

# Equality and Human Rights Commission Consultation Response on Social Security in Scotland

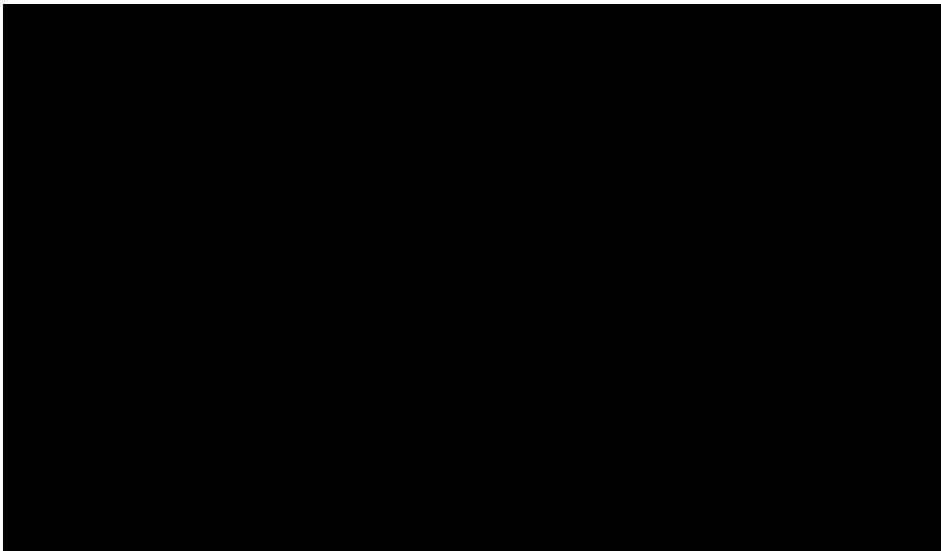
Creating a fairer Britain



Equality and  
Human Rights  
Commission

# Equality and Human Rights Commission Response on Social Security in Scotland

28 October 2016



The Equality and Human Rights Commission is the National Equality Body (NEB) for Scotland, England and Wales. We work to eliminate discrimination and promote equality across the nine protected grounds set out in the Equality Act 2010: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

We are an “A Status” National Human Rights Institution (NHRI) and share our mandate to promote and protect human rights in Scotland with the Scottish Human Rights Commission (SHRC).

We welcome the opportunity to respond to the Scottish Government’s Consultation on Social Security in Scotland. We have not responded to every question posed in the consultation. In particular, we have not put forward detailed proposals for the individual benefits. We defer to organisations such as the Child Poverty Action Group (CPAG) on these issues. Numbered paragraphs correspond to the numbers set out in the consultation document.

## **Part 1: A principled approach**

### **1. Fixing the principles in legislation**

#### **Which way do you think principles should be embedded in the legislation?**

We welcome the Scottish Government’s direction of travel and its commitment that respect for the dignity of individuals will be at the heart of the new social security system in Scotland.<sup>1</sup> However, as the consultation paper acknowledges, the principles are no more than words for the time being. It is essential that the principles are given clear meaning and, further, they should explicitly reflect social security as a human right.

The right to social security has long since been affirmed in international law. The Universal Declaration of Human Rights 1948, states: “Everyone, as a member of society, has the right to social security.”<sup>2</sup> Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which the UK is a signatory to, states: “The States

<sup>1</sup> *Creating a Fairer Scotland: A New Future for Social Security in Scotland*, pg. 11.

<sup>2</sup> Universal Declaration of Human Rights, Article 22. For other references to social security in international human rights treaties see the Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 5; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Articles 11 and 14; Convention on the Right of the Child (CRC), Article 26.

Parties to the present Covenant recognise the right of everyone to social security, including social insurance.”<sup>3</sup>

The Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 19 focuses specifically on the right to social security and makes clear that it is “of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realise their Covenant rights”.<sup>4</sup> General Comment No. 19 goes on to set out, in detail, specific characteristics and requirements of a respectful and dignified system. Key elements of the right to social security are availability, adequacy, affordability, and accessibility.<sup>5</sup>

Of critical importance to the right to social security is the concept of adequacy. Many of the negative perceptions of the current system are shaped by how people have been treated and how this has impacted them, and this is the sphere in which the consultation is framed. People’s experiences of the system are a large part of the picture; however, it is also fundamental that everyone should have adequate resource to lead a fulfilling life where they can participate fully in society.

Human rights are interrelated and interdependent, meaning that the fulfilment of one right often depends on the fulfilment of another. Social security must provide individuals with levels of income that are adequate to allow them to realise their other rights, for example the right to an adequate standard of living or their right to the highest attainable standard of physical and mental health. We urge the Scottish Government to carefully consider the principle of adequacy and the content of General Comment No. 19 in shaping the Scottish system.

We want to move to an emancipatory system which is based on the need to promote public good. Social security policy should be considered as a piece of a broader picture, alongside areas such as transport, taxation, education and health. We appreciate that the Scottish Government’s most pressing short term priority is to ensure that the system works efficiently in practice; however, in the medium to

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<sup>3</sup> International Covenant on Economic, Social and Cultural Rights, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>. In response to the consultation, the Scottish Human Rights Commission has provided a detailed account of the foundations of the right to social security in international law.

<sup>4</sup> CESCR General Comment No. 19, para 1, pg. 2. Available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11)

<sup>5</sup> <http://www.ohchr.org/EN/Issues/RightSocialSecurity/Pages/SocialSecurity.aspx>

long term, we view social security as a lever for change towards a more inclusive, fairer society. We note that the consultation is silent on ‘top-up’ powers, and this is something we would expect the Scottish Government to look at in the near future.

The recent social security reforms implemented by the UK Government have had a disproportionate negative impact on many people who share protected characteristics.<sup>6</sup> The EHRC’s submissions to the UN Committee on Economic, Social and Cultural Rights set out these impacts in detail.<sup>7</sup> The Committee’s Concluding Observations, published in July 2016, stressed particular concerns for the negative impacts felt by “disadvantaged and marginalised individuals and groups, including women, children, persons with disabilities, low-income families and families with two or more children”.<sup>8</sup>

Further, the UN Special Rapporteurs on Housing, Disabilities, Poverty and Food have written a joint letter to the UK Government on the human rights concerns they have with the Welfare Reform and Work Act 2016 (WRWA). The Special Rapporteurs highlighted key concerns with regards to non-discrimination: “While the act is neutral on its face, the above analysis seems to point to its disproportionate and indirectly discriminatory impact on a wide range of groups, including women, children, persons with disabilities and certain households such as large families, single parents, and those living in high rent areas. It is questionable whether a welfare reform which disproportionately hurts those in most need accords with the fundamental principles and objectives of the ICESCR.”<sup>9</sup> Against this backdrop, it is vital that the Scottish system is based on a full and thorough equality and human rights impact assessment to ensure that no groups are disproportionately impacted.

In December 2015, the First Minister spoke at an event marking the second anniversary of Scotland’s National Action Plan on Human Rights (“SNAP”) and International Human Rights Day. The First Minister welcomed the growing interest in the role that human rights, including economic and social rights, can play in creating a fairer

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<sup>6</sup> Age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation

<sup>7</sup> Submission dated August 2015; Updated submission dated April 2016. Available at: <https://www.equalityhumanrights.com/en/our-human-rights-work/monitoring-and-promoting-un-treaties/international-covenant-economic-social>

<sup>8</sup> UN Committee on Economic, Social and Cultural Rights Concluding Observations, 27 June 2016. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/152/41/PDF/G1615241.pdf?OpenElement>

<sup>9</sup> UN Special Rapporteur Joint Communication on human rights impacts of welfare reform in the UK. Available at: [https://spdb.ohchr.org/hrdb/33rd/Public\\_-\\_AL\\_GBR\\_08.04.16\\_\(1.2016\).pdf](https://spdb.ohchr.org/hrdb/33rd/Public_-_AL_GBR_08.04.16_(1.2016).pdf)

society and made clear that the Scottish Government is committed to exploring how to embed the principles of human rights in everything they do. Social security presents a significant opportunity for the Scottish Government to put the First Minister's words into practice.

The consultation asks respondents to choose between whether they believe principles should be embedded in legislation or reflected in a Claimant's Charter. We believe that both options should be put in place. The two are not mutually exclusive.

### **What should be in the Charter?**

We believe that a Charter would be useful to ensure that everyone engaging with the new system understands their rights and entitlements and the parameters in which all interactions should take place. The proposal put forward in the consultation is for a 'Claimant Charter'; however, we believe that the Scottish Government should give serious consideration to extending the scope to include the rights of everyone involved in the system, including staff. This could promote a more inclusive system where everyone is working towards the same end goal – ensuring that recipients are aware of, and receive, what they are entitled to. We believe that establishing an inclusive Charter would go some way to achieving an emancipatory system based on the need to promote public good. We believe that achieving a rights-respecting culture within the new organisation should be a key focus area for the Scottish Government.

The Charter should be enforceable, and should include clear review and challenge mechanisms where it is thought the principles are not being respected. If the Charter is not enforceable, the document could quickly become meaningless for all involved.

### **Should the Charter be drafted by:**

- **An advisory group**
- **A wider group of potential user and other groups or organisations**
- **Both**
- **Some other way, please specify.**

The drafting process should draw on as wide a pool of expertise and experience as possible. Current, past and potential recipients of social security payments should be consulted. Staff should also be involved

in the drafting process, to ensure the Charter reflects the rights of all involved with the system. Civil society groups and organisations with expertise in social security as well as organisations representing particular groups will add valuable input. Finally, organisations with specific expertise in equality and human rights should be part of the drafting process.

**We are considering whether or not to adopt the name “Claimant Charter”. Can you think of another name that would this proposal better? If so, what other name would you choose?**

We do not have a concrete proposal for an alternative name; however “Social Security Rights Charter” or something akin to this may be appropriate.

**Do you have any further comments on the ‘Claimant Charter’?**

No.

**On whom would you place a duty to abide by the principle that claimants should be treated with dignity and respect?**

- **The Scottish Government**
- **The Scottish Ministers**
- **The Chief Executive of the Social Security Agency**
- **Someone else (please specify)**

The consultation document focuses largely on the delivery of social security, and the need to ensure that people are treated with dignity and respect when engaging with the system. There is, however, a wider point that the Scottish Government should consider around the overall purpose of social security. CESCR General Comment No. 19 makes clear that “the right to social security is of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realise their Covenant rights.”<sup>10</sup> General Comment 19 goes on to state that social security “should be treated as a social good, and not primarily as a mere instrument of economic or financial policy.”<sup>11</sup> So, while the functioning of the system on a day-to-day basis should be based on dignity and respect, so too must the foundations of the system. It is

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<sup>10</sup> Paragraph 1.

<sup>11</sup> Paragraph 10.

here that the concept of adequacy, discussed above, is particularly important.

The examples given in the consultation paper concern pieces of legislation that place general duties on bodies, whether that be Scottish Ministers or local authorities, to ensure individuals are treated respectfully and fairly. We do not believe that simply introducing such a general duty would be sufficient in the present circumstances.

The principles – which include the detail on what those principles will mean in practice – must be reflected in legislation governing all aspects of the new social security system at every stage of the process. They should also be reflected in any secondary legislation and guidance. For example, the principles of dignity and respect should be reflected in provisions dealing with individual issues ranging from the procedures around disability benefit assessments to review and challenge mechanisms. It is not enough to introduce general duties that are simply stated on the face of legislation.

CESCR General Comment No. 19 is again highly relevant when approaching legislation on social security. We would draw the Scottish Government's attention to para. 72 at pg. 19 which lists potential aspects of legislation that States may wish to introduce to implement the right to social security. These include: the possibility of including targets and goals to be attained and the time frame for achievement; intended collaboration with civil society; responsibility for the overall process; national monitoring mechanisms; and remedies.

**Do you have any further comments on placing principles in legislation?**

No.

**Do you have any further comments or suggestions in relation to our overall approach, to fix our principles in legislation? For example, do you feel that there is no need to fix principles in legislation?**

No.



## **2. Outcomes and the user experience**

**Are the outcomes the right high level outcomes to develop and measure social security in Scotland? Are there any other outcomes that you think we should also include (and if so, why?)**

We believe that the outcomes should explicitly refer to social security as a human right. The outcomes should reflect the principle of adequacy, making clear that social security payments should be adequate to allow people to realise other human rights such as the right to an adequate standard of living. The long term outcomes listed under the heading “People applying for or in receipt of Scottish benefits and their families” allude to these principles, but they should be more clearly articulated.

The outcomes should better reflect the fact that the system must be flexible to account for individual needs. This is dealt with in detail under the section, ‘Delivering social security in Scotland’.

There should be an outcome centring on the right to a review or challenge to decisions. Recipients should be made aware of review procedures and reviews should be conducted within a set timescale. Individuals should not be subject to detriment while their case is being reviewed or is subject to an appeal process.

Finally, we believe the outcomes should explicitly refer to delivery by staff that are respectful and compassionate, and trained in equality and human rights principles.

**How can the Scottish social security system ensure all social security communications are designed with dignity and respect at their core?**

Communications with recipients should be accurate, up to date, and timely. CPAG case evidence suggests that communications from bodies such as the DWP often contain errors or misleading information. This only adds to feelings of uncertainty and stress and avoiding this should be a priority of the new system.

Communications should be accessible and available in a wide range of formats to meet the needs of individuals. Conducting early and comprehensive impact assessments will be of vital importance in designing suitable communications. On digital communications, please see our responses in below section, Delivering Social Security in Scotland.

**With whom should the Scottish Government consult, in order to ensure that the use of language for social security in Scotland is accessible and appropriate?**

The Scottish Government should consult with civil society organisations who have direct experience of the social security system together with individuals (and their families or support network) with experience of engaging with the system. It is important not to exclude individuals who could be entitled to social security payments but currently do not receive them. There may be communication or other barriers currently preventing them from doing so and those perspectives should be captured in designing appropriate communications. The Scottish Government should also consult with staff who deliver social security as they will have valuable insights into the use of language and the impact on their work in the current system.

**Are there any particular words or phrases that should not be used when delivering social security in Scotland?**

We agree with the Scottish Government's decision to stop using the word 'welfare'. We believe that the Scottish Government should look closely at whether the term 'benefit' is appropriate. The word 'benefit' implies that those in receipt of social security payments are being given something out of kindness. The reality is that social security is a right, something that individuals are entitled to, and is a collective investment in society. Neutralising language in favour of phrases like 'social security payment' should be considered.

**How should the Scottish social security communicate with service users? (For example, text messaging or social media)?**

There should not be a 'one size fits all' approach to communication. Some people will require communications in a specific format, and the consultation paper rightly acknowledges that this must be provided. For example, reasonable adjustments must be recorded and noted by the system at first engagement and followed thereafter. We welcome the reference in the consultation to the importance of inclusive communications principles in developing information and guidance linked to the new system. We would also draw the Scottish

Government's attention to information published by the Scottish Accessible Information Forum.<sup>12</sup>

There should be sufficient flexibility built in to the communications elements of the system to ensure that everyone can participate and access the system and receive communications in a manner most appropriate to them. For example, although some people may find text messaging helpful, there will be recipients for whom this method would be entirely inappropriate. Thorough impact assessment before designing the communications elements of the system will help in shaping a service with sufficient flexibility. For more detail, please see the below section on digital services.

**What are your views on how the Scottish Government can ensure that a Scottish social security system is designed with users using a co-production and co-design approach?**

In fulfilment of the general public sector equality duty and the specific duties set out in the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, the Scottish Ministers are required to assess the impact of proposed new policy against the needs of the general equality duty. In making that assessment, the Scottish Ministers must consider relevant evidence relating to people with or who share a protected characteristic, which includes any evidence from those people. Best practice is to involve equality groups and communities when assessing impact. Detailed guidance is available on our website.<sup>13</sup>

**We are considering whether or not to adopt the name “User Panels”. Can you think of another name that would better suit the groups of existing social security claimants which we will set up?**

A Scottish Government news story published on 14 October 2016 reported that the groups will be named “Experience Groups”. We have no issue with the choice of name; however, we do have questions around the way the groups will be formed.

The announcement states that “people from across the country who currently receive a benefit which will be devolved to Scotland, or who have received it in the last year, will be recruited to help to design and

<sup>12</sup> <http://www.saifscotland.org.uk/>

<sup>13</sup> <https://www.equalityhumanrights.com/en/advice-and-guidance/guidance-scottish-public-authorities>

test the new system to ensure it works for them.”

The Scottish Government must pay particular attention to how the groups are ‘recruited’. Firstly, random sampling will not lead to Experience Groups that are representative of the current make up of social security recipients. For example, the proportion of the population that identified themselves as being from an ethnic minority was 4% in 2011.<sup>14</sup> It is therefore highly unlikely that random sampling would lead to appropriate representation of ethnic minorities on Experience Groups. Similarly, disabled people will have very different perspectives depending on their circumstances and disability. The Scottish Government should therefore make every effort to obtain equality data on current recipients. If, for any reason, data cannot be obtained, mitigating measures must be put in place, such as the use of booster sampling.

Secondly, the Scottish Government should consider whether it is desirable to limit membership of Experience Groups to people currently in receipt of social security payments or who have received payments in the past year. Take-up of certain aspects of social security is low among particular groups. For example, recent research suggested that many Pakistani and Somali participants were not aware of free childcare provision available to them or support they might be entitled to as carers.<sup>15</sup> The experience of those who could receive payments but, for whatever reason, do not, is equally valid in designing an inclusive system.

In the spirit of involving everyone engaged with the social security system, the Scottish Government could also consider establishing staff experience groups to capture their ideas and involve them in the collective understanding of social security as a social good.

### **3. Delivering social security in Scotland**

#### **Should the social security agency administer all social security benefits in Scotland?**

In our view, establishing a consistent approach to the delivery of social

<sup>14</sup> Equality and Human Rights Commission, *Is Scotland Fairer? The state of equality and human rights 2015 2015*, at pg. 22.

<sup>15</sup> Khan, O., Ahmet, A. and Watkins, J. *Poverty and ethnicity: Balancing caring and earning for British Caribbean, Pakistani and Somali people*. York: JRF referred to in Kelly, M. *Poverty and Ethnicity: Key Messages for Scotland*, Joseph Rowntree Foundation. Available at: <https://www.jrf.org.uk/report/poverty-and-ethnicity-key-messages-scotland>

security across Scotland will be essential to the success of any new system. We therefore see an advantage in core functions – including processing claims, decision making, and processing payments – being administered by the new Scottish Social Security Agency (SSSA).

We take this view for the following reasons:

- Establishing an emancipatory culture (which we believe is critical to the success of the whole system) will be far easier to achieve if a uniform approach is taken from the outset. Delivering all core functions from one agency would allow for consistent training and monitoring, ensuring staff abide by set minimum standards of conduct and delivery at all times.
- There is already potential for confusion when individuals have to engage with both reserved and devolved systems. From a recipient's perspective, engaging with only one devolved agency should minimise further uncertainty.
- The CPAG Early Warning System Cases suggest that there has been a divergence of practice resulting from localised delivery in relation to the delivery of housing payments. EWS case evidence points to certain local authorities introducing their own additional rules of entitlements and/or access.<sup>16</sup> One centralised agency would avoid these divergences.
- Data from the Trussell Trust showed the primary referral reason in 28% of requests for emergency food and support was benefit delays, followed by low income (23%) and benefit changes (14%).<sup>17</sup> Administrative errors and delays clearly have a significant human impact and delivering social security from different agencies could add to the risk of administrative confusion and errors.

### **Should the social security agency in Scotland be responsible for providing benefits in cash only or offer a choice of goods and cash?**

We believe that social security payments should be delivered primarily in cash. Dictating that all recipients will receive certain goods or services instead of cash does not promote autonomy, independence and dignity. That is not to say that there are no circumstances where goods would be appropriate,<sup>18</sup> however these circumstances would have to be tightly defined, and offered as a choice to individuals with the option to receive cash remaining.

<sup>16</sup> <http://www.cpag.org.uk/sites/default/files/EWS%20Policy%20Bulletin%20Housing.pdf>

<sup>17</sup> <https://www.trusselltrust.org/news-and-blog/latest-stats/>

<sup>18</sup> For example, the Motability scheme is generally thought of positively by many disabled people.

## How best can we harness digital services for social security delivery in Scotland?

We have no issue in principle with there being a digital element to social security delivery in Scotland. Of course, being digitally connected offers a number of advantages and, for many people, having the option to access services online would no doubt improve their experience of the social security system.

That said, the system must fully accommodate those who cannot access digital services. There are a number of reasons why a person may not be able to access digital services, including disability and ill-health. There is also a high degree of overlap between commonly understood characteristics of deprivation and lack of digital access. Older people, people on low incomes, and people who live in social rented accommodation are far less likely to have digital access when compared to the rest of the population.<sup>19</sup> For example, according to the Scottish Household Survey 2014, 80% of the Scottish population have internet access, however only 25% of those aged 75 or over are online. Similarly, of those with an annual income of between £6,000 and £10,000, the proportion with internet access drops to just 51%. Further, some people may choose not to use digital services as a result of their beliefs. For example, in 2013, a couple won the right not to file online VAT returns for their business on the grounds that their religious beliefs required them to reject the use of computers and the internet in their home.<sup>20</sup>

Finally, CESCR General Comment No. 19 stresses that accessibility is a key element to the right to social security.<sup>21</sup> Several features of accessibility are discussed, including participation and information, and physical access. Paragraph 26 is clear that “beneficiaries of social security schemes must be able to participate in the administration of the social security system”. Paragraph 27 deals with physical access and states “Benefits should be provided in a timely manner and beneficiaries should have physical access to the social security services in order to access benefits and information, and make contributions where relevant. Particular attention should be paid in this regard to persons with disabilities, migrants, and persons living in remote...areas...so that they, too, can have access to these services”.

<sup>19</sup> White, D, *Digital Participation and Social Justice in Scotland*, 2016. Available at: <http://www.carnegieuktrust.org.uk/carnegieuktrust/wp-content/uploads/sites/64/2016/09/v3-2697-CUKT-Digital-Participation-summary.pdf>

<sup>20</sup> G A Blackburn & A Blackburn v Revenue & Customs [2013] UKFTT 525 (TC) (02 October 2013).

<sup>21</sup> CESCR Gen Comment 19, at pg. 8.

The above clearly demonstrates the need for a full and thorough Equality Impact Assessment prior to designing digital aspects of the new system.

### **Should social security in Scotland make some provision for face to face contact?**

Yes. As set out above, there should be sufficient flexibility to ensure that everyone is able to access information and participate in the social security system. Many people, for a variety of reasons, do not have access to online or telephone services; therefore we envisage that face to face contact will be required.

### **Who should deliver social security medical assessments for disability related benefits?**

Concerns around assessments for disability related benefits have been voiced for some time and, although changes were made to Work Capability Assessments (WCA), the WCA still attracts strong criticism. For example, individuals with serious health conditions or disabilities have been found 'fit for work'. There has also been a relatively high success rate for appeals against decisions and there are concerns that the impact of assessments, reassessments and poor decision making has had a negative effect on the physical and mental health of those claiming disability related payments.<sup>22</sup>

The Scottish system should reflect lessons learned from the way assessments have been conducted at a UK level. The Scottish Government may wish to consider whether the involvement of non-medical professionals would be appropriate in certain circumstances. For example, there may be cases where occupational therapists, physiotherapists or psychologists should be engaged, as medical assessments will not always capture a full picture of impact on an individual's day to day life bearing in mind mental health and wellbeing factors.

We have spoken elsewhere in our response about our vision of changing the culture of the social security system. In the Scottish system, we hope there can be a shift in perception around the purpose

<sup>22</sup> Kennedy, S., Murphy, C. and Wilson, W. (2016) Welfare Reform and disabled people. House of Commons Briefing Paper 7571, 25 April. Available at: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7571>



of assessments for disability related benefits, moving towards an emphasis on support and empowerment. Assessments should also be contributing to a social analysis of why someone may not be able to work, for example due to a lack of adjustments in public spaces or problems with accessible transport. This information should be fed back into the system to support broader change in other areas.

We defer to organisations representing disabled people, and the direct experience of disabled people themselves, in shaping the detail of Scottish Government policy on assessments for disability related payments.

**Should we, as much as possible, aim to deliver social security through already available public sector services and organisations?**

As set out above, we believe there are clear management and consistency reasons for delivering social security from a centralised agency. That said, we recognise that some individuals and communities may prefer to engage with existing agencies, for example for cultural reasons. Capturing the views of those with direct experience of the system will be particularly important in agreeing the best way forward.

**Should any aspect of social security be delivered by others such as the 3<sup>rd</sup> sector, not for profit organisations, social enterprises or the private sector?**

Although we believe that decision making and other core functions should be delivered centrally by a single social security agency, there is certainly a place for local information, advice and advocacy organisations and services. With appropriate resourcing, there may also be a role for local authorities to support advice and advocacy services. These services provide crucial support to individuals and we envisage that their role will continue in the new system. The Scottish Government should also be mindful that the demand for support services may well rise during the transition period, as individuals begin navigating the new system. Please see our response dealing with Advice and Advocacy below.

The Scottish Government should carefully consider the role, if any, that the private sector should play in the new Scottish social security system. The use of third-party contractors to provide health and



disability assessments has been heavily criticised. In January 2016, it was reported that, while the DWP had strengthened oversight and management of assessment providers, it had not achieved value for money and providers still were not meeting expected performance standards.<sup>23</sup> The House of Commons Public Accounts Committee reported, in March 2016, that: there are still unacceptable local and regional variations in contractor performance; individuals were still not receiving an acceptable level of services from contractors, with particular concerns for people with fluctuating and mental health conditions; too many assessments did not meet the standard required; and the unit cost of assessments had increased, but there had been no noticeable benefit for recipients.<sup>24</sup>

#### **4. Equality and low income**

**How can the Scottish Government improve its partial EqIA so as to produce a full EqIA to support the Bill?**

**These prompts could be helpful in framing your answer:**

- **What does the Scottish Government need to do, as it develops a Scottish social security system, to ensure that equality implications are fully taken into account?**
- **What does the Scottish Government need to do to ensure that any implications for those on low incomes are fully taken into account?**
- **Are there equality considerations for individual benefits that you would like to draw to our attention?**
- **Are there considerations about individual benefits for those on low incomes that you would like to draw to our attention?**
- **What are your views on how we can best gather equality information for the new Scottish benefits?**
- **What does the Scottish Government need to do to ensure that its social security legislation (including secondary legislation and guidance) aligns its vision and principles with equality for all those who need assistance through social security support?**
- **What does the Scottish Government need to do ensure that a Scottish social security system provides the right level of support for those who need it, and what are the possible equality impacts of this?**

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<sup>23</sup> National Audit Office, *Contracted-out health and disability assessments*, HC 609 2016-17, 8 January 2016, p4

<sup>24</sup> Public Accounts Committee, *Contracted out health and disability assessments*, HC 727 2016-17, 31 March 2016

As the consultation document acknowledges, considerable work is required to produce a complete and comprehensive Equality Impact Assessment.

An assessment by EHRC of the extent that the UK Government's 2010 Spending Review complied with the requirements of the Public Sector Equality Duty found weaknesses in the decision making process and that the impact of decisions (including on welfare social security) and public services was not always fully assessed.<sup>25</sup>

The Scottish Government's partial EqIA approaches each type of entitlement individually. This type of analysis will not result in an understanding of the complete picture. We urge the Scottish Government to conduct cumulative impact assessments of spending and policy decisions on those with or who share a protected characteristic, notably women, children, ethnic minorities, disabled people and older people.

Cumulative impact assessment techniques measure the overall impact of a set of changes to policy (in this case social security) on the population, analysed according to one or more characteristic. Rather than looking at individual policy decisions in isolation, cumulative impact assessment helps government and the public to assess the overall impact of government policies on the population as a whole and on specific groups of people. The EHRC commissioned a report, published in 2014, on cumulative impact modelling which found that the impact of UK Government tax and social security reforms was more negative for families which contained at least one disabled person, especially a disabled child, and that these effects were particularly bad for low income families. They were also assessed to be worse for women than men, largely because a higher proportion of women's income comes from social security and tax credits relating to children, to which a large proportion of cuts have been made.<sup>26</sup>

The EHRC worked with HM Treasury to improve its arrangements for equality impact assessing budget decisions. A final report in 2015 set

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<sup>25</sup> EHRC, Making fair financial decisions: An assessment of HM Treasury's 2010 Spending Review conducted under Section 31 of the 2006 Equality Act, available at: <http://www.equalityhumanrights.com/publication/making-fair-financial-decisions-assessment-hm-treasurys-2010-spending-review-s31>

<sup>26</sup> Reed, H. and Portes, J., *Cumulative Impact Assessment: A Research Report by Landman Economics and the National Institute of Economic and Social Research (NIESR) for the Equality and Human Rights Commission*. Research Report 94. Available at: <https://www.equalityhumanrights.com/en/publication-download/research-report-94-cumulative-impact-assessment>

out a framework of actions, to support effective equality impact assessment. The following points are relevant for the new social security system in Scotland:

- Improving the quality of data - discussions with departments to clarify expectations and reach a common and agreed approach on different types and sources of acceptable data and evidence
- recognising the value of a quantitative approach; extending distributional impact analysis to include aggregate/cumulative impact of decisions on people sharing different protected characteristics
- use of existing cross- departmental groups, and opening up of better communications between departments to highlight and share 'aggregate' impact as they are working through policy and spending measures
- coverage of evidence and analysis in an Equalities Impact Statement, published alongside Spending Reviews
- identifying a single point in government with responsibility for the overall impact of Spending Review decisions on people sharing different protected characteristics.<sup>27</sup>

The Commission would like to share its knowledge and experience of cumulative impact assessment with the Scottish Government to ensure the best outcome for individuals engaging with the new system.

Finally, given the recent devolution of the socio-economic duty under Part 1 of the Equality Act 2010, the Scottish Government may wish to consider piloting a socio-economic analysis.

## **5. Independent advice and scrutiny**

**Do you think that there is a need for an independent body to be set up to scrutinise Scottish social security arrangements?**

We believe there would be real value in establishing an independent, statutory body to scrutinise Scottish social security arrangements. This may be very similar to the current Social Security Advisory Committee, however of course would have to be adapted to a Scottish context.

In our view, an independent scrutiny body's role would include, but not

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<sup>27</sup> Equality and Human Rights Commission, *Future Fair Financial Decision-Making Report*, Feb 2015. Available at: <https://www.equalityhumanrights.com/en/publication-download/future-fair-financial-decision-making-report>

necessarily be limited to, scrutiny of social security legislation, providing advice to Ministers (both on its own initiative and on request) and reviewing draft guidance. The Scottish Government should consider how this body would interact with the UK Social Security Advisory Committee and how it would relate to the Scottish Parliament.

**If you agree, does the body need to be established in law or would administrative establishment by the Scottish government of the day be sufficient?**

In our view, the body should be established by law. There will always be a need for a social security system; therefore it follows that independent scrutiny will always be required. Setting up a statutory body would ensure maximum security, consistency and a level of permanence.

**If yes, what practical arrangements should be made for the independent body (for example, the law could state how appointments to it are made and the length of time an individual may serve as a member of the body)?**

An independent body would be subject to the Public Sector Equality Duty and decisions should be taken in furtherance of the duty.

**Should there be a statutory body to oversee Scottish social security decision making standards?**

The oversight of Scottish social security decision making standards will be a key feature of the new system and is in the interests of all involved.

Proper decision-making is an essential part of good governance; it leads to better outcomes for individuals, increases public confidence in the system and makes decisions more likely to stand up to challenge. We believe statutory oversight and monitoring mechanisms must be put in place; however, we feel that there would be merit in considering whether this could be done by an existing public body.

**If yes, should this be a separate body in its own right?**

Please see the above question.

**Do you have any other views about the independent scrutiny of social security arrangements in Scotland (e.g. alternative approaches)?**

No.

## **Part 2: The Devolved Benefits**

We do not propose to cover each area in detail, nor answer each of the specific questions in this section. We will defer to other organisations, for example the Child Poverty Action Group, on the detail of how each entitlement should operate. Rather, we would like to make short points on Disability Benefit and Universal Credit.

### **6. Disability Benefit**

**How should the new Scottish social security system operate in terms of:**

- **A person applying for a disability related benefit**
- **The eligibility criteria set for disability related benefits**
- **The assessment/consideration of the application and the person's disability and/or health condition**
- **The provision of entitlements and awards (at present cash payments and the option of the Motability Scheme)**
- **The review and appeal process where a person isn't content with the outcome**

Throughout this consultation response, we have pointed to evidence suggesting that disabled people and their families have been disproportionately and negatively impacted by recent welfare reform.

We would like to see a culture shift in the administration of the new system in Scotland to a system focused on income maximisation and ensuring everyone is able to easily access what they are entitled to.

The process of applying for a disability benefit, and indeed any benefit, should be as simple as possible, with a flexible process designed to meets the requirements of all involved. Our comments set out above in relation to communication and digital access are particularly valid here.

The Scottish Government should approach the issue of disability assessment with care. We point to evidence above that suggests clear problems with the current assessment processes and the Scottish Government should carefully consider this and the views of disabled people and organisations acting on their behalf, before designing any assessment processes for the new system.

### **13. Universal Credit Flexibilities**

**Should payments of Universal Credit be split between members of a household?**

We echo the recommendations of organisations such as Engender in asking the Scottish Government to introduce automatic individual payments of Universal Credit.<sup>28</sup> Single household payments risk reinforcing existing power imbalances, which are too often felt by women.

## **Part 3: Operational policy**

### **14. Advice, representation and advocacy**

**What role[s] should publicly funded advice providers play in the development of a new Scottish social security system?**

CESCR General Comment No. 19 makes clear that a key element of an effective social security system is accessibility, which necessarily requires participation and information. Paragraph 26 specifically states: “The system should be established under national law and ensure the right of individuals and organisations to seek, receive and impart information on all social security entitlements in a clear and transparent manner.”

In giving effect to this, the Scottish Government should consider the possibility of including a right to advice and information in legislation. This would be a way of embedding advice and support in the delivery of the social security in Scotland.

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<sup>28</sup> See Engender, *Securing Women’s Futures: Using Scotland’s New Social Security Powers to Close the Gender Equality Gap*, 2016

The Scottish Government should also approach the issue of advice with recognition that any fundamental changes to a system are likely to produce increased demand for information and advice services. The Scottish Government should therefore consider the resourcing of advice providers, and whether this will be adequate to allow them to meet any increase in demand for their services.

**Do you think that Independent Advocacy services should be available to help people successfully claim appropriate benefits?**

We believe that there is a place for Independent Advocacy services in the new system, and demands on those services are likely to increase as people navigate a new system.

## **15. Complaints, reviews and appeals**

**Do you agree that we should base our CHP on the Scottish Public Services Ombudsman's 'Statement of Complaints Handling Principles'?**

We agree that the SPSO's 'Statement of Complaints Handling Principles' includes the key aspects of an effective complaints handling procedure.

The SPSO's Statement provides further detail on each aspect of the process, and we would highlight the importance of publicising a complaints procedure and designing a fully accessible procedure with regard to the needs of particular groups. Another important aspect is instilling a culture into the new Scottish Social Security Agency whereby staff recognise the value of an effective complaints procedure and feel confident in signposting individuals to it.

**How should a Scottish internal review process work?**

Internal reviews are an important part of a fair system. They give organisations valuable insights into their own processes, allowing them to learn from past experience and improve. Effective internal reviews also allow for quick resolution for individuals, without having to enter into a potentially stressful and time consuming formal appeals process.

That said, the 'mandatory reconsideration' process currently in place

has attracted strong criticism. In particular, the absence of any time limit within which the DWP must make a decision on a mandatory reconsideration has left individuals without support for significant lengths of time.<sup>29</sup> A recent report exploring the use of foodbanks in the south east of Glasgow pointed to procedural issues such as mandatory reconsideration as a direct cause of people experiencing severe poverty and hardship.<sup>30</sup> If the Scottish Government retains the requirement for an internal review, a clear time limit should be set. Further, we are clear in our view that, while a matter is under review or appeal, an individual's payments should continue until final determination. This would avoid individuals being pushed into hardship while attempting to challenge a decision.

When designing the review and appeal procedures for the Scottish social security system, we would draw the Scottish Government's attention to the requirements of Article 6 of the European Convention on Human Rights ("ECHR"), which governs the right to a fair trial. Article 6 states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

The European Court of Human Rights has held that Article 6 (1) does apply in the field of social security. Therefore, at a minimum, the appeals procedure must be Article 6 compliant.<sup>31</sup>

## **18. Fraud**

### **Should the existing Scottish Government approach to fraud be adopted for use in our social security system?**

Fraud is a reality in any system; however, it is committed by a small minority of individuals and groups. The Scottish Government's approach to fraud in social security should begin from this starting point.

If any individual is suspected of fraud, it is important that individuals are

<sup>29</sup> Citizens Advice Scotland, *Designing a Social Security System for Scotland: Disability and Carers' Benefit*, 2016, at pg. 36. Available at: [http://www.cas.org.uk/system/files/publications/designing\\_a\\_social\\_security\\_system\\_for\\_scotland\\_-\\_disability\\_and\\_carers\\_benefits.pdf](http://www.cas.org.uk/system/files/publications/designing_a_social_security_system_for_scotland_-_disability_and_carers_benefits.pdf)

<sup>30</sup> Castlemilk Law and Money Advice Centre, *Why people go to foodbank: A year of advice-giving at Glasgow South East Foodbank*, 2016.

<sup>31</sup> For a detailed analysis of how Article 6 relates to social security, see Heredero, A., *Social security as a human right*, Council of Europe Human rights files, No.23, 2007. Available at: [http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-23\(2007\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-23(2007).pdf)



not pushed into financial hardship while any investigation is on-going.

The Scottish Government's fraud strategy should sit alongside clear and accessible information to ensure individuals understand entitlement conditions and their responsibilities.