

# **SOCIAL SECURITY (SCOTLAND) BILL**

Response to Social Security  
Committee

**THE SCOTTISH LABOUR PARTY**

# Introduction

Labour is the party which created the social security safety net to support people - the unemployed, the disabled, the poor and the elderly - from cradle to grave, and we are eager to see powers to deliver a Scottish social security system used to full effect.

The last Labour Government built and strengthened that safety net to lift 120,000 children and 110,000 pensioners in Scotland out of poverty; with that action being reversed, with one in four children living in poverty, getting this right is more important than ever.

After Scottish Labour's work on the Smith Commission, Scotland now has the chance to deliver its own social security system which is based on the principles of dignity and respect. Labour amendments to the Scotland Bill gave the Scottish Parliament the power to top-up reserved benefits, and create new benefits altogether; so now is the right time to determine how we take these powers forward, and start to reverse the cruel and inhumane treatment passed down by the Tory Government. We believe that the new powers give us a chance to build a truly fairer Scotland.

Labour is signed up to make the new system a success, which is why we have repeatedly demanded that the delivery of a new social security system is progressed more swiftly. We are concerned that, for all the warm words we have heard so far, progress has been slow and, as a result, Scottish people who are disabled, poor, sick, or elderly, will continue to suffer.

We also have more fundamental concerns about this Bill. The Scottish Government is seeking substantial ministerial power, without adequate scrutiny or accountability mechanisms. While Scottish Labour shares the aspiration to deliver a fairer system built on the foundations of dignity and respect, we are disappointed that this Bill has failed to deliver what was meant to be landmark legislation.

As a starting point the Bill fails to take the opportunity to guarantee key commitments – banning private sector companies from delivering disability assessments, preventing winter fuel payments from being means-tested, accepting government has a duty to maximise incomes, and uprating benefits in line with inflation – in legislation. On these points, Labour is clear it will seek to amend the Bill to make good these failings.

The first Social Security Act of the Scottish Parliament *should* be a watershed moment in the progress of devolution. It should deliver for Scots who are being humiliated and mistreated by a UK Government which has cut £1.1bn from social security payments, with another £1bn to come, and for people with disabilities who are suffering “grave and systematic violations” of their rights.

Ultimately this framework legislation does not lay down a route map setting out how powers can be used to cut poverty in Scotland and improve people's lives, or how the government can gauge the success of these powers. We want to see rights-based legislation with clear entitlements, that puts money in people's pockets. This response does not intend to identify all the concerns we have about the Bill, but will set out key areas where we believe Committee is required to take action.

# Scottish Social Security Principles, Charter and Accountability

*With new social security powers on their way to the Scottish Parliament, there are new responsibilities to act in a way that is fair.*

*Labour will create a new Scottish Social Security Agency to manage these new powers. It will be based on the principles of dignity and respect, not cuts and punitive sanctions.*

*We will ensure that it undertakes its work following a rights-based, person-centred, flexible and responsive approach. Future social security policy will be developed on clear entitlements and geared towards people achieving their full rights without barriers to access.*

## Scottish Labour Manifesto, April 2016

1. Scottish Labour supports the inclusion of the social security principles on the face of the Bill, in particular the statement of intent to build a system on the foundations of dignity and respect. Our commitment to a better social security system is clear in our 2016 Scottish Parliament election manifesto, and our manifesto for the 2017 UK General Election, which included our commitment to sign the UNCRPD into UK law. As a starting point it is clear that these principles could be enhanced by the inclusion of the UN convention in Scots law.
2. The principles in the Bill go some way to underline the Scottish Government's intention to improve the experience of social security in Scotland. While they underwrite the structure of the system and place some responsibilities on Scottish Ministers and the new agency, it is clear these are not necessarily embedded and reflected across the full provisions of the Bill.
3. While the system is to be based on principles which recognise social security is a human right, the Bill assigns few rights to an applicant. For example, rights to have an automatic appeal, to receive a determination in writing, to choose between payment of assistance in cash or in kind, or to enforce the Charter at section 2 in the courts, are all absent. By equal measure, there are few duties on Ministers; for example, requiring Ministers to process an initial application in a set time, or demonstrate how their use of these powers are improving the lives of Scots.
4. We have a particular concern that principle (d) fails to honour a commitment the Scottish Government made in November 2016, when amended motion S5M-02651 was agreed to state ["that a statutory duty on the new social security agency to maximise people's incomes is necessary to ensure increased take-up by those who are eligible"](#). This followed [Scottish Labour research that up to £2bn in benefits go unclaimed by Scots each year](#). Angela Constance reiterated the government's commitment to the duty when she said ["ensuring that our new social security agency has a duty to maximise incomes"](#) would be a key way of helping people navigate the benefits system, and the government's announcement in April regarding the new agency also made clear there would be a pre-claims support and advice function. However, this duty is not in the Act. Principle (d) in the Bill proposes "the Scottish Ministers have a *role* in ensuring that individuals are given what they are eligible to be given under the Scottish social security system,". As proposed, the "duty" is very much watered down: rather than placing a responsibility on the government the Bill refers to a "role"; and, the role is limited to the Scottish Social Security system.

As defined at section 7, this refers to the newly devolved benefits defined under Chapter 2, as well as top-up payments.

5. Paragraph 50 of the Policy Memorandum claims the Bill *"reflects the Scottish Government's commitment to help maximise people's incomes and encourage the take-up of **all** benefits to ensure that those who are eligible, but who are not currently making claims, receive the benefits to which they are entitled"*. While this is consistent with Scottish Labour's intentions, the principle as drafted does not deliver the intentions described in the policy memorandum. It does not include, for instance, devolved and locally administered social security payments or exemptions such as Council Tax Reduction, Free School Meals, the Scottish Welfare Fund or Discretionary Housing Payments; nor does it extend responsibility to means tested benefits which remain reserved, for example, Tax Credits, Universal Credit, Housing Benefit, or Pension Credit – all of which boost incomes and are vital to remove people from poverty. It is vital that the principle is amended to reflect the commitment for an actual *duty* on Government, and removes the narrow scope of that duty.
6. Most problematically, principle (g), to establish a system based on efficiency and value for money jars with the other principles, and could justify unforeseen consequences in relation to 'clawbacks', 're-determinations', and powers proposed under chapters 4 and 5.
7. Principles (e) and (f) which make reference to the work of the Experience Panels, should set out an ongoing and permanent role for the panels once the system is fully devolved and operational.
8. Later in this response concerns regarding scrutiny will be outlined, however it is important to point out that the provisions in relation to accountability are woefully insubstantial and unacceptable. It is notable, and indeed concerning, that the Charter is not justiciable. The Bill does not provide applicants with rights to enforce the Charter in the courts, as such it is toothless.
9. Much more must be done to enhance the accountability of Ministers in their use of the new powers. As a starting point, it is clear that a thorough, independent review of the full Scottish social security system, rather than just the Charter, is required once the system is fully devolved and operational. This should have a wide remit which considers the support the system has provided above and beyond that required by the annual report, and indeed the relationship of the new system alongside locally administered social security, as well as UK social security policy.
10. The Bill does not set out what success of the system will look like; how it will impact the lives of those who have a relationship with the system; nor how that should be measured and what statistics should be published to track performance. The annual report and statistical account must monitor how the system functions on a variety of fronts: administratively, in accordance with the principles, in terms of equalities, and against the financial position of applicants, as well as detailed and transparent measure of all agency functions.
11. With half of the £2.8bn in annual expenditure currently spent on disability assistance, the system is vitally important to disabled people who have added living costs. It cannot be ignored that the average additional costs to a disabled person, through no fault of their own, is £550 per month. During the passage of the Child Poverty Bill, Scottish Labour sought to require Scottish Ministers to assess how their actions in meeting those targets would seek to help mitigate these costs. It is equally important that the social security system clearly gauges, and can demonstrate to disabled

people, how the assistance it provides directly contributes to meeting the added costs of their disability.

12. Again during the passage of the Child Poverty Bill, Scottish Labour sought to pay specific attention to those with protected characteristics; while the socio-economic duty will cut across all actions of Government, it is important the system should be specifically geared to support and track this duty. Scottish Labour supports proposals for a new principle which tracks the outcomes for groups with protected characteristics.

## Scrutiny & Secondary Legislation

14. Scottish Labour has substantial concerns about this framework legislation. The Bill as proposed represents a concerning and substantial transfer of newly devolved social security powers and would place them in the hands of Ministers, who would be free to design a new system by secondary legislation without appropriate scrutiny. This is unacceptable.
15. Future social security policy must be based on clear entitlements and geared towards people achieving their full rights without barriers to access.
16. Crucially, when policy is developed, it should be scrutinised with the aid of independent and expert advice, by a committee established on a transparent and statutory basis. As a matter of urgency, the Scottish Government must agree to amend the Bill to establish a statutory Scottish Social Security Advisory Committee. This is vital to ensure that Ministers are delivering policy in accordance of the principles of the Bill, and that this is good policy; indeed, this would also reflect the responses of the Consultation on Social Security in Scotland. Any new committee must have an enhanced responsibility and standing in law to tie together better links between advisors, command government accountability and strengthen Parliament to ensure that advice is publicly debated. The committee should be required to regularly advise both Parliament and government; it should consider the decision making standards of Ministers; Ministers should be compelled to modify proposals in accordance with the recommendations of the committee; and, the legislative provisions should limit the freedom of the committee to choose not to advise.
17. Without strong scrutiny mechanisms, it would be inappropriate for entitlements to be provided for within secondary legislation. The Scottish Government has decided that this makes the rules “accessible” and will mean rules can “change from time to time to reflect changes in economic and social conditions”. It means swathes of detail will have to be provided in secondary legislation, subject to the affirmative procedure. While the burden of scrutiny under the current arrangements in the Bill would fall on Parliament, ironically, Parliament and its committees would not have a right to amend or improve legislation. The weight of secondary legislation will place substantial burdens upon the Delegated Powers and Law Reform and Social Security Committees which may struggle to accommodate complex and substantial legislation. Because regulation is made by government, only for Parliament to accept or reject, the power to amend proposals remains in the gift of Ministers. There is a risk such secondary legislation could be used to evade the full scrutiny of Parliament. For people who receive assistance, the system they rely on could be vulnerable to rapid and negative change dependent on the colour or political slant of future governments, or indeed interpretation at Tribunal.
18. It is welcome that initial eligibility criteria will be considered in conjunction with those who are likely to apply through the Experience Panels, and specialists on the Disability and Carers Benefits Advisory Group; however, it is clear that further formal parliamentary consultation, scrutiny and deliberation is needed before criteria become law. At the very least, Scottish Labour believes that the Bill can be strengthened by restricting substantially the scope of the secondary legislation in the schedules; and by requiring eligibility criteria to be set and modified using the “super-affirmative” procedure, though this can only be the case so long as adequate scrutiny mechanisms are in place.

19. Regardless of the procedure used, if eligibility criteria appear in secondary legislation, the primary legislation should provide for consistent and regular consolidation, at most every four years, or upon the recommendation of the advisory committee or Parliament. Without any such consolidation the legislation may be more complicated to understand, contrary to the claims of the Scottish Government.
20. It is noted that the Scottish Government invites MSPs to consider the matter of scrutiny, and it is therefore assumed that it will propose amendments at stage 2, along with provision for information sharing gateways and 'clawbacks' (i.e. direct deductions), as well as other areas of the Bill. In this regard it would be far more appropriate and transparent for the Government to bring these forward well before the Committee completes its considerations at stage 1.

## Assistance, top-ups and new benefits

21. It is important that the Bill delivers a Scottish social security system which looks and feels different from the UK system for Scotland's most vulnerable people. The first Social Security Act of the Scottish Parliament should be a watershed moment in the progress of devolution, however Scottish Labour is patently aware that the Bill fails to deliver a system which underwrites the rhetoric and warm words of the Scottish Government.
22. In preparation for this Bill, Labour in the Scottish Parliament successfully sought and obtained the agreement of the Scottish Government to: uprate disability benefits in line with inflation; place a duty on Ministers to maximise incomes; and ban the private sector from having a role in the delivery of disability assessments. It is an unacceptable disregard for the agreement of Parliament that the Scottish Government has failed to provide guarantees in primary legislation. The people of Scotland should be assured that this, or any future government, must abide by these key commitments. While Scottish Labour appreciates the Scottish Government's intention to deliver on these commitments, this should be backed up by legislation. Scottish Labour will bring forward amendments to ensure these commitments are provided for in legislation.
23. With regard to uprating assistance in line with inflation, it is notable that responses to parliamentary questions, that reaffirm the commitment to uprate, are undermined by a [financial memorandum](#) which refers only to the power to vary assistance but fails to allude to the mechanism or frequency of uprating, or that this is guaranteed. At the very least, the Bill should place a duty on Ministers to a) have regard to the impact of inflation on the value of assistance, and b) uprate benefits on annual basis, by a set measure. In particular, further clarification is required regarding the benefits that will be uprated as the financial memorandum only states only disability and employment-injury assistance are to be uprated.
24. At present Carer's Allowance is uprated by the UK Government, and it is presumed that the component part of the Scottish block grant will be increased in-line with the indexation agreed with the UK Government. It is noted however, that in discussions with SPICe, the overall value of Carers Allowance and the supplement in 2019-20 will not increase beyond the level of Jobseekers Allowance; as a consequence, the additional support provided to carers by the Scottish Government will fall, and the value to carers will fall in real terms.
25. Scottish Labour welcomes the transposition of the power to top-up reserved benefits. In keeping with our commitment to increase child benefit by £240 by the end of the decade, and lift up to 30,000 children out of poverty, we will bring forward amendments to top-up child benefit.
26. Scottish Labour understands concerns about the way in which provisions have been transposed from the Scotland Act and is alarmed that powers to create new benefits in devolved areas have not been transposed from section 28 of the Scotland Act 2016. While the Scottish Government has barely set out possible uses for powers under this provision, it is vital that a framework is established for future use of these powers. As per the power to top-up, basic rules setting how a new benefit should be brought into legislation should be provided.



27. In response to question [S5W-10524](#) the Scottish Government states that a standard wording for all types of assistance, that assistance “may or may not take the form of money” is used. Again, the Bill disregards the intention described in the Minister’s response.
28. Entirely absent from the Bill are provisions to provide for independent advocacy. It is not accepted that the need for this intensive support will cease to exist under the current system, even if there are fewer face to face assessments and the private sector is removed from the system; Scottish Labour agrees that provision in this area is required and will bring forward amendments. Independent advocacy is vital to ensure the system is responsive to the needs of disabled people. It can help them communicate exactly the type of challenges they experience and how it affects their independence, better making the case for the assistance they are seeking. Having funded the successful Welfare Advocacy Support Project, the Scottish Government is aware of the value of independent advocacy services and the improved outcomes it achieved in relation to ESA and PIP.
29. By equal measure, provisions in Schedule 3, which would allow for the means-testing of winter heating assistance is unacceptable. While the memoranda identify this power is provided for to assess the recommendations of the Fuel Poverty Strategic Working Group and Rural Fuel Poverty Task Force, this power is inconsistent with commitment made in the SNP 2017 General Election manifesto: “We will protect the Winter Fuel Payment” and should be removed from the Bill.

## Operational and Administrative Functions

30. This is not an exhaustive list of the concerns and necessary amendments which Labour has discussed with key stakeholders and third sector organisations since the Bill was lodged. Those organisations with extensive knowledge of welfare rights, and indeed the welfare reform that has taken place since 2010, are best placed to detail to Committee where alteration is needed.
31. Outlined earlier in this response, it is necessary that the legislation places a duty to maximise incomes of those who contact the agency. The Scottish Government has stated that its agency will have a pre-claims and support function, but more must be done to confirm this function in the Bill. In particular, it would be expected that gateways to facilitate information sharing would be included in the Bill; if information can be shared in a way that is safe, secure, and done so in a positive way, individuals can be helped to receive their entitlements from the public sector. It is appreciated that the Scottish Government intends to bring forward these amendments at stage 2, however it would be more appropriate if this is done before Committee concludes consideration at stage 1.
32. As part of this function, and indeed the standard determination and redetermination processes, it would be reasonable to see a duty on Ministers to exhaust all opportunities to collect evidence from the applicant at section 20; this should also be accompanied by statutory timescales (set in secondary legislation, by affirmative procedure) for the initial determination, in section 19. Notice of determination should always be made in writing (section 22).
33. Scottish Labour has substantial concerns about the redetermination processes outlined in the Bill. Scottish Labour believes that these arrangements mirror the current mandatory reconsideration process established by the UK Government which has caused misery to thousands of sick and disabled people across Scotland leaving them without the help they need for weeks on end. The process systematically blocks people advancing to an appeal, has left disabled people destitute and suffering with no income. Scottish Labour believes this part of the Bill should be substantially overhauled to ensure applicants should have a statutory and automatic right of appeal in law. Proposals for payments of short term assistance are welcome, but this should be automatic and non-recoverable. Powers to make regulations at section 23(2)(b), to change the timescales for redetermination should be made by the affirmative procedure; applicants should not be subject to long, stressful waits.
34. By equal measure, provision for overpayments (“assistance given in error”) are worrying. While SPICe has clarified it is the government’s intention that prescription begins at the point an error is made, not the point it is determined, the Bill fails to deliver this, and the proposal must be improved to make good this intention.
35. This aspect of the Bill is distinct from the UK social security overpayments regime. That regime is far more specific and expansive about the circumstances where an overpayment is determined, and while being unduly punitive it avoids the use of common law. Committee will have to consider in detail if this approach needs to be better balanced in order to afford protection to the applicant. The circumstances in the Bill may, on initial interpretation, preclude recovery under the system where there has been an unforeseen error, for example IT problems, and the Scottish Government should consider whether this is the intention behind the provisions. Mirroring the

UK Government's changes to the overpayments regime, the provisions would mean that payments can be recovered from an individual where Ministers have made an error; this is unreasonable and unacceptable.

36. Mechanisms for disregard are required to accommodate circumstances where Ministers have made an error, but equally where it would be a waste of public resource to recover a small sum; due to the variability in assistance paid, this should be equivalent to a number of weeks entitlement, rather than a set nominal value.

## Conclusion

37. Scottish Labour is clear that this Bill is unacceptable in a number of areas and requires thorough and substantial improvement to live up to the expectations for what should be landmark legislation. It cannot be restated enough that the first Social Security Act of the Scottish Parliament should be a watershed moment in the progress of devolution.
38. This Bill does not set out the clear entitlements Scotland's unemployed, disabled, poor and elderly will have to rely on; or how the aspiration to deliver a system built on dignity and respect will look and feel in practical terms. Scottish Labour is clear that key commitments the Scottish Government has made over the past year to the people of Scotland and to key stakeholders, in the media and indeed in Parliament, should be guaranteed and underwritten in law.
39. It is so disappointing this framework legislation does not lay down a route map setting out how powers can be used to cut poverty in Scotland, and improve people's lives. The government has failed to set out how it will gauge the success of these powers or hold itself accountable to the people who rely on the system, the wider public and Parliament. It is alarming Ministers are willing to propose a Bill which grants substantial power to the Scottish Government while failing to set out how this will be scrutinised in practice.
40. While this paper has set out a number of areas where Scottish Labour will seek to amend this Bill, we are clear that the response provided here is not exhaustive but does highlight the approach we would take. It is for the Committee to consider a number of areas in full, and to ensure that the system is suitably distinct from the current UK social security system, for instance with regard to redeterminations and the recovery of overpayments.
41. Scotland now has the chance to deliver its own social security system which is based on the principles of dignity and respect. It is a surprising omission for the Bill not to transpose the power to create new benefits in devolved areas when it could be used as a key tool to reverse the cruel and inhumane treatment passed down by the Tory Government.
42. Labour is signed up to make the new system a success, and take the chance to build a truly fairer Scotland, which is why we have repeatedly demanded that the delivery of a new social security system is progressed more swiftly. This Bill, unless improved, would represent a failure of the Parliament and the Scottish Government to take the opportunity the first Social Security Act of the Scottish Parliament should bring.

## The Scottish Labour Party