

Social Security (Scotland) Bill

Stage 3

25 April 2018

Written briefing from Citizens Advice Scotland

Citizens Advice Scotland (CAS), our 60 member Citizen Advice Bureaux (CAB), the Citizen Advice consumer helpline, and the Extra Help Unit, form Scotland's largest independent advice network. Advice provided by our service is free, independent, confidential, impartial and available to everyone. Our self-help website Advice for Scotland provides information on rights and helps people solve their problems.

In 2016/17 the Citizens Advice network in Scotland helped over 310,000 clients in Scotland alone and dealt with over one million advice issues. With support from the network clients had financial gains of over £120 million and our Scottish self-help website Advice for Scotland received over 4 million unique page views.

Summary

Citizens Advice Scotland (CAS) supports the following amendments (in Marshalled List order):

20; 21; 22; 23; 24; 25; 26; 27; 28; 29; 30; 31; 32; 33; 34; 36; 37; 38; 39; 2; 46; 7; 53; 54; 55; 56; 57; 8; 58; 59; 60; 61; 62; 9; 10; 132; 63; 66; 69; 70; 137; 146; 81; 82; 83; 84; 85; 86; 87; 88; 12; 13; 14; 15; 147; 98; 145; 148; 113.

Introduction

In 2016/17, Scotland's CAB network provided advice on 94,301 new issues relating to the benefits being devolved, representing 37% of benefits advice given by Scotland's citizens advice bureaux in that year. CAS has provided a substantial body of evidence based on CAB clients and advisers' daily experiences of engaging with the current system, together with their priorities for the new Scottish system.¹ We look forward to continuing to work with the Scottish Parliament and Scottish Government to ensure the new system is fair, equal and responsive with Scotland's citizens at the heart of it.

Social Security Bill – general points

Citizens Advice Scotland welcomes the publication of the Bill and agrees with its general principles. The devolution of social security powers is an extremely significant development in the history of the Scottish Parliament and represents a unique opportunity to create a new system that has the potential to make a positive difference for tens of thousands of Scotland's citizens.

CAS welcomes the values of dignity and respect that are intended to underpin the new social security system, and the Scottish Government's commitment to make improvements on issues in the reserved benefits system. We also welcome the inclusive approach the Scottish Government has taken to developing the new system. The extensive engagement undertaken, including with those with lived experience of the benefits system has been welcome and will contribute to a system designed around the needs of those who require support from it.

At introduction, there were a number of issues that CAS raised where we believed the Bill could do more to live up to the values and ambitions for the new system. A substantial number of these have been addressed through amendments at Stage 2, with a small number of outstanding issues that could be addressed through Stage 3 amendments below.

Promoting take-up: Recognition of independent advice (group 3)

Independent advice plays a key role in a well-functioning social security system, including support with entitlement, take-up, applications, complaints, appeals, access to information, outreach and continuous improvement. The development of the new Scottish Security System offers a unique opportunity to harness and support the key role of independent advice in Scotland, both to ensure access to quality independent advice through citizens advice bureaux, but also to support the aims of the new system. When respondents from the Scottish Government's Experience Panels were asked about their top priorities for improvement in the new system, 71% listed 'advice and support about claiming' as a priority.ⁱⁱ

Issues relating to benefits and tax credits are the most common area of advice provided by citizens advice bureaux, with over 253,000 new issues advised on in Scotland in 2016/17, representing 43% of their work. This equates to 970 new benefit issues for each working day of the year. As a result, citizens advice bureaux supported clients to claim almost £90 million in benefits they were entitled to.

At Stage 2, Citizens Advice Scotland welcomed both the Scottish Government's amendments that would recognise the role that independent advice plays in ensuring access to the social security system, and its crucial role in assisting individuals to claim all the benefits they are entitled to; as well as Jeremy Balfour's amendment which achieved the same positive outcome. The amendments lodged at Stage 3 consolidate these two separate, welcome amendments into one.

CAS supports amendments 22, 24 to 26 and 28 (in the name of Jeremy Balfour) and amendments 23 and 27 (in the name of the Minister).

Promoting take-up: Recognition of importance of accessible information (group 3)

CAS has previously supported setting out rules in the Bill for communicating with people, including ensuring that benefit claim forms are in clear, accessible language, and come accompanied by guidance on how to complete the form; and that written communications should be individualised, written in clear, plain English, avoiding medical jargon, legalistic language and abbreviations. There should also be an acknowledgement immediately sent when any benefit claim has been received which sets out reasonable and realistic timescales within which someone can expect their claim to be dealt with.

At Stage 2, CAS welcomed the amendment from Ruth Maguire which would require the Scottish Government to have regard to using an inclusive communication standard,ⁱⁱⁱ which would benefit all users of the Scottish social security system, but particularly those requiring support from disability benefits, as well as an amendment from Mark Griffin which would require relevant information about social security claims to be given to individuals in an accessible manner. The amendments lodged at Stage 3 consolidate these two separate, welcome amendments into one.

CAS supports amendments 20 and 21 (in the name of Ruth Maguire).

Promoting take-up: Strategy to promote take-up (group 3)

One of the main areas where the work of citizens advice bureaux complements the work of the social security system is through benefit checks and income maximisation. We know from our work that a substantial number of people are entitled to social security support but are currently not receiving it. Bureaux play a hugely important role in maximising the income of clients, ensuring that they are claiming all the benefits that they are entitled to. In many instances, clients may be seeking advice about another issue (eg. debt), with the bureau able to improve their financial circumstances through ensuring that they are claiming the right benefits. In 2016/17, the client financial gain as a direct result of advice on benefits and tax credits was almost £90 million.

In addition to the recognition of the role of independent advice, CAS welcomed amendments from Mark Griffin, the Minister and Alison Johnstone at Stage 2 requiring the Scottish Government to take steps to support income maximisation and the take-up of benefits, including a requirement to publish an income maximisation strategy. CAS welcomes Stage 3 amendments from the Minister which achieve the same effect as those passed at Stage 2.

CAS supports amendments 36 to 38 (in the name of the Minister) which are a variant on a welcome amendment passed at Stage 2.

Advocacy (group 4)

Independent advocacy also plays an important role in a well-functioning system particularly those with specific needs and vulnerabilities. CAS would also support a statutory duty to provide independent advocacy to those who need it. It is important to recognise that independent

advocacy is different to independent advice, and that advocacy is most effective when it is undertaken in partnership with independent advice services.

CAS welcomes the Scottish Government's amendment which makes an important contribution to ensuring that disabled people receive what they are entitled to in the new Social Security system. Independent advocacy is an integral part of the advice and support process and has an important role to play in a well-functioning social security system. The holistic approach of the CAB network already provides a voice for disabled people, and this amendment will ensure that they are empowered to not only access the new system but challenge it where necessary.

CAS supports amendments 29 to 34 (in the name of the Minister) which provides a duty to provide independent advocacy for all disabled people who need it.

Assessments: Restrictions on assessments (group 5)

From consultation with several hundred CAB clients and advisers, the highest priority that emerged for the Scottish social security system was that the number of unnecessary medical assessments for disability benefits is substantially reduced by making the best use of existing evidence. There was an extremely clear view that the existing PIP assessment process was not working for clients, including not being treated with dignity or respect; poor quality of decision-making; charges for medical evidence; and people on DLA losing their award on reassessment.

CAS has recommended that in assessing people's eligibility for disability benefits, much greater emphasis should be given to evidence from people who know the claimant, including health and other relevant professionals, carers and family members. There should be a tiered approach to assessment, with a face-to-face assessment only carried out in a small number of cases either when a claimant requests one or it has not been possible to gather enough information to make a decision. If an individual's condition or circumstances are unlikely to change, there should be no requirement for them to be re-assessed to continue receiving an award.

CAS welcomes the amendments from Alison Johnstone which would place restrictions on face-to-face assessments by only allowing them to take place if all available evidence cannot be used to make a decision, requiring Ministers to justify their use of an assessment, and to take the individual's views and circumstances into account before an assessment is carried out.

CAS supports amendments 46 and 66 (in the name of Alison Johnstone)

Assessments: Requirement for assessors to be suitably qualified (group 5)

CAS recommends that if the conditions above are met a face-to-face assessment is required, it should only be carried out by a suitably qualified professional with knowledge and experience of the particular claimant's condition(s). They should take place at a location that is local and accessible to the claimant. Claimants should be treated with dignity and respect at all times.

As part of our consultation with CAB clients and advisers many thought that any assessment should be conducted by a health professional already known to the claimant, such as a GP.

Clients and advisers stressed the importance of assessors being properly trained and qualified. Some thought assessments should only be done by doctors. Overall, participants' key concern was that the assessor should have knowledge and understanding of the claimant's specific condition. This point was frequently raised in relation to mental health conditions.

The assessment must be based on principles of dignity and respect. Claimants should not be made to feel they are 'lying'; the emphasis should be on helping them to fully express their needs so as to get appropriate support. In terms of the content of the assessment, participants felt there should be a more flexible approach and a focus on asking questions appropriate to the claimant's condition and circumstances. There should be less of a focus on box ticking and criteria which do not apply in every case.

"[Face-to-face assessments] could be improved by getting rid of pre-programmed questions and tests. This information should be on the form and face-to-face assessments should be about an expert using their judgement. This can only be done properly if the assessor is free to conduct the assessment by way of getting to know the claimant". CAB adviser

CAS supports amendments 2 and 15 (in the name of Mark Griffin) which would require that any assessment is carried out by someone who is suitably qualified.

Voluntarily ending entitlement to assistance (group 8)

CAS agrees with a proposed amendment to allow people who would ordinarily be entitled to a particular social security benefit to choose to end their entitlement to it. Although this may appear to be counter-intuitive at first glance, there are complex interactions in the reserved social security system, which may mean that an individual would be better off by receiving a different method of support than a Scottish social security payment. One particular example of this is the current Carer's Allowance which has a number of overlaps with reserved social security benefits, in particular Income Support, Universal Credit, the State Pension and Pension Credit.^{iv}

In circumstances where an individual would be better off receiving reserved benefits instead of devolved ones it should be possible for them to decline the assistance, without it conflicting with the Scottish Government's welcome responsibility to ensure that everyone is given what they are eligible to be given through the Scottish social security system.

CAS supports amendment 7 (in the name of Mark Griffin) which would enable someone to end their entitlement to a social security benefit, even though they still qualify for it.

Disability assistance for the terminally ill (group 9)

Currently, if an individual is diagnosed with a terminal illness with less than six months to live, they can apply for disability benefits (PIP) under a fast-track system. This is very helpful, in that it removes the need for a stressful face-to-face assessment at a difficult time, and cuts the often lengthy wait for their claim to be processed. However, a number of terminal conditions have a more uncertain prognosis (e.g. Motor Neurone Disease), and as a result the person will need to go through the regular lengthy and stressful process at a time when they are already

facing great challenges in their lives. CAS previously welcomed the proposed amendment from Jeremy Balfour which extended the fast-track system to people diagnosed with a terminal condition with less than 24 months to live.

We warmly welcome the Scottish Government's recognition that the current six-month limit does not adequately capture the range of conditions and situations that should be covered, and makes the decision purely based on clinical judgement.

CAS supports amendments 53 and 148 (in the name of the Minister) which remove restrictions on support to people with terminal illnesses. **CAS also supports amendment 113 (in the name of the Minister)** which makes provision for Special Rules for the terminally ill.

Application process and appealing against rejection of applications and re-determination requests (group 10)

CAS welcomes the proposed amendments to extend the re-determination and appeals process to all types of decisions made by the social security agency, which will improve access to justice for individuals using the system. The proposed amendments would extend the re-determination and appeals process to challenge the agency's decisions to:

- Reject an application on the basis of validity or technical grounds
- Reject a re-determination request for similar reasons
- Other process decisions

CAS supports amendments 54 to 56, 58 to 61, 63, 69 and 98 (in the name of the Minister).

Right to reports used in determining entitlement (group 11)

CAS welcomes amendments that would guarantee individuals the right to see any assessment or medical reports that agency decision-makers have used in making decision on people's entitlement to assistance. This is not always currently the case, and CAB advisers frequently report of lengthy delays in receiving a copy of a report of an assessment for Personal Independence Payment (PIP) which causes problems in allowing clients to challenge decisions they believe to be inaccurate or unfair.

CAS supports amendments 57, 62 and 70 (in the name of Mark Griffin) which would make provision for this.

Record of Ministers' determinations and associated information (group 12)

CAS welcomes proposals to require decisions to be communicated to individuals in writing, or in another suitable method that provides a record of the decision, in keeping with the commitment in the Bill to communicate in an inclusive way.

Whilst we recommend that users of the Scottish social security system are offered a choice of communication methods, including face to face, written letters, online claims, and telephony, CAS recommends that the Scottish Social Security Agency uses written letters to communicate any important information regarding someone's claim. From consultation with CAB advisers, there was a strong preference for use of written letters, which was the preferred option for ongoing communications regarding a claim, communicating decisions regarding a claim, challenging decisions, making complaints and communicating changes of circumstances. In addition, focus groups with CAB clients also showed a preference for written letters, especially when communicating decisions to claimants. Many focus group participants raised concerns that they did not have access to computers and sometimes phones, and in any event, are wary of giving out information over the phone, making these communication methods less favourable.

CAS supports amendments 8 to 10 (in the name of Mark Griffin) which would require a record of decisions on benefit entitlement to be provided to individuals in an inclusive way, which would include providing a decision in writing.

Appeal to First-tier Tribunal against Ministers' determination (group 13)

CAS recommends that the new re-determination process should differ in a number of ways from the current mandatory reconsideration process, which can discourage people from appealing entirely, effectively preventing the right to an independent appeal and acting as a barrier to justice. The best way to reduce demand on both the internal review process and the appeals process is by improving the accuracy of initial decisions, including analysis of claimant feedback and a well-designed complaints process.

However, CAS recommended the system of redeterminations and appeals could be improved by making it one seamless process from the perspective of the individual.

In our view, the best way to do this is to have the review decision passed directly from the Agency to the Scottish Tribunals Service, rather than the claimant having to lodge an appeal themselves. At this stage the claimant could be sent a '*Do you wish to continue with your appeal?*' letter, which they must return to the Tribunal Service. This allows an opt-in, but is less onerous on the individual, and would help to make the individual feel that they were on one journey of challenging the decision, rather than two distinct processes.

CAS promoted and warmly welcomed the Scottish Government's amendments at Stage 2, which removed the need for people to have to lodge a separate appeal and resubmit evidence if they wish to continue to appeal. This in effect removes a barrier, and makes it one seamless process from the individual's perspective.

The complexity of the current system of reconsiderations and appeals has the potential to deter people from appealing and act as a barrier to justice. Part of the problem is that the claimant must have their decision reconsidered internally by the DWP, and then, if they disagree with the reviewed decision, undergo the additional step of lodging an appeal.

Official statistics from the Department of Work and Pensions indicate that since the advent of mandatory reconsideration (MR), 323,000 Personal Independence Payment claims were upheld at mandatory reconsideration taken, but not further appealed to a Tribunal^v. This represents the majority of upheld MR claims (72%) and suggests that CAB evidence which illustrates that the two-step system acts as a barrier to claimants is a common occurrence.

CAS does not support amendments 124 to 131 (in the name of Jackie Baillie), which would require an individual to decide in advance of the decision being reviewed whether they wish to continue to an appeal or not, would require officials rather than the individual to decide whether the redetermined decision is more favourable to them and create the potential for the unintended consequence of individuals being required to attend a tribunal even if they no longer wish to pursue their appeal.

However **CAS does support amendment 132 (in the name of Pauline McNeill)** making provision for reports on the impact of the new re-determination and appeals system, as the process is a new one and determining its impact based on robust evidence is important.

Recovery of assistance given in error (group 14)

A further area of process which it would be appropriate to extend the re-determinations and appeals system to would be in respect to challenges to liability to repay overpayments. In the absence of any other mechanism in the Bill, this would require to be challenged in the Sheriff Court. Currently in the courts, the creditor just has to aver that the debt exists, and do not have to provide original paperwork unless challenged to do so. Also in the simple procedure process (for debts less than £5000), which is most likely to cover overpayments, if the debtor does not respond to the creditor's claim then the creditor can simply apply for a decision without a hearing. The question of liability is therefore not addressed. CAB In-Court advisers report that the vast majority of court actions go through undefended or responded to. One of the main reasons for this is because of a strong sense of powerlessness that most people feel when faced with an adversarial system which is alien to them.

CAS supports amendments 137, 146 and 147 (in the name of Jeremy Balfour) which would make provision for challenges on an individual's liability to repay overpayments to be made through the re-determination and appeals process rather than the courts.

Offences (group 15)

It is important to draw a distinction between intentional fraud and unintentional error, such as not reporting a change of circumstances. As it stands, the Bill applies similar levels of offence and penalties to both. CAS would recommend that changes are made in this area, to ensure an appropriate distinction between actions committed with criminal intent to obtain money fraudulently, and failures to notify changes in circumstances which were not committed with malicious intent. CAS agrees with the approach suggested by Justice Scotland^{vi}, and the amendments proposed by them which would ensure that no-one would be criminalised for an unintentional error.

CAS supports amendments 81 to 88 (in the name of Pauline McNeill).

Adjusting for inflation: Funeral Expense Assistance Annual Uprating (group 16)

Citizens Advice Bureaux frequently advise clients who, despite receiving assistance from the Social Fund Funeral Expenses Payment scheme, are unable to afford to pay for a funeral for their loved one. A CAS report showed that the average cost of a funeral in Scotland was £3,550 and the average Social Fund Funeral Payment was £1,375, leaving an average shortfall for an average funeral of £2,175^{vii}.

The existing Social Fund Funeral Payment is designed in two parts, the first part is designed cover costs such as the cost of the burial or cremation; doctor's fees; transportation of the body; and a return journey to attend the funeral. The second part is designed to cover the cost of "other expenses", such as funeral director fees. One factor which contributes to the shortfall between the Social Fund Funeral Payment and the cost of an average funeral is that it has not been increased 2003 when the UK Government redefined the "other costs" element of the Social Fund's Funeral Expenses Payment as a "contribution" to other costs and capped it at £700. Given this shortfall and a significant increase in the number of clients seeking advice from Citizens Advice Bureaux regarding funeral costs CAS recommends that the Scottish government increases this cap on "other costs" at least in line with inflation, if it is not to be removed altogether

CAS research estimated that one in ten people struggle to pay for a funeral^{viii}. This can lead to people either getting into debt or getting into a worse financial situation than they are already in, for example by having to use high cost short term credit to cover the costs of a funeral. Struggling to pay for a funeral can also negatively impact on an individual's grieving process and, consequently, their mental health. Below are a number of cases which highlight difficulties faced by a client to find funds to cover the shortfall between the Funeral Payment and the cost of a funeral. These illustrate why CAS recommends that the level of Funeral Payments should be increased.

A client in the South of Scotland paying for her mother's funeral was left with a funeral bill of over £3000 despite receiving a funeral payment of approximately £1400. In order to pay for this bill she sold some of her mother's belongings but this was not enough. She resorted to going into debt by paying the remaining balance on her credit card.

A client in the East of Scotland was very distressed as he had been quoted £4,000 for a funeral for his brother, and told that the most he would receive in a Funeral Payment was £2,000. He had cared for his brother for the past five years and, following his brother's death, was told his Carer's Allowance would end after six weeks. The client managed to borrow £500 to pay for the deposit and felt he would need to pay the remainder on his credit card. He was already struggling with a balance of £3,700 on his credit card, which he was managing to pay the minimum or slightly over each month but was concerned he wouldn't be able to keep this up much longer.

In the last year, the average SFFP award has risen from £1,410 to £1,429 – a below inflation rise of 1.3%. The number of SFFEP applications remained at 45,000 in 2017. Awards reduced to 27,000 in 2017 from 29,000 in 2016 and 32,000 in 2015.

CAS supports amendments 12 to 14 (in the name of Ben Macpherson) which would add Funeral Expense Assistance to the list of benefits that the Scottish Ministers would have a duty to uprate annually in line with inflation. A duty to uprate carer's, disability and employment-injury assistance was added to the Bill at Stage 2, as section 44B.

Scrutiny of subordinate legislation (group 20)

CAS has recommended a robust scrutiny process for social security regulations in the new system. In addition to welcome amendments establishing a Scottish Commission on Social Security, and a 'super-affirmative procedure' for regulations, we would welcome provision being made to enable the Commission to consider all regulations that are proposed under the new system, without exception, as recommended by the Scottish Government's Expert Advisory Group on Disability and Carers Benefits (DACBEAG).^{ix}

CAS support amendment 145 (in the name of Pauline McNeill) which makes provision for this in a 'light-touch' way.

For more information or CAB cases, contact:

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ⁱ A New Future for Social Security: Consultation on Social Security in Scotland – Response from Citizens Advice Scotland, October 2016 <http://www.cas.org.uk/publications/designing-social-security-system-scotland-consultation-new-powers>

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- ⁱⁱ Social Security Experience Panels: About Your Benefits and You – Quantitative Research Findings – Scottish Government Social Research - <http://www.gov.scot/Resource/0052/00527173.pdf>
- ⁱⁱⁱ Inclusive Communications Standards – Royal College of Speech and Language Therapists - https://www.rcslt.org/cq_live/resources_a_z/inclusive_communication/overview
- ^{iv} For more see pages 115 to 117 of A New Future for Social Security: Consultation on Social Security in Scotland – Response from Citizens Advice Scotland, October 2016 <http://www.cas.org.uk/publications/designing-social-security-system-scotland-consultation-new-powers>
- ^v Work and Pensions Select Committee PIP and ESA assessments inquiry: supporting statistics – Department for Work and Pensions, December 2017 <https://www.gov.uk/government/statistics/work-and-pensions-select-committee-pip-and-esa-assessments-inquiry-supporting-statistics>
- ^{vi} Social Security (Scotland) Bill: Committee briefing – Justice Scotland, August 2017 <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2017/09/JUSTICE-Scotland-Social-Security-Scotland-Bill.pdf>
- ^{vii} Funeral Poverty: A Review for Scottish Government – Citizens Advice Scotland, January 2016 <https://www.cas.org.uk/publications/funeral-poverty>
- ^{viii} Ibid.
- ^{ix} http://www.parliament.scot/S5_Social_Security/Inquiries/Scrutiny_Workstream_DACBEAG_final_report.pdf