue of residence and presence tests.

Giving evidence at stage 1, the Minister stated that the Scottish Government was:

“ 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.”

Social Security Committee 02 November 2017, Jeane Freeman, contrib. 57<sup>71</sup>

At stage 2, opposition amendments sought to establish a default set of three residence conditions (which could be modified by regulations). These would have broadly mirrored the current residence conditions for disability living allowance, personal independence payment and attendance allowance, and were:

- presence in Scotland
- past presence in Scotland amounting to 104 of the past 156 weeks
- habitual residence in Scotland.

The amendments were withdrawn, after the Minister pointed out that not all of the benefits to be devolved have the same residence conditions. Jeremy Balfour MSP suggested he would seek to work with the government towards placing a common definition which would be workable in the bill. The Minister's response was that she would be:

“ perfectly happy to look into seeing whether it can be done but ... it will be a very difficult ask indeed, not least because, benefit by benefit, we also have to take account of residency requirements in other matters, not least in relation to European Union nationals.”

Social Security Committee 08 February 2018, Jeane Freeman, contrib. 90<sup>72</sup>

## Universality of some types of assistance

As introduced, the schedules to the bill allowed eligibility for any type of devolved assistance to make "eligibility depend on the financial circumstances of the individual". In evidence at stage 1, concerns were raised that this would allow for means-testing of those benefits that are currently not means-tested, including disability living allowance and winter fuel payments.

Opposition amendments at stage 2 (supported by the Minister) have prevented eligibility for winter heating assistance, disability assistance or employment-injury assistance from depending on the financial circumstances of the individual (Sch. 3 para 6ZA, Sch. 4 para 5A and Sch. 6 para 7A). In all cases, these amendments are subject to a provision (already in the bill as introduced) that allows eligibility to depend on the individual receiving another benefit (either devolved or reserved). It appears that this would technically permit a future government to indirectly means-test these types of assistance, should it wish to. If eligibility for disability assistance was made dependent on the individual also receiving universal credit (UC), for example, anyone with too much income or capital to get UC would not be able to qualify for disability assistance.

In the case of winter heating assistance, the Minister indicated her support for a consequential opposition amendment. This would have prevented the general enabling power to make any provision in regulations under the bill (Sch. 3 para 7) from undercutting the new provisions added by the amendments. However, this amendment was not moved during stage 2. As such, the bill appears to still permit means-testing of winter heating assistance, as it stands. Similar amendments in relation to disability and employment-injury assistance were moved and agreed - see Sch. 4 para 13(b) and Sch. 6 para 14(b) of the bill as amended.

## Carer's assistance for more than one person

The Scottish Government has committed to paying an increased amount of carer's assistance to applicants who care for more than one disabled child.<sup>31</sup> Opposition amendments sought to amend s.11 and Schedule 1 to the bill to ensure that the regulations make provision for applicants with multiple caring responsibilities. The amendments were withdrawn, in several cases as they were unnecessary to achieve their intended effect.<sup>iii</sup>

During the debate on the amendments, SNP members pointed out that the bill already contained a power to vary the amount of carer's assistance. The Minister acknowledged that:

“ there are many potential improvements to be made to carers support, and I believe that we should make them together, through the development of and consultation on carers assistance regulations, which will be brought forward following the passage of the bill.”

Social Security Committee 08 February 2018 [Draft], Jeane Freeman, contrib. 98<sup>74</sup>

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<sup>iii</sup> In essence, this is as s. 22 of the [Interpretation and Legislative Reform \(Scotland\) Act 2010](#)<sup>73</sup> provides that a reference to a single individual includes a reference to more than one individual.

Alison Johnstone MSP (who had brought forward the amendment) agreed that the bill **allows** regulations to vary the amount of carer's assistance. But she pointed out that, in relation to taking into account all hours of care provided, the amendment was:

“ seeking a requirement on the Parliament and the Government.”

Social Security Committee 08 February 2018 [Draft], Alison Johnstone, contrib. 100<sup>75</sup>

She suggested that she may bring forward further amendments to this effect at stage 3.

## Terminal illness and disability assistance

In the current reserved social security system, an individual is deemed to be "terminally ill" if they have a progressive disease from which their death can reasonably be expected within six months. Some organisations responding to the Social Security Committee's call for views touched on these rules. As the Committee's stage 1 report noted:

“ Marie Curie and MND Scotland...argued that the definition of terminal illness should not take account of life expectancy. ”

para 382 Scottish Parliament Social Security Committee, 2017<sup>11</sup>

In contrast, Peter Hastie of McMillan Cancer Support, giving oral evidence and making clear that he referred specifically to cancer patients, felt that:

“ although it is obviously not an exact science, we think that the timescale—the last six months of life—is appropriate.”

Social Security Committee 05 October 2017, Peter Hastie, contrib. 93<sup>76</sup>

An amendment to the bill at stage 2 (see s.14(1A)) has extended the six month period in the current reserved system to two years. In advance of the stage 2 debate on the amendment, the Minister provided the Social Security Committee with a copy of a letter to a number of medical organisations, requesting their views on a suitable definition of terminal illness. <sup>39</sup>

The Minister urged the Committee to disagree to the amendment, arguing that stakeholders were not agreed on such an approach, and that:

“ Any definition of terminal illness that the agency works from must be one that the clinical and health community is comfortable with and believes is deliverable in a fair and consistent manner across the country.”

Social Security Committee 08 February 2018 [Draft], Jeane Freeman, contrib. 114<sup>77</sup>

All members contributing to the debate acknowledged that there may be potential to refine the definition as set out in the amendment. But the amendment as it stood was agreed to by division.

The supplementary financial memorandum (paras 14-15) makes a set of assumptions of the costs of this amendment. This is estimated to perhaps be £300 million a year, but "should be treated with a high level of caution." <sup>41</sup>

Whilst most assumptions made are not specified, the memorandum states that



“the intention is that an individual with a terminal illness... can access the highest rate of the care component of disability assistance without the usual tests.”

Social Security (Scotland) Bill [as amended at stage 2] Supplementary Financial Memorandum. SP Bill 18A-FM, 2018<sup>41</sup>

This is indeed the position in the reserved system, and was the intention in moving the amendment. However, the bill does not actually require that a particular amount of assistance is given to terminally ill applicants as it is drafted.

Further amendments which probed the Scottish Government's intention to create a streamlined application process for terminally ill applicants were withdrawn, after the Minister confirmed that she intends to:

“ensure that we have a clear proposition on fast tracking that, as a minimum, replicates the current special rules for how we fast track individuals who have a diagnosis of terminal illness.”

Social Security Committee 08 February 2018 [Draft], Jeane Freeman, contrib. 114<sup>77</sup>

An amendment which would have required re-assessment of all terminally ill applicants after three years was also not moved.

## Assessments for devolved assistance

The Scottish Government made a commitment to not using the private sector for disability benefit assessments prior to the introduction of the bill. The bill as introduced did not specifically mention assessments. In its stage 1 report,<sup>11</sup> the majority of the Social Security Committee agreed with the Minister's argument that a legislative ban was unwise, as it might lead to unintended consequences, including that the Scottish Government might be:

“constrained from accepting, for example, supporting evidence for an application that comes from a private sector organisation.”

Social Security Committee 02 November 2017, Jeane Freeman, contrib. 71<sup>78</sup>

The Scottish Government response welcomed this position, but signalled that it would “continue to reflect on this matter”.<sup>79</sup>

In the event, a government amendment at stage 2 has introduced s.1J of the bill. This provides that compulsory assessments of physical or mental health for the purpose of deciding entitlement to devolved assistance must be carried out by someone “acting in the course of employment by a public body.” Whilst the focus has been on disability assistance, the provision also extends to employment-injury assistance.

In terms of avoiding “unintended consequences”, the Scottish Government paper explaining the amendment stated that:

“The amendment permits Ministers to require people to submit to an assessment by an individual acting in the course of employment by a public body. This approach allows for a person to submit evidence derived from the private sector, if they wish, and for this to be considered by decision makers.”

Freeman, 2018<sup>37</sup>

Further opposition amendments sought to:

- make further provision for assessments, aimed at restricting their number
- ensure those assessing people with mental health problems have relevant professional expertise.

These were withdrawn, after Committee members expressed concern about their wording. The Minister offered to work with opposition parties to bring forward amendments to achieve their intended effect at stage 3.

A government amendment has introduced a new section making explicit that applicants have a right to supporters at any "discussion or assessment" relating to their entitlement to devolved assistance (s.32B). Supporters can be excluded if the applicant's wish to be accompanied is "unreasonable". What is reasonable is left to the discretion of whoever is carrying out the assessment. It would be for applicants to seek support, as there is no duty on Ministers to provide (or pay for) it.

## Short-term assistance

Prior to the introduction of the bill, the Scottish Government had not publicly stated that it was considering the introduction of short-term assistance. The bill documents left unclear a number of aspects of the policy proposal. This was perhaps reflected in the confusion of some respondents to the Social Security Committee's call for views about exactly what was proposed.<sup>44</sup> Most respondents welcomed what they assumed to be the policy intention, but without always agreeing about what this was.

Government amendments have introduced a new schedule (Sch. 9) giving further detail of short-term assistance (STA). This has clarified some matters. Short-term assistance must be paid if all of the following conditions are all met.

1. An applicant was receiving assistance payable on an ongoing basis.
2. This has been stopped or reduced by a later determination.
3. The determination is 'under review'.
4. Any other conditions set out in the regulations are also met.

A determination is 'under review' if a re-determination request has been made or an appeal to the First-tier Tribunal is pending, or if the First-tier Tribunal is considering whether to admit a late appeal. The Minister stated that:

“ The amendments make clear our policy intent that short-term assistance will maintain payments at the original level until a redetermination or, after that, an appeal to the First-tier Tribunal has been determined.”

Social Security Committee 22 February 2018 [Draft], Jeane Freeman, contrib. 21<sup>80</sup>

The amendments do not make any specific provision for the periods between:

- a determination being made and a re-determination being requested

- a re-determination notice being sent and an appeal being made.

It is unclear whether, once a determination is "under review", short-term assistance will be paid for the period before the re-determination request or appeal was received by the agency.

The supplementary financial memorandum states that the amendments:

“ would see more individuals eligible for STA [at a cost] estimated to be in the region of £13 million per annum when all benefits are fully devolved.”

41

The original financial memorandum had made no specific mention of short-term assistance.

It remains unclear whether short-term assistance will be recoverable, in the event of an unsuccessful challenge. The Social Security Committee specifically requested that the Scottish Government clarify this point in its stage 1 report. The Scottish Government response did not answer this question, and it was not mentioned in the stage 2 debate.

Opposition amendments aimed at requiring that short-term assistance must be given to those moving to other parts of the United Kingdom were withdrawn, after the Minister gave assurances that:

“ both the Scottish Government and the UK Government entirely share Mr Balfour’s concern to get this right. Officials are working together to agree arrangements that will ensure that people transitioning between systems experience no gaps in payment or unnecessary administrative burdens.”

Social Security Committee 22 February 2018 [Draft], Jeane Freeman, contrib. 21<sup>80</sup>

The Minister also argued that the existing regulation-making powers are broad enough to allow short-term assistance to be paid to people moving to other parts of the UK, should this be necessary.

## Housing assistance

Government amendments have been brought forward to mitigate the effect of two UK Government welfare reforms, through a new type of social security assistance - housing assistance (s.17A and Sch. 8). These are the interaction between mitigation of "bedroom tax" (or "removal of the spare room subsidy") in universal credit (UC) with the benefit cap, and the removal of help with housing costs through UC for some 18-21 year olds.

The Scottish Government already mitigates the effect of both reforms. At present the bedroom tax is mitigated through discretionary housing payments. 18-21 year olds can get support with housing costs “on an interim basis” through the Scottish welfare fund (SWF), as set out in [guidance produced by the Scottish Government](#).<sup>81</sup>

Like the interim solution, the Scottish Government's intention was that housing costs for 18-21 year olds would be delivered by local authorities. For this reason, a new section added by a government amendment permits agency arrangements for housing assistance to be created with local authorities (s.48D). However, it appears that this type of housing

assistance may no longer be necessary. In a [written statement to the House of Commons on 29 March 2018](#), the Secretary of State for Work and Pensions announced that:

“ the Government will amend regulations so that all 18-21 year olds will be entitled to claim support for housing costs in UC.”

House of Commons Hansard, 2018<sup>82</sup>

It is currently unclear exactly when this will happen.

s.29 of the [Scotland Act 2016](#)<sup>83</sup> gives Scottish Ministers the power to make regulations varying the amount of the UC housing costs element. By doing so they can abolish the bedroom tax in UC at source. However, a difficulty with use of this power was that for some claimants any additional UC would have been immediately clawed back, due to the benefit cap. In [a statement to Parliament on 19 September 2017](#) (after the introduction of the bill), the Minister for Social Security confirmed that the Scottish Government:

“ now have an agreed proposal that will fully mitigate the effect of the bedroom tax without funding being clawed back or the support that we provide to those to whom the tax applies being limited by the operation of the United Kingdom Government’s benefit cap. I hope to be in a position to lodge an amendment at stage 2 of the Social Security (Scotland) Bill to provide full legal cover for the technical solution.”

Col 12 Scottish Parliament, 2017<sup>84</sup>

The Scottish Government's paper explaining these amendments states that this type of housing assistance will be delivered by the DWP through the UC system.<sup>38</sup> Due to the technical nature of the amendments required, Schedule 8 gives more detail of the entitlement conditions for housing assistance than most other schedules to the bill.

The supplementary financial memorandum (paras 28-31) highlighted that both types of housing assistance proposed are existing Scottish Government commitments, being delivered through other means at present. As such, the only additional cost estimated is that:

“ between £1 million and £2 million... will be payable to DWP to facilitate the system changes necessary to mitigate [the "bedroom tax"] at source. ”

Social Security (Scotland) Bill [as amended at stage 2] Supplementary Financial Memorandum. SP Bill 18A-FM, 2018<sup>41</sup>

## The power to create new benefits

Opposition amendments at stage 2 sought to transpose the power to create new social security benefits in areas of devolved responsibility into the bill. The way in which the amendments were drafted would have made such benefits part of the "Scottish social security system", so the principles and social security charter would have applied to them.

Other members of the Committee argued that new benefits should be created through primary legislation, to ensure the appropriate level of parliamentary scrutiny of the Government's proposals. Adam Tomkins MSP (who brought forward the amendment) gave the hypothetical example of a future desire to:

“ create a new benefit that is directed at prisoners so that they do not have to sleep on the streets and would have temporary accommodation provided when they are released from prison [which he argued would be within devolved competence]... Right now, if ministers identified that that was a problem in Scotland, they could use their budgets ... to design and deliver an ad hoc scheme of assistance ... and there would be absolutely no parliamentary scrutiny of that. It could all be done by ministers using their spending powers. The only scrutiny that members would have would be our scrutiny of the annual budget process.”

Social Security Committee 08 February 2018 [Draft], Adam Tomkins, contrib. 69<sup>85</sup>

He argued that his amendment would thus mean an increased level of scrutiny compared to the present situation, were it to be agreed. In light of the position of other Committee members, this amendment was withdrawn, but with a suggestion that a similar amendment may perhaps be brought forward at stage 3.

The only amendment pressed to a vote at stage 2 sought to ensure that any new benefits created in the future (whether under this bill or not) would be a part of the "Scottish social security system" - and so subject to the principles and charter. It was disagreed to by division.

## General rules for the devolved social security system

Part 2 of the bill sets a common framework for decision making and challenges to decisions which applies to all types of devolved assistance. It also makes provision for recovery of overpayments, and the creation of new criminal offences. The following sections look at some areas in which the bill has been amended.

### Applications for assistance

Amendments at stage 2 have required the form of applications to be set out in regulations. At stage 1, some evidence suggested that the lack of a regulation-making power for the form of an application for assistance limited opportunities for parliamentary scrutiny. An opposition amendment, agreed by division, now requires that the form of an application is set out in regulations. In urging the Committee not to agree the amendment, the Minister argued that this would make the form of applications too inflexible, and that:

“ If the agency has told the public that an application can be made in a particular way, a court or tribunal should treat an application that has been made in that way as valid. As a no doubt unintended consequence of Mr Griffin’s amendments, judges would be limited to looking at regulations when deciding whether an application has been validly made.”

Social Security Committee 22 February 2018 [Draft], Jeane Freeman, contrib. 34<sup>86</sup>

The illustrative regulations produced during stage 1 by the Scottish Government simply provided that:

“ 3.—(1) An application is to be treated as made on the day it is received by the Scottish Ministers. (2) For the avoidance of doubt, a thing that purports to be an application is not an application unless it is— (a) made in the form, and (b) accompanied by the evidence, required under section 20(1) of the Social Security (Scotland) Act 2018.”

Scottish Government, 2017<sup>34</sup>

As such, it is not clear how an application not made in the form required by Ministers could ever have resulted in a determination of entitlement. Without a determination, there can be no right of appeal to a tribunal. As the bill has been amended, applications not made in the correct form still need not be determined. The effect of the amendment is simply to make the type(s) of application that will be accepted subject to Parliamentary scrutiny.

The draft best start grant (BSG) regulations currently subject to public consultation do not include the form of applications in the main regulations. The drafting suggests that there may be further provision made within the BSG regulations themselves, once the design of the benefit has progressed further.<sup>36</sup>

### **Premature applications**

Government amendments have introduced a new type of decision - that an application in respect of an event is "possibly premature" (s.33(1)(d)). If this is the case, a determination refusing the application must state that the applicant may re-apply (s.33(1A)). A consequential amendment allows a repeat application to be made in respect of the same event, but only if the determination of the most recent application contains such a statement (s.20(4)).

The Scottish Government paper explaining its amendments gives the example of a pregnant woman applying for the best start grant, but not being in receipt of a qualifying benefit. Once the child was born, this could mean that in the same financial circumstances she might qualify for one of the benefits. Amounts are added to some benefits for dependent children, and others are only paid to families with children.

The paper explaining the amendments is clear that:

“ The amendments at the same time retain a mechanism for preventing repeat applications where a person could not become eligible. ”

Freeman, 2018<sup>38</sup>

There are a number of situations in which someone could become eligible for assistance following an unsuccessful application. For example, someone's financial circumstances might change dramatically during the time allowed to apply, or their immigration status might change, giving them access to benefits for the first time. The Scottish Government intends that the power to prevent repeat applications will largely be used where the time allowed to apply in respect of an event has expired.<sup>87</sup>

Unless a notice of determination expressly permits a further application, there is no power to accept a further application in respect of the same event. In this situation, it appears that the applicant would have to challenge the refusal, if there was a chance that the eligibility conditions were satisfied by the time the re-determination was considered or the appeal heard.

## Treating applications as for other types of assistance

Opposition amendments at stage 2 would have made provisions allowing Ministers to treat an applications for one kind of devolved assistance as being for another kind of assistance, or to advise the individual to make a further application for it. The Minister indicated that she supported these amendments, but that:

“ ahead of stage 3, I will look to discuss with Ms McNeill amending the duty to treat an application for one type of assistance as an application for any other type to make it clear that nothing should be done without the permission of the individual in question. That is in line with the person-centred approach that I have referred to, which I am sure Ms McNeill supports.”

Social Security Committee 01 February 2018 [Draft], Jeane Freeman, contrib. 22<sup>88</sup>

In the event these amendments were not moved at stage 2, so it appears likely that similar amendments will be brought forward at stage 3.

A further opposition amendment, which would have created a **duty** to consider entitlement to other types of devolved assistance, was disagreed to by division. This was described as a companion to the above amendments, intended to streamline the system and help people to navigate it. The Minister emphasised the importance of an individual's right to choose, arguing that the amendment:

“ would mean that the social security agency would have to judge whether an individual who applied for one type of assistance should be entitled to another.”

Social Security Committee 01 February 2018, Jeane Freeman, contrib. 22<sup>89</sup>

## Notifications and evidence requirements

Opposition amendments at stage 2 sought to require that all notifications of determinations are issued in writing, and prescribe that notifications must contain of details of the eligibility rules, evidence used and copies of any assessment reports. Moving the amendments, Mark Griffin MSP argued that (in relation to notifications in writing):

“ Nothing in the amendments would preclude a decision being communicated in other inclusive communication formats, as set out in amendments in my and Ruth Maguire’s names that were agreed to earlier in stage 2. They would not detract from the right to have that accessible information, nor would they prevent, say, a decision maker from notifying someone of a decision by phone.”

Social Security Committee 22 February 2018 [Draft], Mark Griffin, contrib. 45<sup>90</sup>

In relation to the amendments about evidence included with notifications, the Minister argued that they were overly prescriptive, might have required assessment reports to be sent to those not wishing to see them, and would require all eligibility rules to be considered where it was determined at an early stage that an application could not succeed. She agreed to consider whether stage 3 amendments could be brought forward to address concerns with the wording. On this basis the amendments were withdrawn.

Opposition amendments also sought to remove the provision (s.30(2)) which permits an application to be refused without further consideration if a request for further evidence is not complied with in the time allowed. Had it been agreed, the effect would have been

broadly similar to a recommendation in the Social Security Committee's stage 1 report (para 245).<sup>11</sup> The Minister argued that this amendment went further, and that:

“ the agency would have to keep the application open and would have to hold the personal information of the individual in question in perpetuity.”

Social Security Committee 22 February 2018 [Draft], Jeane Freeman, contrib. 79<sup>91</sup>

The Minister also stressed that applications do not **automatically** fail if required evidence is not provided.<sup>iv</sup> On this basis the amendment was withdrawn.

## Re-determinations and appeals

Before being able to appeal to the First-tier Tribunal against a determination, an applicant must first request a re-determination. The Scottish Government has emphasised the differences between this and the current "mandatory reconsideration" process in the reserved benefit system. Prominent amongst the differences noted have been:

1. the fact that a determination will be re-made from scratch
2. the inclusion of a time-limit to consider a re-determination request
3. a right of appeal if the time-limit is not met.

The commitments to a more thorough re-examination and a time limit to do so suggest a requirement for additional resources, compared to the current system.

Not all stakeholders were convinced by these arguments, and a number of witnesses giving evidence at stage 1 suggested that such a stage presents a barrier to access to justice. For example, Regional Tribunal Judge Burns felt that:

“ 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.”

Social Security Committee 21 September 2017, Jessica Burns, contrib. 82<sup>92</sup>

Asked about the need to request a re-determination before appealing, the Minister responded that she was:

“ finding it difficult to square a rights-based approach with one that would take away from an individual the right to decide whether they wanted to challenge. That is why it should always sit with the individual to choose what to do.”

Social Security Committee 02 November 2017, Jeane Freeman, contrib. 9<sup>93</sup>

The Scottish Government's view is that the re-determination stage is needed as:

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iv It is perhaps worth noting that s.30(2) leaves open whether a tribunal could consider the substantive entitlement conditions in an appeal against such a determination, or would be limited to considering whether the request for evidence had been complied with within the time limit or not.



“ It is simply not conceivable that a tribunal decision could correct any mistake on behalf of the individual as quickly as the agency could. Therefore, the individual's interests are best served by giving the agency the immediate opportunity to put right any errors.”

Scottish Government, 2017<sup>28</sup>

Government amendments at stage 2 have made a number of changes to the process. Broadly, these relate to:

- [late re-determination requests](#)
- [provision of appeal forms](#)
- [initiating appeals](#).

These amendments are discussed in the following sections. A technical government amendment provides that bill's original provisions for calculating time in relation to appeal time limits also apply to other notifications (s.28A).

Opposition amendments sought to allow applicants to choose in advance for their re-determination request to proceed automatically to appeal if the determination was not changed. In addition to highlighting difficulties with the wording of the amendments, the Minister returned to the issue of a rights-based approach, explaining that her:

“ central difficulty with Ms McNeill's amendments is that the individual is being asked to make a decision about whether they will wish to appeal before they have any information about the result of their first challenge—the re-determination. The decision about whether or not it is advantageous is out of the hands of the individual and in the hands of the agency. In a rights-based system—if we mean to embed that approach in every aspect of what we do—that is the wrong approach.”

Social Security Committee 22 February 2018 [Draft], Jeane Freeman, contrib. 54<sup>94</sup>

Like the current tribunal rules, the draft social security tribunal rules subject to consultation give an appellant the right to withdraw their appeal at any point before the hearing.<sup>58</sup>

The amendments were withdrawn, but with an indication that the issue may be raised again at stage 3.

### **Late re-determination requests**

A new section of the bill makes new provision in relation to late re-determination requests (s.23A). It broadly replicates the provisions in the current reserved system. A request must be made in the form required (s.23(2B)), and within a year of the expiry of the normal time limit (s.23(2C)). The normal time limit is to be set out in regulations (s.23(2C)(a)).

There is a right of appeal to the First-tier Tribunal against a refusal to accept that there is a good reason for a late re-determination request (s.23A(3)). This is the position in the current reserved system, after it was confirmed by an Upper Tribunal decision.<sup>95</sup>

However, the bill provides that there is no onward right of appeal against the First-tier Tribunal's decision about whether there is a good reason(s.23A(6) and (7)). The reason for this restriction is not explained in the Scottish Government paper explaining its amendments, and was not touched on in the stage 2 debates.

## Provision of appeal forms

A new requirement is that an appeal must be made in a particular form (see [below](#)). As a part of the same package of amendments, this form must be sent to the applicant with a notice of re-determination (s.25(b)), or a notice that a re-determination has not been carried out within the required time (s.26(b)). This was welcomed by opposition members during the stage 2 debate. There is no exception to this requirement, even if the individual has been awarded the highest possible rate of a benefit at re-determination, for example.

No similar provision is made in relation to notifications of determinations, despite the fact that a re-determination request must also be made in the specific form required by Ministers (s.23(2B)). This may perhaps be as the potential "form" of a re-determination request is intended to be wider (perhaps including the ability to make such a request by phone, for example). This seems unlikely to be the intention in relation to the form of appeals, given the Scottish Government paper explaining its amendments refers to:

“ the necessary form that they would need to complete and return back to the agency.”

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## Initiating an appeal

Significant changes have been made to the bill, in terms of the process to submit an appeal. The amendments are explained by the Scottish Government as follows:

“ the key driving factors for the Scottish Government has [sic] been to ensure the process is as easy as possible for an individual to exercise their right of appeal and that they have the right to control whether their appeal is made. The approach, which has the support of Citizen’s Advice Scotland and Inclusion Scotland, proposes that the agency will have a duty to assist people to exercise their right of appeal, should they wish to do so. After the re-determination and as part of its notification, the agency will provide the individual with information on what action the individual needs to take to initiate an appeal and provide the necessary form that they would need to complete and return back to the agency. This form need not be paper based and could come in, for example, an electronic format. Upon receipt of the completed form, the agency will then forward it and the documentation it holds in relation to the determination to the First-tier Tribunal which will then manage the appeals process. ”

Freeman, 2018<sup>37</sup>

Between stages 1 and 2, a public consultation on regulations making provision for social security appeal tribunals began. The bill sets a different process to make an appeal to the draft rules in the consultation document.<sup>58</sup> If the bill is passed in its current form, the tribunal rules would appear to require some re-drafting.

Questioned on how to minimise barriers to appeal during stage 1, the Minister responded that:

“ We are also having discussions with our colleagues in the Scottish Courts and Tribunals Service about what they require and are looking for so that we minimise the amount of effort that the individual needs to go to. I want the decision about what happens next to sit with the individual who has challenged a decision, but I do not want to overburden them with lots of form filling—in this instance or indeed in any instance—in a way that they feel precludes them from pursuing the issue. I want people to be really clear about what they need to do, what they should expect and the timeframe within which they should expect it.”

Social Security Committee 02 November 2017, Jeane Freeman, contrib. 21<sup>96</sup>

As amended, the bill contains the following new provisions.

- An appeal must be made to the agency and not the tribunal (s.27A(1)).
- An appeal must be made on the form provided (s.27A(1)) - or a copy of it (s.27A(4)).
- There is the possibility of requiring that appeals must be made electronically (s.27A(5)).
- An appeal has not been made (for the purposes of the time-limit to appeal) unless the form is completed in a way that meets all requirements set out in the tribunal rules (s.28(2)(b)).

This contrasts with the reserved system, where the appeal is made directly to the tribunal.

With reference to the last bullet point above, in the draft rules under consultation (which are not finalised), the requirements include that the appellant provides both the grounds for their appeal and the outcome sought.<sup>58</sup> Whether the agency or the tribunal take responsibility for ensuring that the appellant has provided grounds for an appeal, until this has happened, a valid appeal will not have been made within the time limit.

## Overpayments

The policy memorandum to the bill as introduced stated that only rarely would overpayments caused by the social security agency (commonly known as due to “official error” in the reserved social security system) be recovered from the individual.<sup>43</sup> But the bill, as introduced, created a liability to repay all overpayments due to mistaken decisions. Any decision to write off overpayments was left to the discretion of the agency. A number of those submitting evidence at stage 1 argued that the policy intent was not reflected in the bill's provisions.<sup>44</sup>

For context, reserved benefit overpayments can be broadly dividing into three groups (ranked here according to the breadth of the legal power to recover overpayments):

1. those which are always legally recoverable, leaving the only right of appeal about the calculation of the amount overpaid (tax credits and universal credit)
2. those which can be recovered unless they were caused by an official error, **and** the claimant could not reasonably be expected to know that they had been overpaid (housing benefit)

3. those which can **only** be recovered if the claimant is somehow at fault and this contributes to causing the overpayment (broadly, the 11 benefits to be devolved, as well as other DWP benefits which will remain reserved).<sup>97</sup>

In all cases there is also the discretion not to pursue recovery of an overpayment in a particular case. As introduced, the bill made provision most similar to the first group above.

Government amendments at stage 2 have made provision (s.36A) that there is no liability to repay devolved assistance if:

- the error is not the individual's fault; and
- it is not the kind of error that the individual could have reasonably been expected to notice.

This leaves the provision most similar to that which currently applies to housing benefit overpayments in the reserved system.

Further detail is provided in relation to both of these tests. An error is only an individual's fault if they "caused or contributed to it" by providing false misleading information, failing to report a change, or causing someone else to do either of these things (s.36A(2)). The reasonableness of noticing an error depends on how much difference the error made to the amount of assistance provided, and whether "a reasonable person" would have known from the information provided to them that the amount of assistance was incorrect.

This amendment was agreed to without division at stage 2, but it was suggested during the debate that opposition members would:

“ seek to work with the Government and the minister ahead of stage 3 on areas that we think can be improved.”

Social Security Committee 22 February 2018 [Draft], Mark Griffin, contrib. 101<sup>98</sup>

A further government amendment broadens the scope of when a liability can arise (s.36(4)). The original bill only allowed a liability to arise from a "mistaken decision", which would have meant that overpayments resulting from errors outside the decision-making process would not have been recoverable under powers in the bill.

A final complementary amendment creates a new section restricting non-statutory recovery of assistance paid in error (s.38A). The Scottish Government's paper explaining the amendment states that:

“ The purpose is to bring all types of error that result in an overpayment within the statutory framework set out in Section 36. The practical effect is that it brings the entire social security framework around those errors within a statutory framework, set out clearly and transparently in the Bill. This means that Scottish Ministers will have no recourse to common law rules of unjustified enrichment for recovering such overpayment liabilities. ”

Freeman, 2018<sup>37</sup>

## Recovery of overpayments

As an overpayment will result from a (retrospective) determination of entitlement, people the agency determines have been overpaid will be able to request a re-determination and

then appeal, and argue that there is in fact no liability at all. During the stage 2 debate, opposition members raised concerns about the right to appeal against **recovery** of overpayments, and the fact that no maximum rate of recovery will be set out in the law. Responding, the Minister confirmed that:

“ it is possible to appeal any recovery deductions through the First-tier Tribunal.”

Social Security Committee 22 February 2018 [Draft], Jeane Freeman, contrib. 104<sup>99</sup>

"Recovery deductions" refers to the power to give some types of assistance in the form of a deduction from the individual's liability to repay an overpayment. Such deductions can be made without the individual's consent if they have "unreasonably refused" to deductions being made. Even if made without consent, deductions must be made at a "reasonable level". A deduction to recover an overpayment will be a type of decision leading to a fresh determination (s.33(1)(b)). As all determinations can be appealed (following a re-determination request), there will be the possibility of a tribunal making its own determination on deductions to recover an overpayment (s.22).

It remains to be seen how much detail of what is considered to be reasonable will be prescribed in the regulations, and whether there will be an absolute maximum amount. The fact that a reasonable level "means a level that is reasonable having regard to the financial circumstances **of the individual**" (Sch. 4 para 11A(3), for example - emphasis added) suggests that there may be no upper limit to the amount that might be deducted set in the regulations.

If someone is not receiving an ongoing payment of devolved assistance, then recovery will take place using alternative statutory powers to recover debts, and challenges will not be to the First-tier Tribunal. This seems to be an option open to Ministers even if the individual is receiving devolved assistance. This would leave the agency to decide whether to try to agree deductions, or use other methods of recovery.

For funeral expenses assistance only, a government amendment provides that assistance can be recovered from the estate of the deceased as a priority debt (mirroring the current reserved system) (s.38B).

## Criminal offences

The bill creates a number of new criminal offences in relation to the devolved social security system. Contained in part 2 of the bill, these offences do not apply to:

- any top-ups of reserved benefits introduced by regulations
- the carer's allowance supplement
- discretionary housing payments.

At stage 1, a number of organisations giving evidence questioned whether the new offences in relation to failures to report changes in circumstances risked criminalising genuine errors. This focused on the fact that the offences of failure to report changes could be committed where someone "ought to have known" that a change was relevant to entitlement. The Social Security Committee's report called for the bill to be clarified to reflect the Scottish Government's policy intention that genuine errors would not be criminalised.

In response, a government amendment has inserted a new requirement into the offence of failing to report a change, that the individual "does not have a reasonable excuse" for their failure (s.40(1)(aa)). The Minister argued that this addressed concerns raised by stakeholders about the proposed offences. The Scottish Government's view is that as individuals will be told what changes must be notified (and only failures in relation to these specific changes will be prosecutable), there is sufficient protection from prosecution for unintentional failures.

No such change has been made to the almost identically-worded offence of causing someone else to fail to notify a change of circumstances (s.41). This was not discussed during stage 2. The person causing someone else to fail to notify a change only commits an offence if that other person had been placed under a duty to notify it.

Opposition amendments sought to replace references in the bill to what someone "ought to have known" with "knowingly" - a wording used in some offences in the current reserved system. The Minister argued that this risked:

“ making offences so difficult to prosecute that nobody would take the risk of prosecution seriously.”

Social Security Committee 01 March 2018 [Draft], The Minister for Social Security (Jeane Freeman), contrib. 5<sup>100</sup>

Committee members objected to the withdrawal of the lead opposition amendment, and it was disagreed to by division.

## **Rights and responsibilities in the Scottish social security system**

A series of technical government amendments have made provision in the following areas:

- [allowing an "appointee" to take responsibility for someone else's application](#)
- [ensuring that a right to assistance cannot be transferred to someone else](#)
- [giving Scottish Ministers the power to share information with other public bodies.](#)

These amendments were the subject of little debate. The following sections briefly explain their effect.

### **Appointees**

An "appointee" is the term used in the reserved social security system for someone who can be appointed to take responsibility for someone else's benefit claim. Broadly this situation currently arises if the claimant is under 16, lacks mental capacity, or has died. Government amendments have made similar provision in relation to the devolved social security system, but not included specific rules for under 16s (s.32A).

Anyone over 16 can be appointed to act for an applicant who has died or is "incapable" as defined in the Adults with Incapacity (Scotland) Act 2000.<sup>101</sup> This definition is that due to a mental disorder or inability to communicate through physical disability, an individual is incapable of either:

- acting

- making decisions
- communicating decisions
- understanding decisions, or
- retaining the memory of decisions.

However, a person is not incapable if any difficulty they have communicating "can be made good by human or mechanical aid" (including an interpreter).

Certain other legal relationships take priority, preventing an appointment from being made. These include:

- an executor (if someone has died)
- a guardian appointed under the Adults with Incapacity (Scotland) Act 2000
- a judicial factor.

A more general exclusion prevents an appointment from being made for someone "incapable" if another person "has authority to act on behalf of the individual, and is willing to do so" (s.32A(4)(d)). This provision is very broadly drafted, and it is not clear what other kinds of authority the Scottish Government envisages would prevent an appointment from being made.

The bill does not make specific provision for children, who might be the "individual" entitled to disability assistance. In the current system, someone (usually a parent) is automatically appointed to act for a child under 16 claiming disability living allowance.<sup>102</sup> As not all disabled children are "incapable" as defined, the intention is that if a child under 16 is capable of being responsible for their application, either the child or a parent<sup>v</sup> would be able to apply for assistance.<sup>87</sup>

Once an appointment is made, an appointee can act on an individual's behalf, and receive any assistance that they are entitled to. The appointee may do anything that an applicant can (including apply for assistance), can be placed under a duty to report changes, and must be notified of anything that the individual would otherwise be told.

The Scottish Government's description of the amendment states that appointments can be reviewed and if necessary terminated.<sup>38</sup> A review might be required if a young adult and their parent disagreed about whether an appointment should be made, for example. Another situation which may arise later in life is that both a local authority and a relative might apply to be the appointee of someone who loses capacity and moves into a care home. There is no process to challenge any appointment set out in the bill.

### **Inalienability of assistance**

Government amendments have made devolved social security assistance "inalienable" - prevented the right to it from being passed on to another person. The amendments ensure

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<sup>v</sup> s.2 of the Children (Scotland) Act 1995<sup>103</sup> gives a parent the right to act as the legal representative of a child under 16 .

that an entitlement cannot be assigned to someone else or have a charge placed on it (s.48A). An individual retains the right to social security assistance on bankruptcy,<sup>vi</sup> or if a judicial factor is appointed (s.48B).

These amendments essentially re-create the position in the current reserved system. The Scottish Government paper explaining the amendments clarifies that they do not prevent assistance from being paid to a third party (for example housing assistance can be paid directly to a landlord).<sup>40</sup>

### **Information-sharing powers**

When the bill was introduced, the Scottish Government had already identified a need to make amendments providing for information-sharing between public bodies.<sup>104</sup>

Government amendments have now introduced such powers in relation to devolved public bodies (s.48c). For the purpose of performing their functions under the bill, Ministers can require that the following bodies (or anyone providing services to them) supply information:

- a local authority
- an NHS board
- an integration joint board
- the Registrar General for Scotland
- the Keeper of the Records of Scotland
- the Scottish Courts and Tribunals Service.

Other bodies can be added to this list by regulations. The new provision cannot require information-sharing if it is specifically prohibited by other legislation.

During the stage 2 debate, the Minister confirmed that the amendment had been drafted to take account of the Supreme Court judgement in relation to information-sharing in the named person scheme.<sup>105</sup> The Minister was also asked how broad the power in s.48C(3) is in practice. This power provides that:

“ Where information is supplied to the Scottish Ministers under subsection (1) for use for any purpose, they may use it for any other purposes for which information held by them for that purpose may be used. ”

Social Security (Scotland) Bill [as amended at Stage 2]. SP Bill 18A, 2018<sup>23</sup>

The Minister responded that this may simply be standard legal drafting for a power of this kind. She also confirmed that:

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vi The bill uses the legal term "sequestration".



“ The amendment means that data that the agency holds can be used only for the purposes that we seek the approval of the individual whose data it is to hold, if you follow me. If the agency wanted to hold data about me, I would have to give it approval and it would have to be clear with me the purposes for which it wanted to hold that information. My consent would be an absolute requirement.”

Social Security Committee 01 March 2018 [Draft], Jeane Freeman, contrib. 52<sup>106</sup>

The Scottish Government paper explaining the amendments highlights that it is also in discussion with the Scottish Public Services Ombudsman about whether a further amendment will be required at stage 3 to ensure she can deliver effective redress for complaints about the social security charter (see [above](#)).

Separate data-sharing arrangements with UK Government departments (such as HM Revenue and Customs) will also be made, but not via further amendments to the bill.<sup>40</sup> The necessary powers to share information with the DWP are already in place.<sup>104</sup>

## Discretionary housing payments

Since full devolution of discretionary housing payments (DHPs) in April 2017, local authorities have continued to administer them under existing legislative provisions.<sup>vii</sup> The Scottish Government has

“ no plans to make significant changes to the way the DHP scheme operates.”

Social Security (Scotland) Bill [as introduced] Policy Memorandum, SP Bill 18-PM, 2017<sup>43</sup>

This notwithstanding, the bill includes provisions to change the legislative basis of the DHP scheme. As defined, DHPs are not a part of the "Scottish social security system" (see s.7 of the bill). As such the principles, charter and [new reporting duties](#) added at stage 2 do not apply to the DHP scheme.

Some concern was expressed at stage 1 that the bill did not require local authorities to run a DHP scheme. This mirrors the structure of the current legislation.

Government amendments provide that funding to local authorities to run DHP schemes may only be used for that purpose. But there is no requirement to make DHPs if any funding provided by Scottish Ministers has run out (s.52A). The Scottish Government's view is that this ensures that all local authorities will maintain a DHP scheme.

An opposition amendment sought to convert the "power" to make DHPs into a "duty". The Minister's argument that this would have undermined the discretionary nature of DHP awards was accepted, and the amendment withdrawn.

Another government amendment has clarified that a DHP can take the form of a payment to an individual, payment direct to a landlord or a reduction in rent liability, if the applicant is a local authority tenant (s.49(4)).

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vii Broadly, this is by operation of the same mechanism that allowed existing statutory references to a Secretary of State to be read as a referring to the Scottish Ministers upon creation of the Scottish Parliament

## Stage 3

Stage 3 of the bill will take place on 25 April 2018. The deadline for lodging amendments is noon on 18 April 2018.

During stage 2, there were a number of suggestions that stage 3 amendments might be brought forward at stage 3 (largely where stage 2 amendments were either withdrawn or not moved following debate). The following links are to sections of this briefing discussing areas in which further amendments may be brought forward. It does not intend to suggest that these will, or should, be the main areas of debate at stage 3.

- [Ministers' duty to uphold the principles](#)
- [The right to refuse assistance](#)
- [A role for the Parliament in approving the first charter](#)
- [Changes to the right to independent advocacy](#)
- [Membership of the Scottish Commission on Social Security](#)
- [The "super-affirmative" procedure](#)
- [The definition of the "Scottish social security system"](#)
- [Residence conditions](#)
- [Carer's assistance for individuals with multiple caring responsibilities](#)
- [Further provision on disability assessments](#)
- [Definition of "terminally ill"](#)
- [The power to create new benefits](#)
- [The form of notifications](#)
- [Consideration of entitlement to other types of assistance](#)
- [Re-determinations and appeals](#)
- [Overpayments](#)
- [Information sharing with the Scottish Public Services Ombudsman.](#)

## Amendments made at Stage 2

211 amendments were lodged at stage 2, along with 46 amendments making changes to the wording of other amendments. Of the 211 primary amendments:

- 87 were agreed to without division
- 4 were agreed to with amendments made to them, but without division
- 18 were agreed to by division
- 23 were disagreed to by division
- 63 were not moved
- 16 were withdrawn by agreement

Due to the number of amendments lodged, the tables in the following sections list the amendments agreed to by the part of the bill amended. All of the amendments withdrawn, not moved or disagreed to at stage 2 are listed separately in [Annexe 2 to this briefing](#).

The full list of amendments lodged at stage 2 can be found (ordered from start to end of the bill, rather than the order in which they were lodged) in the marshalled lists:

- [1st Marshalled list of Amendments for Stage 2](#) <sup>107</sup>
- [2nd Marshalled list of Amendments for Stage 2](#) <sup>108</sup>
- [3rd Marshalled list of Amendments for Stage 2](#) <sup>109</sup>
- [4th Marshalled list of Amendments for Stage 2](#) <sup>110</sup>

### Part 1 of the bill - amendments agreed to

The substantive amendments to part 1 of the bill agreed to at stage 2 are listed in Table 2 below.

**Table 2: amendments to part 1 of the bill agreed to at stage 2**

<b>Additional principles for the social security system</b>	
77 - George Adam	These amendments added new principles to s.1 of the bill, that "the delivery of social security is a public service" (77) and that "the social security system is to contribute to reducing poverty "(1). The principle of continuous improvement (s.1(f) of the bill) was amended (5 and 6) to require that in considering changes to the social security system, Ministers must seek to promote equality of opportunity. see further discussion <a href="#">above</a> .
1 - Alison Johnstone	
5 and 6 - Jeane Freeman	
<b>Legal effect of the social security principles</b>	
57 - Adam Tomkins	This amendment provides that whilst courts and tribunals may take the principles into account, a breach of the principles does not itself give rise to grounds for legal action. See further discussion <a href="#">above</a> .
<b>Duty to promote take-up</b>	
4, 7, and 8 - Jeane Freeman	These amendments replaced one of the former principles in s.1 with a free-standing duty on Ministers to promote take-up of devolved social security assistance. Ministers must have regard to the role that advice and advocacy can have in promoting take-up. See further discussion <a href="#">above</a> .
<b>Right to independent advocacy</b>	
9 - Jeane Freeman	This amendment ensures that individuals with a "mental disorder" have a statutory right to independent advocacy. See further discussion <a href="#">above</a> .
<b>Right to independent advice</b>	
58 - Jeremy Balfour	This amendment creates an entitlement to independent information and advice advice. Scottish Ministers can delegate this function. See further discussion <a href="#">above</a> .
<b>Recognition of importance of inclusive communication</b>	
112 - Ruth Maguire	This amendment requires Ministers to have regard to the importance of "communicating in an inclusive way". See further discussion <a href="#">above</a> .
<b>Income maximisation strategy</b>	
114 and 115 - Mark Griffin	These amendments require the Scottish Ministers to publish and periodically review a strategy to encourage take -up of benefits. The strategy must be laid before Parliament. See further discussion <a href="#">above</a> .
<b>Accessibility of information</b>	
139 - Mark Griffin	This amendment requires that where reasonably practicable, claim forms, decision notices and guidance must be provided in an accessible format. See further discussion <a href="#">above</a> .
<b>Restriction on private sector involvement in assessments</b>	
10 - Jeane Freeman	This amendment provides that assessments of an individual's physical or mental health must be carried out by someone employed by a public body. See further discussion <a href="#">above</a> .
<b>The charter</b>	
11 - Jeane Freeman	This technical amendment ensures that the charter applies to any functions of the Scottish Ministers under parts 1 to 3 of the bill. See further discussion <a href="#">above</a> .
<b>Preparing the first charter</b>	
145 - Jeremy Balfour	These amendments extend the consultation requirements when preparing the first charter, and ensure that consultation undertaken before this section is commenced is relevant to meeting the requirements in it. See further discussion <a href="#">above</a> .
103, 104 and 105 - Mark Griffin	
12 - Jeane Freeman	

**Reviewing the charter**

13 - These amendments require that additional groups must be consulted when reviewing the charter. See  
 Jeane further discussion [above](#).  
 Freeman

106 and  
 107 -Mark  
 Griffin

**Effect of the charter**

61 - Adam This amendment provides that breach of the charter is not grounds for legal action. See further discussion  
 Tomkins [above](#).

**Annual report on the charter**

108 - This amendment requires that the annual report on the charter includes information about how people  
 Mark with protected characteristics are affected by the social security system. See further discussion [above](#).  
 Griffin

**Scottish Commission on Social Security**

15 and 16 These amendments create a Scottish Commission on Social Security and set out its functions. See  
 - Jeane further discussion [above](#).  
 Freeman

16A and  
 16B -  
 Jeremy  
 Balfour

118 -  
 Jeane  
 Freeman

## Part 2 of the bill - amendments agreed to

The substantive amendments to part 2 of the bill agreed to at stage 2 are listed in table 3 below.

**Table 3: amendments to part 2 of the bill agreed to at stage 2**

<b>Determinations by the Supreme Court</b>	
19 - Jeane Freeman	This amendment clarifies that the Supreme Court can make a determination of entitlement to devolved assistance, if a Court of Session decision is appealed to it.
<b>Form of assistance</b>	
20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32 - Jeane Freeman	These amendments ensure that assistance in a form other than money can only ever be provided as a choice. See further discussion <a href="#">above</a> .
<b>Winter fuel, disability and employment injury assistance not to be means-tested</b>	
184, 185, 186, 187, 188, 190, 27A, 30A - Mark Griffin	These amendments provide that eligibility for some types of assistance cannot depend on the financial circumstances of the applicant or their family. See further discussion <a href="#">above</a> .
<b>Disability assistance - definition of terminal illness</b>	
67, 68 - Jeremy Balfour	These amendments define terminal illness for the purpose of disability assistance. See further discussion <a href="#">above</a> .
<b>Housing assistance</b>	
152, 153, 165 - Jeane Freeman	This creates a new category of devolved assistance. The accompanying schedule sets out the detail of the group groups to whom it will be paid. See further discussion <a href="#">above</a> .
<b>Short-term assistance</b>	
154, 155 - Jeane Freeman	These amendments introduce a schedule setting out more detail of short-term assistance. See further discussion <a href="#">above</a> .
<b>Form of application</b>	
204, 205 - Mark Griffin	These amendments require regulations to prescribe the form of an application for devolved assistance. For further discussion, see <a href="#">above</a> .
<b>Further applications for assistance</b>	
156, 157 - Jeane Freeman	These amendments allow a refusal of an application for assistance to state that a further application for it may be made, if a decision is made that it is "premature". See further discussion <a href="#">above</a> .
<b>Late re-determination requests</b>	
33, 34, 35, 36 - Jeane Freeman	These amendments make provision for late re-determination requests. See further discussion <a href="#">above</a> .
<b>Provision of appeal forms</b>	
82, 84, 85, 87 - Jeane Freeman	These amendments require that an appeal form must be sent with a redetermination notice. See further discussion <a href="#">above</a> .
<b>Form of appeals</b>	
88, 89, 90, 91, 92, 93 - Jeane Freeman	These amendments require that an appeal must be made to the Scottish Ministers, using the form provided. See further discussion <a href="#">above</a> .
<b>Calculations of time</b>	
37, 38 - Jeane Freeman	These amendments set out when individuals are treated as having been informed of a determination, which is relevant to calculating the time limit to challenge it. See further discussion <a href="#">above</a> .
<b>Appointees</b>	
157, 158, 159 - Jeane Freeman	These amendments insert a new section into the bill, which gives Ministers the power to appoint someone to act on behalf of an applicant where they lack capacity to do so. See further discussion <a href="#">above</a> .
<b>Right to support</b>	
39 - Jeane Freeman	This amendment makes explicit that applicants being assessed have the right to be accompanied by someone to support them, unless this is "unreasonable". See further discussion <a href="#">above</a> .
<b>Overpayments</b>	
40, 41, 42, 43, 44 - Jeane Freeman	These amendments restrict the circumstances in which an overpayment of devolved assistance can be recovered. See further discussion <a href="#">above</a> .
<b>Liability of estate for funeral expenses assistance</b>	
45 - Jeane Freeman	This amendment provides that any funeral expenses assistance given can be recovered from the estate of the deceased.

**Offences**

46 - Jeane Freeman	This amendment modifies the new offence of failing to report a change of circumstances by requiring that to be guilty of it, an individual must not have a reasonable excuse for their failure. See further discussion <a href="#">above</a> .
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**Uprating for inflation**

47, 48 - Jeane Freeman	These amendments require that the value of all types of devolved assistance in relation to prices must be reviewed annually. Disability, carer's and employment-injury assistance rates must be increased to keep pace with inflation. See further discussion <a href="#">above</a> .
48A, 48B, 48C - Mark Griffin	

## New part of the bill - amendments agreed to

A number of government amendments created a new part of the bill, making further provision in relation to parts 2 and 3. Table 4 below lists these.

**Table 4: amendments to a new part of the bill agreed to at stage 2****Inalienability of the right to assistance**

198, 199 - Jeane Freeman	These amendments ensure that an individual's right to assistance cannot be assigned or charged to someone else. See further discussion <a href="#">above</a> .
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**Information-sharing**

200 - Jeane Freeman	This amendment allows information sharing with other Scottish public bodies for the purpose of social security functions. See further discussion <a href="#">above</a> .
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**Agency arrangements for housing assistance**

161 - Jeane Freeman	This amendments allows regulations to create agency arrangements for the delivery of housing assistance. See further discussion <a href="#">above</a> .
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## Part 4 of the bill - amendments agreed to

The substantive amendments to part 4 of the bill agreed to at stage 2 are listed in table 5 below.

**Table 5: amendments to part 4 of the bill agreed to at stage 2****Discretionary housing payments - form of payment**

162 - Jeane Freeman	This amendment clarifies that discretionary housing payments can take the form of payment to an individual, payment to a landlord, or a reduction to the applicant's rent liability if they live in a council tenancy. See further discussion <a href="#">above</a> .
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**Discretionary housing payments - duty to provide**

163, 164 - Jeane Freeman	These amendments require all local authorities to provide information about their DHP schemes. They also make explicit that there is no duty to provide DHPs unless funded to do so by the Scottish Government. See further discussion <a href="#">above</a> .
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## Part 5 of the bill - amendments agreed to

The substantive amendments to part 5 of the bill agreed to at stage 2 are listed in table 6 below.

**Table 6: amendments to part 5 of the bill agreed to at stage 2**

<b>Regulations subject to the affirmative procedure</b>	
49, 50, 165, - Jeane Freeman	<p>These amendments add the following to the regulation-making powers subject to the affirmative procedure:</p> <ul style="list-style-type: none"> <li>• modifications of the Commission's functions (49)</li> <li>• setting the form of applications (210)</li> </ul>
210 - Mark Griffin	<ul style="list-style-type: none"> <li>• agency arrangements for housing assistance (165).</li> </ul> <p>Amendment 50 appears to have been moved and agreed in error, as the Minister stated that she did:</p> <p>“ not intend to move... amendment 50.”</p> <p>Social Security Committee 08 February 2018 [Draft], Jeane Freeman, contrib. 21<sup>111</sup></p> <p>It purports to make regulations made under a section of the bill which does not exist subject to the affirmative procedure.</p>
<b>Regulations subject to the negative procedure</b>	
52, 53, 201 - Jeane Freeman	<p>These amendments ensure that regulations setting the time limit for a redetermination request (52), and the following new regulation-making powers subject to the negative procedure:</p> <ul style="list-style-type: none"> <li>• people from whom the Scottish Commission on Social Security can request information (53)</li> </ul>
210 - Mark Griffin	<ul style="list-style-type: none"> <li>• changes to the number of people appointed to the Scottish Commission on Social Security (53)</li> <li>• extension of the duty to share information with Scottish Ministers for social security purposes (201)</li> <li>• regulations setting the form of applications (210).</li> </ul>
<b>Regulations modifying the functions of the Scottish Commission on Social Security</b>	
54 - Jeane Freeman	<p>This amendment makes regulations modifying the functions of the Scottish Commission on Social Security subject to a bespoke procedure, requiring consultation with the Commission itself before such regulations can be made (using the negative procedure).</p>
<b>Further procedure for regulations under the bill</b>	
131, 132 - Jeane Freeman	<p>These amendments introduce a bespoke "super-affirmative" procedure for regulations setting entitlement conditions for the types of devolved assistance under the bill. Such a procedure need not be followed in relation to early years and funeral expenses assistance if the Scottish Commission on Social Security is yet to begin its work at the time the regulations are made. See further discussion <a href="#">above</a>.</p>



# Annexe 1 - Committee recommendations at Stage 1 and Scottish Government responses

Table 7 below collates all of the Social Security Committee's recommendations in its [Stage 1 Report on the Social Security \(Scotland\) Bill](#).<sup>11</sup> Following the structure of that report, it matches them to the responses in the [Social Security \(Scotland\) Bill: Scottish Government Response](#).<sup>79</sup> Where relevant it also gives the numbers of government amendments subsequently brought forward at Stage 2. Further details of these are given above.

**Table 7: Committee Recommendations and Scottish Government responses**

Social Security Committee Recommendation	Scottish Government response
<b>Primary v secondary legislation</b>	
<p>The Committee highlighted evidence it had received that the balance between what is contained in primary or secondary legislation had not been appropriately struck, and suggested that this was an issue that needed "to be carefully addressed by the Scottish Government as the bill proceeds." (para 82)</p>	<p>Setting out the detailed rules for each benefit in regulations "will make the legislation as simple, accessible and easy to understand as possible." Too much detail in primary legislation "may lead to to inefficient, costly or undeliverable mistakes."</p> <p>Amendments would introduce a super-affirmative procedure and independent scrutiny at Stage 2 to address these concerns (see below). (paras 5-10)</p>
<b>Eligibility criteria</b>	
<p>The Committee invited the Scottish Government to reflect on the evidence that suggested that the eligibility criteria for the 8 forms of assistance should be included within primary legislation. (para 88)</p>	<p>The necessary policy development and service design "will not have concluded within the timescales of the bill." The government agreed to reflect on the possibility of including the purpose of devolved benefits on the face of the bill before Stage 2. (paras 11-14)</p>
<b>Super-affirmative procedure</b>	
<p>The bill did not allow for adequate scrutiny without provision for a super-affirmative procedure for, or independent scrutiny of, regulations produced under it. The Scottish Government was asked to come forward with detailed proposals. (para 94)</p>	<p>Amendments would be brought forward at Stage 2 "to apply a form of super-affirmative procedure to regulations made under part 2 of the bill." (paras 15-16)</p> <p>[See <a href="#">amendments</a> 131 and 132]</p>
<b>Independent scrutiny</b>	
<p>An independent Scottish Social Security Advisory Committee (SSAC) should be created, with a role similar to the UK SSAC and a statutory basis. Ministers should be obliged to consult it on draft regulations. SSAC reports and recommendations should be public and the Scottish Government should be required to set out an explanation if disagreeing with them. (para 106)</p>	<p>The government was considering the recommendations of the Disability and Carers Benefits Expert Advisory Group report, and would respond to the details of it in due course. Proposals for independent scrutiny would be brought forward at Stage 2. The Committee's views would be welcome before then. (paras 17-27)</p> <p>[See <a href="#">amendments</a> 15, 16 and 188]</p>
<b>Uprating of benefits</b>	
<p>The majority of the Committee supported the Scottish Government's commitment to uprate disability assistance. A majority believed that the bill should include an annual duty on Ministers to have regard to the impact of inflation on the value of assistance. (para 113)</p>	<p>Regulations can change the rates of devolved assistance. The government agreed to reflect on the possibility of introducing an annual duty to have regard to the effects of inflation. (paras 28-31)</p> <p>[See <a href="#">amendments</a> 47 and 48]</p>
<b>Use of private contractors</b>	
<p>The majority of the Committee supported the Scottish Government's commitment not to involve private contractors in delivering health assessments for disability benefits. But the majority also believed a formal ban on private sector contractors in the bill might lead to unintended consequences, so did not support that proposal. (para 121)</p>	<p>The government welcomed the majority's support for its view that a formal ban should not be included in the bill. It committed to reflect further on the matter. (paras 32-33)</p> <p>[In the event a government amendment at Stage 2 <b>did</b> introduce a formal ban - see <a href="#">amendment</a> 10]</p>
<b>Residency</b>	
<p>A definition of residency should be included in the bill or regulations. (para 127)</p> <p>The ongoing work on reciprocal arrangements with the UK Government was welcomed. (para 129)</p>	<p>A definition, based on the UK social security law concept of "habitual residence, will be included in the regulations. A single set of criteria in the bill "would be unhelpful" (paras 34-35)</p>
<b>Legal status of the principles</b>	
<p>The Scottish Government should clarify the legal status of the principles contained in the bill, and where appropriate amend the bill to achieve this clarity. (para 143)</p>	<p>The principles are "incompatible (to a degree) with legal enforceability." Human rights cases can be heard by the Scottish Courts if rights are breached. Court action should be a last resort and a system that listens and adapts is a better way of guaranteeing rights. DACBEAG's recommendation that an independent scrutiny body could consider complaints</p>

Social Security Committee Recommendation	Scottish Government response
	<p>that charter rights had been breached were being considered. (paras 43-51)</p> <p>[See <a href="#">amendment 118</a>]</p>
<b>Additional principle of the right to advocacy</b>	
<p>A new principle should be added to the bill stating that individuals have the right to independent advocacy with regard to the Scottish social security system. (para 154)</p>	<p>An amendment would be brought forward at Stage 2 to address this issue. (para 52)</p> <p>[See <a href="#">amendment 9</a>]</p>
<b>Additional principle of the right to advice</b>	
<p>The Committee recognised that a case was made for the inclusion in the bill of a right to advice and asked the Scottish Government to reflect on this. (para 155)</p>	<p>Whilst acknowledging the value of the advice sector, the government was of the view that no specific duty needed to be placed in the bill. (paras 53 and 54)</p>
<b>Duty to ensure individuals are given assistance they are eligible for</b>	
<p>The fourth principle in the Bill should be amended to introduce a <u>duty</u> on Scottish Ministers to ensure that individuals are given what they are eligible to be given under the Scottish social security system. (para 159)</p>	<p>An amendment would be brought forward at Stage 2 to convert the role in the fourth principle into a duty. (paras 55-56)</p> <p>[This was in fact removed from the list of principles, and placed in a new section of the bill - see <a href="#">amendments 4 and 7</a>]</p>
<b>Additional principle of eradication of poverty</b>	
<p>An additional principle should be included in the bill, stating that 'Social security has a role to play in the eradication of poverty in Scotland'. (para 163)</p>	<p>Whilst agreeing with the sentiment expressed, the government pointed out that most social security benefits remain reserved. It also noted that the socio-economic duty on public bodies will apply to the social security agency. (paras 57-58)</p>
<b>Other additional principles</b>	
<p>The Committee was 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 believed that these were covered by the existing principles and that the way to make them effective would be to develop them within the charter. (para 165)</p>	<p>The Committee's view was welcomed, and the government confirmed that the charter "will translate the principles into specific, tangible commitments, ensuring that they are carried through to operational delivery." (para 59)</p>
<b>The charter</b>	
<p>There is a need for a robust mechanism for redress for individuals if they feel their treatment has not been compatible with the Charter. The Scottish Government should clarify the legal status of the Charter and what the mechanism for redress would be, where appropriate amending the bill. (para 187)</p>	<p>The government argued that a legally enforceable charter was "not the best means of ensuring [legal redress]." Challenges would be complex and expensive and the possible remedy available unclear. Reference was made to the proposals for independent scrutiny (see above). (paras 64-73)</p>
<b>Types of assistance</b>	
<p>With the exception of short-term assistance, the Committee did not feel able to make recommendations on the substance of the specific forms of assistance, due to the lack of detail in the bill. It invited the Scottish Government to reflect on the evidence in the annex to its report. (para 206)</p>	<p>A commentary on the Committee's summary of evidence was included as an Annex to the government response. (para 78 and Annex A)</p>
<b>Illustrative regulations and consultation</b>	
<p>The Committee requested confirmation of whether, and if so when, illustrative regulations would be available for each of the forms of assistance. It asked when the Scottish Government planned to consult on draft regulations. (para 207)</p>	<p>Illustrative funeral expenses assistance regulations were shared with the Committee on 30 November 2017. Public consultation on the draft best start grant and funeral expenses assistance regulations is planned for 2018. (paras 79-81)</p> <p>Publication of other illustrative regulations will depend on the delivery timetable, which is still undecided. They would be developed using the proposed "super-affirmative procedure". (para 82)</p>

Social Security Committee Recommendation	Scottish Government response
<b>Form of assistance</b>	
<p>The Committee asked the Scottish Government should bring forward amendments at stage 2 to make that clear 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. (para 210)</p>	<p>An amendment would be brought forward at Stage 2 to address make clear that assistance in a form other than cash would only be offered as a choice. (para 83)</p> <p>[See <a href="#">amendments</a> 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, and 32]</p>
<b>New benefits</b>	
<p>The Committee asked the Scottish Government to confirm that the social security principles and charter would apply to any provision in primary legislation to create a new benefit as they do to the forms of assistance set out in the bill. (para 214)</p>	<p>The response argued that the breadth of a general power to create new benefits would be so broad it might raise issues for both the Parliament and (particularly) the DPLR Committee. (paras 86-88) The principles and charter would apply to any new types of assistance created under part 2 of the bill. (para 89)</p>
<b>Short-term assistance</b>	
<p>The Committee welcomed clarification from the Minister that short-term assistance would ensure that the level of financial assistance would remain the same until any process of appeal had been concluded. (para 225)</p> <p>It sought clarification from the Scottish Government of whether short-term assistance would be repayable. (para 230)</p> <p>The bill should be amended to reflect the Scottish Government's policy intentions, including regarding repayment of short-term assistance. (para 234)</p>	<p>The government would consider whether the bill should be amended to reflect its policy intention at stage 2. (paras 88-89)</p> <p>[See <a href="#">amendments</a> 154 and 155]</p> <p>The response did not state whether the policy intention is that short-term assistance would be recoverable in the event of an unsuccessful challenge.</p>
<b>Timescale to determine applications</b>	
<p>The Committee asked the Government to respond to the evidence calling for a timescale for making a determination in the bill. (para 245)</p>	<p>Timescales to make a determination will be set out in regulations, and may vary for different devolved benefits. (paras 90-91)</p>
<b>Further evidence</b>	
<p>Where a request is made by the social security agency for further information and it is not received, a determination should be made on the available evidence. (para 245)</p>	<p>The substance of the recommendation was not addressed in the Scottish Government's response, which simply welcomed the Committee's recognition that decision makers will have the power to make a determination based on all available evidence if some evidence is not received. (para 92)</p>
<b>Re-determinations and appeals</b>	
<p>The Committee agreed that regulations should set a time limit within which the agency is required to complete the re-determination process. (para 255)</p> <p>The Committee acknowledged concerns about the two-stage appeal process and asked the Government for assurances it will not create barriers for those wishing to challenge a decision. A majority of the Committee agreed with the Minister that it should then be for an individual to decide whether to continue with a challenge to the First-Tier Tribunal. (para 256)</p>	<p>The time limit for re-determinations will be developed in collaboration with the Experience Panels, stakeholders and individuals. (para 93)</p> <p>If evidence gathering from individuals during the design of the re-determinations and appeals process identifies barriers to, these will be removed. (para 94-97)</p> <p>[See <a href="#">amendments</a> 33, 34, 35, 36, 82, 84, 87, 89, 90, 91, 92 and 93]</p>
<b>Recovery of assistance given in error</b>	
<p>The Committee welcomed the intention that recovery of overpayments resulting from official error would only be pursued in exceptional circumstances. It asked the Scottish Government to consider whether the bill adequately reflected this policy. (para 265)</p>	<p>The Scottish Government agreed to consider whether amendments were needed to the bill. (paras 98-99)</p> <p>[See <a href="#">amendments</a> 40, 41, 42, 43, 44 and 45]</p>
<b>Offences</b>	
<p>The bill should be clarified to ensure that genuine errors or misunderstandings will not result in someone being criminalised. The Committee felt that the bill did</p>	<p>The government confirmed its intention that "genuine errors or misunderstanding will not result in someone being criminalised". It agreed to consider whether the bill could be clarified in this regard. (paras 100-102)</p>

Social Security Committee Recommendation	Scottish Government response
not reflect the Scottish Government's stated policy intention. (para 275)	[See <a href="#">amendment 46</a> ]
<b>Discretionary housing payments</b>	
The Committee invited the Scottish Government to reflect on the evidence received about discretionary housing payments. (para 301)	The government agreed to reflect on whether amendments were needed, but explicitly rejected the call for the guidance to be subject to parliamentary scrutiny (which was recommended by the DPLR Committee). (paras 104-108)  [See <a href="#">amendments 162, 163 and 164</a> ]
<b>Finance and Constitution Committee consideration</b>	
<p>The Scottish Government was requested to</p> <ul style="list-style-type: none"> <li>• provide further detail on arrangements it is putting in place to manage the new budgetary risks in its response to the report. (para 309)</li> <li>• The Scottish Government was requested to provide further detail on the potential costs associated with the charter. (para 311)</li> <li>• The Scottish Government was requested to provide a further breakdown of the £190 million figure allocated for spending on IT systems, and further detail on the system specification for Wave 1 benefits. (para 315)</li> <li>• The Scottish Government was requested to outline its view of the anticipated wider societal impact of spend on social security benefits. (para 318)</li> <li>• The Scottish Government was requested to outline when and how Parliament will have the opportunity to scrutinise the costs associated with the bill. (para 320)</li> </ul>	<ul style="list-style-type: none"> <li>• Details of arrangements for managing budgetary risks were provided, and the proposed new budget process highlighted. (paras 109-114)</li> <li>• The government does not believe that introducing the charter or an independent scrutiny body will result in any material increase in costs. (paras 115-117)</li> <li>• A breakdown of estimated IT costs by the systems required was provided, along with an update on contract awards. (paras 118-122)</li> <li>• An estimate of the impact of creating the new agency on GDP was provided, along with an overview of the process of agreeing business cases for investments. (paras 123-126)</li> <li>• Parliament can scrutinise the costs flowing from the bill as part of the normal budget process. Further detail of the block grant adjustment and Scottish Fiscal Commission forecasts were given. (paras 127-133)</li> </ul>
<b>Social Security Committee consideration - ICT implementation</b>	
The Scottish Government was requested to report to the Committee on ICT implementation on a 6 monthly basis. (para 329)	The government would be happy to oblige, and requested the Committee provide a suggested reporting schedule. (para 134)

## **Annexe 2: Amendments not agreed to, withdrawn or not moved**

The amendments that were withdrawn, not agreed to or not moved at stage 2 are listed in Table 8 below. The full text of the amendments can be found in [the Marshallled lists](#).

**Table 8: amendments withdrawn, not agreed to or not moved at stage 2**

Amendments and result	Description of intended effect
<b>Additional principles</b>	
102 (disagreed to 3:6) and 78 (not moved) - Mark Griffin	These amendments would have inserted additional principles into s.1 of the bill of:
113 (disagreed to 3:6) - Pauline McNeill	<ul style="list-style-type: none"> <li>• equality of outcome for people with protected characteristics (102)</li> <li>• aiming to reduced the number of disabled people in poverty (78)</li> <li>• promoting improved health and mental wellbeing (113).</li> </ul>
<b>Duty to promote take-up</b>	
7A (disagreed to 3:6) and 7B (not moved) - Mark Griffin	These amendments sought to re-word the new duty to promote take-up introduced by amendment 7. The Minister argued that the amendments weakened the duty to promote take-up in her amendment.
<b>Duty to have regard to the principles</b>	
138 (not moved) - Mark Griffin	This amendment would have required the Scottish Ministers to have regard to the principles in exercising their functions under the bill.
<b>Consideration of entitlement to other types of assistance and take-up targets</b>	
14 (not moved), 51 (not moved), 140 (disagreed to 3:4 with 2 abstaining) - Alison Johnstone	These amendments would have required targets to be set for take-up of devolved benefits (14 and 51). the Minister argued that everyone would aspire to 100% take-up so they would have little meaning in practice.
126 (not moved), 128 (not moved), 129 (not moved) - Pauline McNeill	The other amendments were all aimed at ensuring that where someone applies for one type of assistance, entitlement to other types of assistance can be considered. The Minister stated her preference for amendments 126, 128 and 129, with the caveat that applicants should be able to choose for this to happen. She offered to support the amendments in the name of Pauline McNeill, with a view to making adjustments to them at stage 3, but the amendments were not moved at stage 2.
<b>Independent advocacy</b>	
59 (not moved), 75 (not moved) - Jeremy Balfour	This amendment would have created a right to independent advocacy. It was not moved, the Committee having already agreed a government amendment to similar effect (amendment 8).
<b>Regulations setting the charter</b>	
141 (withdrawn), 142 (not moved), 143 (not moved), 144 (not moved), 146 (not moved), 147 (not moved), 150 (disagreed 2:4 with 2 abstaining) - Pauline McNeill	These amendments would have required the social security charter to be set out in regulations.
<b>Bodies established to deliver social security</b>	
60 (not moved), 62 (not moved) - Jeremy Balfour	These amendments sought to place various requirements on any body established by the Scottish Ministers to deliver social security. They were not moved after the Minister confirmed her intention not to create any such body. Any staff employed in the agency will be the same legal person as the Scottish Ministers, for the purposes of the bill.
<b>Right to social security</b>	
116 (disagreed to 3:6), 117 (not moved) - Mark Griffin	These amendments would have required that Ministers and other public bodies had due regard to the right to social security as set out in the International Convention on Economic, Social And Cultural Rights. In fulfilling this duty, they would have needed to have regard the general comments and observations of the relevant UN Committee. The Minister argued that the First Minister's advisory group on human rights was the place to consider introducing legislation of this type.
<b>Charter-based complaints</b>	



Amendments and result	Description of intended effect
18 (not moved) - Jeane Freeman  18A (could not be moved once amendment 18 was not moved) - Adam Tomkins	These amendments would have required the creation of a system to allow people to complain about their rights in the charter being breached. The Minister did not move it in light of evidence from the Scottish Public Services Ombudsman that her existing powers to investigate complaints would allow her to fulfil this role.
<b>Annual reviews of the charter and act and annual feedback surveys</b>	
79 (disagreed to 3:6), 80 (disagreed to 3:6), 148 (disagreed to 3:6) - Mark Griffin	These amendments sought to create a variety of new reporting duties on Ministers in relation to the provisions in the bill.
<b>Creation of new benefits</b>	
63 (disagreed to 3:5, with 1 abstaining), 119 (withdrawn), 121 (not moved), 122 (not moved), 123 (not moved), 124 (not moved), 125 (not moved), 130 (not moved), 131A (not moved) - Adam Tomkins	These amendments sought to include a power to create new benefits by regulations in the bill. The Minister argued that any proposals for new benefits should be subject to detailed parliamentary scrutiny during the passage of a bill.
<b>Definition of the Scottish social security system</b>	
120 (withdrawn) - Mark Griffin	These amendment would have extended the definition of the "Scottish social security system" - to which the principles and charter apply - to include a range of other policy areas, including regulation-making powers over universal credit, free school meals and student loans, amongst others.
<b>Creation of a social security agency</b>	
149 (withdrawn), 151 (disagreed to 2:4 with 2 abstaining) - Pauline McNeil	These amendments would have created a social security agency in statute. The Minister confirmed that the agency is the same legal person the Scottish Ministers, and argued that the amendment was both unnecessary, and would bring unintended consequences if agreed.
<b>Residence conditions</b>	
64 (withdrawn), 65 (not moved), 66 (not moved), 70 (not moved), 71 (not moved), 72 (not moved), 73 (not moved), 76 (not moved), 153A (not moved) - Jeremy Balfour	These amendments would have required that applicants for devolved social security assistance were in Scotland, had been in Scotland for 104 of the last 156 weeks and were habitually resident in Scotland, although regulations could have provided for exceptions to this test. This is similar to the requirements for some of the disability benefits to be devolved. The Minister argued that having a single set of residence conditions in the regulations was a better approach than a default position in primary legislation and exceptions in the regulations.
<b>Carer's assistance for those caring for more than one person</b>	
173 (withdrawn), 174 (not moved), 175 (not moved), 176 (not moved), 177 (not moved), 178 (not moved), 179 (not moved), 180 (not moved), 181 (not moved), 183 (not moved) - Alison Johnstone	These amendments sought to make provision for carers looking after more than one disabled person. Whilst some were agreed to be superfluous in light of s.22 of the Interpretation and Legislative Reform (Scotland) Act 2010, others were debated. The Minister suggested that the bill as drafted gave sufficient flexibility and proposals for carer's assistance should be developed by consultation for inclusion in the regulations, following the passage of the bill.
<b>Form of assistance</b>	
20A (withdrawn), 20B (not moved), 20c (not moved), 22A (not moved), 22B (not moved), 22C (not moved), 24A (not moved), 24B (not moved), 24C (not moved), 26A (not moved), 26B (not moved), 26C (not moved), 28A (not moved), 28B (not moved), 28C (not moved), 29A (not moved), 29B (not moved), 29C (not moved), 31A (not moved), 31B (not moved), 31C (not moved) - Mark Griffin	These amendments would have modified the Minister's amendments on the form in which assistance must be given. The Minister argued that the amendments would have added unnecessary complication. They were not moved following the Minister's clarification that assistance in a form other than money would be a choice for individuals, and they would be free to change their minds at any point.
<b>Winter fuel payment to be universal in spite of general regulation-making power</b>	
25A (not moved) - Mark Griffin	The fact that this amendment was not moved leaves it ambiguous whether regulations <b>must</b> make winter fuel payments universal. The Minister had indicated her support for this amendment during the stage 2 debate.
<b>Administrative arrangements for terminally ill applicants</b>	



Amendments and result	Description of intended effect
182 (withdrawn), 189 (not moved), 191 (not moved), 192 (not moved) - Mark Griffin	These amendments would have introduced new regulation-making powers around application processes and payment arrangements for terminally-ill people. The Minister committed to introducing fast-track procedures which at a minimum replicate the current special rules for terminally ill claimants.
<b>Reassessments for terminally ill claimants</b>	
69 (not moved) - Jeremy Balfour	This amendment would have required a reassessment of terminally ill people in receipt of disability assistance if they were still alive three years after being awarded it. It was not moved after concerns about its wording were raised outside the Committee.
<b>Disability assistance - equal consideration of different impairments</b>	
166 (withdrawn) - Mark Griffin	This amendment would have required disability assistance regulations to not differentiate between physical and mental impairments. It was withdrawn after the Minister expressed concern that it might prevent the provision of special rules for terminally ill claimants, and commented that the process of consultation on the regulations would allow the intent of the amendment to be met.
<b>Short-term assistance</b>	
155A (not moved), 155B (not moved) - Jeremy Balfour	These amendments would have enabled regulations to make people moving to other parts of the UK eligible for short-term assistance. The amendments were withdrawn after the Minister confirmed that discussions with the UK government are ongoing on this issue.
<b>Notifications in writing and with reasons</b>	
81 (not moved), 83 (not moved), 86 (not moved), 167 (withdrawn), 168 (not moved), 169 (not moved), 170 (not moved), - Mark Griffin	These amendments sought to require that all notifications of determinations be given in writing, and provide certain information relating to the determination. The Minister argued that the duty to notify in writing cut across an already agreed amendment to the bill on inclusive communication, and that the evidence requirements were too prescriptive. She agreed to work towards agreeing amendments to meet the policy intent at stage 3.
<b>Re-determinations</b>	
33A (withdrawn), 84A (not moved), 87A (not moved), 88A (not moved), 193 (not moved), 194 (not moved), 195 (not moved) - Pauline McNeil	These amendments sought to allow an individual to indicate in a re-determination request that should the determination not be changed they would want their case to proceed to appeal.
<b>First-tier Tribunal membership</b>	
127 (withdrawn) - Pauline McNeill	This amendment would have required regulations to make people with lived experience of the social security system eligible for appointment to the First-tier Tribunal. The Minister argued that this was not a matter for this bill, and instead a matter to be raised in response to the ongoing consultation on draft social security tribunal rules.
<b>Scope of First-tier Tribunal powers</b>	
206 (withdrawn) - Pauline McNeil	This amendment sought to clarify the scope of the First-tier Tribunal's discretion to consider issues.
<b>Obligation to provide information</b>	
196 (withdrawn) - Mark Griffin	This amendment sought to remove the power to refuse an application without further consideration if requested evidence is not provided. The Minister argued that it might leave applications open indefinitely and thus create data protection issues.
<b>Disability assessments</b>	
207 (withdrawn), 208 (not moved) - Alison Johnstone	These amendments sought to prescribe detail of the assessment process for devolved assistance. Concerns were raised about the use of the word "medical" by Committee members.
<b>Mental health assessments</b>	
171 (not moved), 172 (not moved) - Mark Griffin	These amendments would have required anyone assessing someone with a mental health condition to have relevant experience. The Minister suggested that as worded it would create

Amendments and result	Description of intended effect
	problems for those applicants with both physical and mental conditions.
<b>Assistance no longer required</b>	
197 (withdrawn) - Mark Griffin	This amendment sought clarity that an individual could request to no longer receive assistance. The Minister indicated that she would seek an alternative amendment which fitted better with the new duty to promote take-up at stage 3.
<b>Offences</b>	
94 (disagreed to 2:6), 95 (not moved), 96 (not moved), 97 (not moved), 98 (not moved), 99 (not moved), 100 (not moved), 101 (not moved) - Pauline McNeill	These amendments sought to insert "knowingly" into a number of new criminal offences created by the bill, and remove references to what someone "ought to have known".
<b>Child benefit supplement</b>	
202 (disagreed to 2:6), 110 (disagreed to 2:6), 111 (disagreed to 2:6) - Mark Griffin	These amendments would have required the Scottish Ministers to top-up child benefit by £5 a week.
<b>Uprating of assistance</b>	
133 (disagreed to 2:6), 134 (disagreed to 2:6), 135 (disagreed to 2:6), 136 (disagreed to 2:6), 137 (disagreed to 2:6) - Mark Griffin  2 (disagreed to 2:6), 3 (not moved) - Alison Johnstone	These amendments presented alternative approaches to the uprating of devolved assistance to the Government amendments which were agreed. Amendments 133-137 would have introduced a different "super-affirmative" procedure for uprating regulations. Amendments 2 and 3 would have required that any top-ups of reserved benefits and also types of devolved assistance were uprated annually, or a statement made to Parliament explaining why this had not been done.
<b>Split payments of universal credit</b>	
203 (disagreed to 2:6) - Mark Griffin	This amendment would have required regulations to be made within a year of Royal Assent splitting payments of universal credit between members of a couple. The Minister argued that it could not be guaranteed on the timescale set in the amendment and:  " The amendment would write a blank cheque for the negotiations on costs. Although the Scottish Government is committed to the policy... deliverability is completely in the hands of the DWP."  Social Security Committee 01 March 2018 [Draft], Jeane Freeman, contrib. 82 <sup>112</sup>
<b>Procedure for regulations</b>	
131B (disagreed to 2:6) - Pauline McNeil	Amendment 131B sought to extend the "super-affirmative" procedure to all regulations under the bill, and also under the Welfare Funds (Scotland) Act 2015.
211 (disagreed to 0:8) - Mark Griffin	Amendment 211 was a probing amendment to generate debate on whether the balance between primary and secondary legislation was correct. It would have prevented "retrogressive" regulations from being made.  Other members objected to withdrawal of them and pressed both amendments to a vote.

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