

SOCIAL SECURITY COMMITTEE

SOCIAL SECURITY ADMINISTRATION AND TRIBUNAL MEMBERSHIP (SCOTLAND) BILL

SUBMISSION FROM CITIZENS ADVICE SCOTLAND

Introduction

Citizens Advice Scotland (CAS) welcomes the opportunity to provide evidence on the Bill. The Bill provides an opportunity to make minor amendments to address issues which have been identified since the passage of the Social Security (Scotland) Act 2018, including making provision for the introduction of the Scottish Child Payment. CAS welcomes the Bill and is broadly content with its provisions, although there are a number of areas that the Committee may wish to consider in its scrutiny.

1. Consultation and Engagement

- Have you engaged with the Scottish Government on the issues addressed in this bill? If so, how have you been engaged with the Government?

Citizens Advice Scotland (CAS) has extensively engaged with the Scottish Government around fraud, offences and overpayments, the Scottish Child Payment and the terminal illness provisions (as detailed below). Whilst we have engaged in formal and informal consultation around the issue of appointees generally, we have not done so on the specific issues raised in the Bill. We have not been engaged around tribunal management issues.

- Are you content with the expedited timetable for this legislation?

Yes, CAS is content with the expedited timetable. Most of the issues raised in the Bill are either to extend identical provisions to the Scottish Child Payment as exist for other devolved social security payments, or are 'tidying-up' amendments to the primary legislation identified during the development of specific benefits.

However, CAS recommends the Bill is subject to suitable Parliamentary scrutiny, including appropriate opportunity to consider amendments during its passage.

2. Terminal Illness

- Did you engage with the Scottish Government on the terminal illness amendment to the Social Security (Scotland) Bill in 2018, and if so, whether at the time they were content with the term 'medical practitioner', and if so, what has changed?

CAS were supporters of the campaign by Marie Curie and MND Scotland to remove the 'six month rule' for people who are terminally ill applying for disability assistance through special rules, although we were not involved in discussions around the specific provisions of the amendment. We subsequently participated in the Stakeholder Reference Group to provide advice on the development of the Chief Medical Officer's Guidance, which identified at an early stage that the legislation would exclude specialist nurses (e.g. Macmillan cancer nurses). Under the present reserved system, specialist nurses will frequently sign the

DS1500 form to provide evidence that a person is terminally ill, as they may have more contact with the patient and be more familiar with their condition than a GP would be. CAS supports the proposed change in the Bill.

- What training and skills should nurses have in order to act under the terminal illness provisions?

- Should health professionals other than registered nurses should be included in the definition of 'appropriate healthcare professional'

Current advice on completing the DS1500 form suggests that "The registered nurse needs to have acquired the expert knowledge and clinical competencies to undertake the assessment. They may be working in a role such as an advanced nurse practitioner, a Macmillan nurse, a clinical specialist nurse or a practice nurse with expertise in long term conditions management."ⁱ Others will be better placed to comment on specific training and skills requirements for medical professionals.

3. Claimant Appointees

- Are you content with the proposed provisions on appointees?

Yes, CAS is broadly content with the proposed provisions on appointees. They address an area where a gap in the law currently exists – allowing adults to manage a child's benefits payments on their behalf, for instance where informal kinship care arrangements exist. We are also broadly content with the amendment to enable adults who have capacity, but wish for an appointee to be made. However, regulations and guidance should include safeguards to ensure this provision is used appropriately and sensitively.

- Is further detail required in the Bill, or can that detail can be left to regulations and/or guidance?

DWP guidance on the making of appointees is detailed by necessity, setting out how officials should determine whether it is appropriate or inappropriate for an appointee to be made, details of visiting and interviewing prospective appointees and individuals, resolving disputes where there are two prospective appointees, what information can be provided if an individual with an appointee makes contact and other situations.ⁱⁱ This detail is necessary, but would appear to be more detail than would typically appear in primary legislation, so CAS would be content for it not to appear on the face of the Bill.

However, there may be some key elements that may be considered appropriate to be made in regulations or in primary legislation. These include:

- Requiring detailed guidance (such as above) to be developed
- Making specific provision for people with parental responsibility to receive payments for, and act on the behalf of, children under the age of 16.
- Providing for a process to assess if a young person would be incapable to be responsible for their own claim when they turn 16.
- Providing for both potential appointee and person for whom the prospective appointee would act on behalf of, to be visited by officials to assure that the application would be appropriate.

- Providing for a resolution mechanism for disputes between appointees, or if the relationship between the individual and their appointee breaks down, including a right of independent review

Analysis of CAB cases shows that most commonly, advice issues related to appointees include:

- Communications from DWP being made with an individual, rather than their appointee in error. This can cause confusion and distress to the client.
- The relationship between the individual and their appointee breaking down (or where the appointee has died). This has led to the individual's claim being closed by their appointee against their wishes, them not being informed about changes to their benefit entitlement, or, as in the case below, having difficulty removing the appointee.
- Excessive administrative delays in processing the approval of an appointee.

A South of Scotland CAB reports of a client who is 18 years old, has mental health issues and receives PIP. Until yesterday he lived with his mother, but she has now thrown him out. His mother is listed as his appointee, and receives his PIP award on his behalf. However, DWP would not change who the benefit is paid to without his mother's consent, despite the breakdown in the relationship.

These are particular examples of where clear guidance is needed for devolved social security payments, as well as that guidance to be adhered to in practice.

- How can vulnerable adults be safeguarded so they are not pressured into agreeing to have an appointee?

As detailed above, from analysis of CAB cases related to appointees, most issues were caused by administrative errors. However, there appears to be issues where a relationship breaks down or where an appointee dies.

Whilst we note the potential risks of abuse associated with appointees, it is unclear from our recent evidence how common this might be in practice. However, it is nonetheless important that appropriate safeguards are in place to prevent abuses, no matter how common or rare they may be.

Particularly key would be to ensure that both the potential appointee, and the person for whom the appointment is being made are interviewed by an appropriately trained and skilled Social Security Scotland official with the ability detect potential situations where a person is inappropriately pressuring a vulnerable person to agree to make them their appointee. It is also important that a mechanism is available for people with concerns about a potential abuse or misuse of an appointeeship to be able to report their concerns in confidence and have them acted upon, including the individual for whom the appointee is acting.

4. Top-up powers: offences and investigations

- Do you agree that the same provisions on offences should apply to the SCP as they apply to benefits legislated for under part 2 of the 2018 Act such as the best start grant?

Yes, it would be appropriate and consistent to apply the same provisions on offences and investigations to Scottish Child Payment that are applied to other devolved social security payments.

However, the Bill may present an opportunity to consider whether the provision in Section 4 of the Bill, which mirrors Section 68 of the 2018 Act, requiring Scottish Ministers to bring forward regulations before a person can challenge liability for an overpayment in a Tribunal, rather than the Sheriff Court are appropriate. See 'Other comments' below for further detail.

- Are there any other provisions that apply to benefits legislated for under Part 2 of the 2018 Act that ought to be applied to the SCP?

We are not aware of any other provisions.

- Do you think that, on the same timescale, SCP could have been legislated for as a 'new benefit' under the 2018 Act?

It would appear be possible to legislate for Scottish Child Payment as a 'new benefit' without excessive disruption. As the 2018 Act is framing legislation, rather than containing a large amount of detail of how the benefit should operate, Part 2, Chapter 2 contains a description of the purpose of each of benefits and requires Scottish Ministers to make regulations prescribing the eligibility rules and value of each, with a corresponding Schedule setting out some requirements and restrictions for how the regulations should be framed. To legislate for the Scottish Child Payment would require for the Act to be amended to insert a similar description, with a Schedule to set out the framework for regulations.

However, Citizens Advice Scotland supports the Scottish Child Payment being brought forward without delay, so would not favour an option that would result in further delay to the introduction of the payment in practice. The Committee may wish to consider whether legislating for SCP as a new benefit would cause delay.

- In the longer term, should SCP should be legislated for as a 'new benefit' rather than a 'top-up'?

It is certainly worth exploring the possibility of legislating for SP as a 'new benefit' in the long term, as there would be a number of additional options for developing the benefit that would become possible

Whilst we look forward to providing more detailed views on the Scottish Child Payment when the Committee considers the forthcoming regulations, Citizens Advice Scotland warmly welcomes the introduction of SCP, which has the potential to reduce child poverty and provide a much needed boost to people's incomes.

However, issues we have highlighted to the Scottish Government in terms of the policy detail include a concern that the payment stopping at the age of 6, will lead to a drop in

income for families, before them subsequently becoming eligible to re-apply for SCP when the scheme expands to cover children up to the age of 16.

We understand that the reason for this is due to the DWP being unable to compile and provide a data feed identifying people with children aged 6 – 15 who receive a qualifying benefit in time for the launch of Scottish Child Payment. If SCP were provided as a new, rather than a top-up benefit it may be possible to adjust eligibility criteria to cover this gap – although it should be recognised that this may not necessarily provide a solution that would be feasible in the timescales for the launch of SCP.

As the Scottish Commission on Social Security has also notedⁱⁱⁱ, delivering SCP as a new benefit could open up further options such as enabling people who do not receive a reserved benefit – such as people who have lost entitlement to Universal Credit because of a short-term increase in their earnings – to be paid SCP.

- More generally, reflecting on this early experience of using s.79, whether "top-ups" is a useful provision in the legislation?

It would be more appropriate to fully reflect on the use of section 79 once Scottish Child Payment has been fully established and is operational. It is a potentially useful tool to address gaps in the social security system, but may be slightly misunderstood due to being referred to as a 'top-up' power – despite it being the intention of both the UK and Scottish Governments that a separate benefit would be created to exercise the power (such as the Scottish Child Payment), it appears to be frequently assumed that in practice an additional sum will be added in as part of regular payments of reserved benefits. This may have implications for perceptions of how quickly and easily the power can be used in practice.

- Do you have any concerns that top-ups will be subject to different rules from the reserved benefit they are topping up?

As the benefits are delivered as a separate payment by Social Security Scotland, rather than being added in as part of the payment made by the UK Government, it is less of a concern that rules may vary between the payments. For instance, people will be required to make an application for Scottish Child Payment, which will be paid separately to their Universal Credit or legacy benefit claim. This may have the effect of any difference in the rules between the two being less obvious and confusing for individuals.

However, in general, two of the biggest barriers to people taking up all the benefits they are entitled to are that people don't know what they are entitled to; and that application and assessment processes are too complex.^{iv} Citizens Advice Scotland supports automating elements of the process if possible, where eligibility information is already known – for instance, if personal details are already held in respect of an existing benefit claim, or where their eligibility has been established by virtue of receiving another benefit.^v

In the case of Scottish Child Payment, this might include the ability for Social Security Scotland to make payments automatically to people with children who receive one of the qualifying benefits, without them having to make a separate application. A similar process is carried out for Carers Allowance Supplement, where payments are made to all qualifying individuals without the need for a separate application. Whilst we recognise that this may not be possible at the time SCP is launched without causing delays, CAS however

recommends that the Scottish Government keep this measure under consideration for implementation once the payment is up and running.

5. Tribunals

- Do you have any concerns about the preparedness of the tribunal service for dealing with devolved social security?

As the number of appeals being heard by the Social Security Chamber remains relatively small, with around 60-65 appeals by February 2020^{vi}, it is too early for CAS to draw conclusions on the Chamber's operation. In 2019/20, Scotland's CAB network provided advice on 25 issues related to appeals on devolved benefits. We would anticipate the number of appeals to grow considerably when the three disability benefits become operational. The provisions in the Bill to expand the number of Tribunal judges seems appropriate.

Other comments

In addition to the points above, Citizens Advice Scotland believes the Bill presents an opportunity to consider further minor amendments to the 2018 Act:

Suspension of payments

In our response to the draft regulations for Disability Assistance for Children and Young People, CAS highlighted that, contrary to the Scottish Government's policy intentions, the regulations appeared to remove entitlement for children or young people who spend more than 28 days in a care home, residential educational establishment or legal custody.^{vii} The Scottish Commission on Social Security also highlighted the same point, and identified that this could be achieved by amending the Act to enable entitlement to remain while payment is suspended.^{viii}

CAS believes it is important that the payment should be suspended rather than stopped, and should be resumed promptly and smoothly, as opposed to the individual having to re-apply and be assessed for the benefit again. We would recommend the Bill is used as an opportunity to amend the 2018 Act to make provision for a suspension and resumption of a benefit, rather than removing entitlement.

Challenging liability to repay an overpayment in a Tribunal

At Stage 3 of the Social Security Bill's passage through the Scottish Parliament, amendments were considered relating to allowing people to challenge liability to repay a social security overpayment through an appeal to the Tribunal, rather than through the Sheriff Court. Section 68 of the Act (proposed to be replicated for 'top-up' benefits by Section 4 of the Bill) creates a power for Scottish Ministers to make regulations to transfer certain powers in this regard from the Sheriff to the Tribunal.

However, despite consensus around the principle of challenge in a Tribunal in Parliament^{ix} and subsequently from discussions with stakeholders, regulations have not been brought forward at the time of writing. The Bill may present an opportunity to consider whether it

would be appropriate to make an amendment to transfer the powers to the Tribunal in legislation, rather than by regulations.

CAS believes it would be appropriate to extend the re-determinations and appeals system in respect to challenges to liability to repay overpayments. In the absence of regulations being made, this would require to be challenged in the Sheriff Court. Currently in the courts, the creditor must only aver that the debt exists, and does 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 with 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.

ⁱ DS 1500 – GP Notebook <https://gpnotebook.com/simplepage.cfm?ID=x20050803153747160230>

ⁱⁱ Agents, appointees, attorneys, deputies and third parties staff guide – Department for Work and Pensions https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/771549/part-05-appointee.pdf

ⁱⁱⁱ Scrutiny Report on draft regulations: Scottish Child Payment Draft Regulations 2020 – Scottish Commission on Social Security, January 2020

<https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2020/01/the-scottish-child-payment-regulations-2020-scrutiny-report-on-draft-regulations/documents/the-scottish-child-payment-regulations-2020-scrutiny-report-on-draft-regulations/the-scottish-child-payment-regulations-2020-scrutiny-report-on-draft-regulations/govscot%3Adocument/The%2BScottish%2BChild%2BPayment%2BRegulations%2B2020-%2Bscrutiny%2Breport%2Bon%2Bdraft%2Bregulations.pdf>

^{iv} Social Security Committee Benefit Take-up inquiry – Submission from Citizens Advice Scotland, October 2019 https://www.cas.org.uk/system/files/publications/cas_submission_-_benefit_take-up.pdf

^v Ibid.

^{vi} SPICe Briefing: Social Security Administration and Tribunal Membership (Scotland) Bill – Scottish Parliament Information Centre, May 2020

<https://digitalpublications.parliament.scot/ResearchBriefings/Report/2020/5/1/Social-Security-Administration-and-Tribunal-Membership--Scotland--Bill>

^{vii} Citizens Advice Scotland response to Scottish Commission on Social Security consultation: The Disability Assistance for Children and Young People (Scotland) Regulations 2020 – January 2020

https://www.cas.org.uk/system/files/publications/cas_response_-_dacyp_regulations.pdf

^{viii} Scrutiny Report on draft regulations: Disability Assistance for Children and Young People (Scotland) Regulations 2020 – Scottish Commission on Social Security, March 2020

<https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2020/03/the-disability-assistance-for-children-and-young-people-scotland-regulations-2020-scrutiny-report-on-draft-regulations/documents/the-disability-assistance-for-children-and-young-people-scotland-regulations-2020-scrutiny-report-on-draft-regulations/the-disability-assistance-for-children-and-young-people-scotland-regulations-2020-scrutiny-report-on-draft-regulations/govscot%3Adocument/FINAL%2BSCoSS%2BReport%2Bon%2Bthe%2Bdraft%2BDACYP%2B%2528S%2529%2BRegs%2B2020.pdf>

^{ix} Col. 72-76, Official Report, 25 April 2018

<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11482&mode=pdf>