Health and Social Care Alliance Scotland (the ALLIANCE)

Scotland's social security system Enhanced Administration and Compensation Recovery

26 October 2022

The Health and Social Care Alliance Scotland (the ALLIANCE) welcomes the opportunity to respond to this consultation. The ALLIANCE considers social security to be a fundamental human right, and one which is essential to ensuring that disabled people, people living with long term conditions, and unpaid carers are able to fully realise social and cultural rights including the right to independent living. Social security is also one of the key tools to reduce poverty across a diverse range of groups in addition to those previously mentioned, including women, children and young people.

Payments so far devolved to the Scottish Parliament have represented a substantial improvement upon the previous reserved social security system. The positive impact of new initiatives such as the Scottish Child Payment have been widely recognised, whilst the more dignified, rights based approach that is being taken to disability and carer payments is welcome.

The ALLIANCE strongly support continuing to strengthen Scotland's social security system, including via widening eligibility, increasing payments, and improving administrative processes. We welcome many of the proposals put forward in this consultation and recommend that:

- The Scottish Child Payment should change from a "top-up" payment to one with its own statutory basis, allowing the Scottish Government greater flexibility in administering the payment.
- Individuals should be given more choice and control throughout the re-determination process, including the ability to withdraw a request for re-determination and to challenge any re-determinations arising from a Social Security Scotland error on the same basis as the initial determination.
- Where it is possible to do so without negative impact on payments, re-determinations arising from a Social Security Scotland error should be able to end a Tribunal process.
- Payments be made to DWP-agreed appointees on an interim basis whilst Social Security Scotland completes its own appointee process.
- Overpayment recovery processes should avoid formal legal proceedings where possible, and individuals should have the right to challenge liability for overpayments.

- Independent scrutiny and advice should continue to be provided by different bodies, recognising the distinct nature of these two functions and the possible conflict of interest that may arise if they were combined.
- Advice on Employment Injury Assistance should likewise be provided by a separate body.

Response

Question 1: Do you agree or disagree that it would be useful to be able to make changes to Scottish Child Payment that were not limited by the current approach that relies on 'top-up' powers??

Agree.

Question 2. Please give reasons for your answer.

The ALLIANCE recognise that rapid and streamlined implementation of the Scottish Child Payment was essential, and that the approach using "top up" powers was justified in that context. However, we would agree that in the longer term, maintaining an approach which ties the Scottish Child Payment to qualifying payments reserved to the UK Parliament could prove to be a significant limitation. In particular, we would be concerned about the risk that the UK Parliament might narrow the eligibility for a qualifying payment, resulting in a sudden loss of Scottish Child Payment eligibility for some individuals. It is also likely that some families that would be within the Scottish Government's policy intention to include within the Scottish Child Payment are already missing out due to not receiving any of the qualifying payments.

Question 3. Please give your views on the advantages that could arise from creating this additional flexibility.

Grounding the Scottish Child Payment in primary legislation as a social security payment in its own right would give the Scottish Government greater ability to set broader eligibility criteria, reaching people who would benefit from the payment but who are not currently receiving or eligible for a qualifying benefit. As per our response to the previous question, we also consider that it will allow the Scottish Government to protect entitlement to the Scottish Child Payment even should a future UK Government decide to narrow the eligibility criteria for qualifying payments.

In addition, there will also be greater flexibility to consider options that would avoid the "cliff edge", where social security payments are withdrawn in their entirety as income increases. Under current rules, it is possible for a parent to earn additional income that renders them ineligible for Scottish Child Payment, but which is lower

than the £1,300 per year that they would receive per child under current arrangements, thus resulting in a net loss of income. This could have severe impacts on the families in question, potentially worsening rather than alleviating poverty. An approach such as a taper, where payment would be gradually reduced as income increases, would only be possible if Scottish Child Payment was a standalone payment, but would help to reduce poverty.

We also agree with the point made in the consultation paper that this would allow for closer and easier alignment between the Scottish Child Payment and other forms of devolved social security.

Question 4. Please give your views on the disadvantages that could arise from creating this additional flexibility.

The additional flexibility arising from grounding Scottish Child Payment in primary legislation is likely to require additional administration, resulting from the need to determine eligibility for the payment by itself, and potentially from broadened eligibility criteria. We do not consider this to be a pressing disadvantage, and believe that the focus should be on outcomes, but acknowledge the likely requirement for additional staffing resource for Social Security Scotland.

Question 5. Do you agree or disagree that a client should be able to withdraw a re-determination request before Social Security Scotland has made a re-determination decision?

Agree.

Question 6. Please give reasons for your answer.

Individuals accessing social security should be given choice and flexibility as to how to and if to progress administrative aspects of their payments, including to withdraw applications or requests with reasonable notice. The re-determination process can be stressful for individuals going through it, and as noted in the consultation document, they may change their mind after receiving further advice or having thought about it further.

If individuals are given the right to withdraw a re-determination request, it is important that this right is appropriately communicated to them, alongside any other relevant information. This should include reminding them that they will no longer receive any short term assistance that was related to the re-determination, alongside the reassurance that they will not be required to repay any payments they had received prior to their decision to withdraw the request. Given this, it is particularly important that people going through a re-determination are able to access

independent advocacy and independent advice before making a decision to withdraw their request.

Question 7. Do you agree or disagree that a new determination should only be made if it gives the client everything they could get from the Tribunal?

Agree.

Question 8. Please give reasons for your answer.

The ALLIANCE agrees that, where rectification of a Social Security Scotland error would enable a determination for an award to be made, that determination should come into effect without requirement for the appeal to conclude. In addition to reducing the emotional and health impacts on the individual who would otherwise have to attend a Tribunal hearing, this would also reduce the administrative burden on Social Security Scotland and the Tribunal by relieving them of the need to continue appeals processes that have already identified a satisfactory alternative resolution.

Question 9. Do you agree or disagree that a client should be asked for their consent before a new determination is made?

Agree.

Question 10. Please give reasons for your answer.

In line with our response to an earlier question, we consider this to be a matter of ensuring maximum personal choice and flexibility throughout the social security system. The reasons as to why they will be entitled to end the appeal process by accepting the determination should be made clear to them, as well as their right to continue the appeal if they so choose. They should likewise be informed, in a neutral manner, as to the implications for their payments if they proceed with either option.

Question 11. Please provide your views on what challenge rights the client should have on the new determination.

When a determination is made which ends an appeals process, the individual should have the same challenge rights as they would otherwise have had. For example, if the Tribunal would otherwise have been considering a determination, they should be able to request a re-determination and/or an appeal. If the Tribunal had been considering a re-determination, the individual should be able to request an appeal if, on further reflection, they disagree with the re-determination they had previously accepted.

Question 12. Do you agree or disagree that Social Security Scotland should be able to make payments to a DWP appointee until it completes its appointee process?

Agree.

Question 13. Please give reasons for your answer.

Timely and adequate payment of social security entitlements is an essential component of a dignified system which reduces poverty. We agree that where it is possible to get payments to affected individuals earlier via a DWP appointee, that option should be pursued. In some cases, the time it would take to confirm the appointee as appropriate for Social Security Scotland could result in additional hardship, or payments not being available when they are needed most. This is especially relevant in circumstances where a terminally ill person has made an application under the Special Rules.

We recognise there is a potentially difficult balance to be struck in this area, including the example given of a payment being made to an appointee who is found to be unsuitable. We have also heard some concerns that individuals who have objected to their DWP appointee have, upon requesting to the DWP that they be changed, been told that requires the appointee to agree. That could put the person for whom the payments are intended in a difficult situation, if they do not feel their appointee is acting in their interests. These issues, and how to address them, should be carefully considered by the Scottish Government.

Question 14. Do you agree or disagree that the Scottish Government should introduce rights of challenge against Social Security Scotland's decision that someone is liable to repay an overpayment?

Agree.

Question 15. Please give reasons for your answer.

In line with answers to previous questions, we agree that people accessing social security should be able to avoid stressful situations such as court proceedings where possible. As such, they should be able to challenge their liability for an overpayment without having to wait for civil court proceedings to be brought by Social Security Scotland seeking recovery.

Question 16. Please provide your views on the most appropriate way to hear challenges against Social Security's decisions that someone is liable to repay an overpayment, bearing in mind that the aim is to avoid clients having to go to court.

Enabling individuals to challenge overpayment liability though the same procedures as they would challenge a determination would be a logical approach. In particular, allowing them to request what would effectively amount to a re-determination of their liability would offer an opportunity for rectification without needing to involve either a Tribunal or civil court. Being granted the right to appeal liability for an overpayment, although still involving legal proceedings in the form of a Tribunal, would also likely allow for a less stressful means of resolving the issue.

Question 19. Do you agree or disagree that Social Security Scotland should have available an alternative to prosecution where small sums of money have been obtained illegally?

Agree.

Question 20. Please give reasons for your answer.

Seeking recovery of illegally obtained sums through alternative routes would avoid significant costs and also cause less distress to the individual involved. It is however important that the Social Security Scotland adhere strictly to the stated approach of not criminalising or penalising genuine errors, and that people retain the right to challenge an accusation of fraud.

Question 21. If you agree, please describe what alternatives to prosecution you consider might be appropriate where small sums of money have been obtained illegally?

In line with responses to earlier questions, and the Scottish Government's stated preference to avoid court proceedings wherever possible, approaches such as administrative penalties, as are currently available to the DWP, may be appropriate. However, it is important that if administrative penalties are considered, that people suspected of fraud have access to independent advice and independent advocacy, to ensure they are clear of what they are accused of and that they retain the right to challenge the decision if they disagree with it.

Question 22. Do you agree or disagree that third parties, such as appointees, should be included within the scope of statutory liability for overpayments in the way described above?

Agree.

Question 23. Please give reasons for your answer.

Where a third party is responsible for a recoverable overpayment, for example one they have fraudulently obtained, it would be unfair for liability to fall on the client. In

such circumstances, it would be reasonable for liability to fall on the responsible third party. It is however important that the Social Security Scotland adhere strictly to the stated approach of not criminalising or penalising genuine errors.

Question 24. To what extent do you think the current arrangements for the provision of independent scrutiny and advice work effectively?

Partially.

Question 25. Please give reasons for your answer.

The Scottish Commission on Social Security (SCoSS) and Disability and Carers Benefit Expert Advisory Group (DACBEAG) both play valuable, and distinct, roles in the Scottish social security system. As detailed in our answer to question 26, the ALLIANCE recommends that both SCoSS and DACBEAG are retained as separate entities.

To enable the current arrangements to better fulfil their functions, we recommend additional resources are made available to increase the capacity of the bodies, in particular for SCoSS. Since its formation, SCoSS has existed as a body of four part-time commissioners, with a very small secretariat. Although its expert advice and scrutiny of regulations has been exemplary, the lack of capacity has prevented it from engaging with stakeholders and people with lived experience as much as it could.

Additionally, we would recommend that draft regulations are submitted to SCoSS with a longer timescale for their advice to be provided on them. The extremely short timescales given to SCoSS to complete its work has meant that it has only able to do very short and limited consultations with stakeholders.

Question 26. If the current arrangements were changed, would it be right to:
(a) maintain separation between independent scrutiny and advice
(b) combine these functions to maximise the effective use of independent expertise and secretariat resources
(c) take a completely different approach.

(a)

Question 27. Please give reasons for your answer.

Advice and scrutiny are essential components of Scotland's social security system, particularly in light of the Scottish Government's commitment to delivering a more compassionate, dignified and rights based approach than the UK Government has. To truly deliver on this commitment, policy development must be informed by expert

advice and scrutiny, including from experts by lived experience. However, it is important to understand that advice and scrutiny are distinct functions. Typically, advice informs the initial development of proposals, whilst scrutiny looks in detail at the precise details of implementation.

At a recent discussion between third sector organisations regarding this consultation, one attendee noted their concerns that combining advice and scrutiny into one body would lead to that organisation "marking their own homework". Whilst scrutiny should take the advice issued to the Scottish Government, and the degree to which it was applied, into consideration, it should do so from a position of independence that considers policies and legislation from a wide variety of angles, rather than one where its primary concern may be to see its own advice followed.

Whilst the ALLIANCE recognise the Scottish Government's concerns regarding the resourcing of scrutiny and advice bodies, as well as the availability of appropriate experts, we would argue that the development of Scotland's social security system should be taken as an opportunity to further develop expertise and capacity in this area. If the Scottish Government does not invest in scrutiny and advice bodies, then this risks creating a self-fulfilling cycle whereby individuals do not consider it worth their while developing or offering their expertise, thus limiting the number of people available to fill these roles, which then makes it difficult to maintain such bodies.

Question 28. There are different options for organising independent advice and scrutiny e.g. formal arrangements in the form of a statutory body like a non-departmental public body and paid board members, or informal arrangements at Ministerial invitation with members participating on a voluntary basis.

Please describe your views on how independent advice and scrutiny should be organised in the future.

As a matter of principle, the ALLIANCE supports paying individuals for their time, expertise and knowledge, particularly in circumstances where the time commitments are sustained and substantial. Formal, statutory footing for advice and scrutiny bodies would seem to offer the best platform for doing so, as well as for ensuring that individuals involved are appropriately supported by a reliable administrative base.

However, we recognise that renumeration in circumstances such as these can often have complex interactions with the reserved components of the social security system, sometimes potentially even leaving individuals worse off than if they were not paid. Rather than choosing between a paid, statutory model or a voluntary, informal model, the Scottish Government should consider a combined approach, whereby appropriately renumerated board members act as the core of advice and scrutiny organisations, with a correspondingly higher level of engagement and time

commitment, whilst a broader pool of individuals can be drawn upon on a policy-by-policy basis to offer their expertise over a more limited time frame.

Question 29. Do you agree or disagree that the public body or bodies providing the Scottish Government with independent scrutiny and advice of Scottish Social Security should also provide advice in the future on Employment Injury Assistance?

Disagree.

Question 30. Please give reasons for your answer.

The role of the current Industrial Injuries Advisory Council is to make recommendations for which 'prescribed diseases' should be covered by Industrial Injuries Disablement Benefit, which is due to be replaced by Employment Injury Assistance. This is a very different function to those played by SCoSS and DACBEAG and requires very different specialist knowledge from either of those bodies, in particular clinical and workplace injury expertise. The ALLIANCE recommends a discrete Scottish Employment Injuries Advisory Council should be created to fulfil this function.

Question 31. Do you agree or disagree that requests for a re-determination should no longer be able to be treated as valid where they are made more than a year late and the reason for that delay is COVID-19?

Don't know.

Question 32. Please give reasons for your answer.

From the consultation document it is unclear how many requests for a re-determination have been made more than a year after the original determination due to COVID-19 or have refused due to being 'timed out'. The ALLIANCE recommends that the Scottish Government conducts research using cases where either of these situations have occurred, and consultation with the Social Security Experience Panels in deciding whether it would be valuable to make changes to the rules around timescales.

Question 33. Do you agree or disagree that applications for an appeal should no longer be able to be treated as valid where they are made more than a year late and the reason for that delay is related to COVID-19.

Don't know

Question 34. Please give reasons for your answer.

As detailed in our answer to a previous question, The ALLIANCE recommends that the Scottish Government conducts research using cases where either of these situations have occurred, and consultation with the Social Security Experience Panels in deciding whether it would be valuable to make changes to the rules around timescales.

Question 35. Do you agree or disagree that applications for assistance to Social Security Scotland should no longer be able to be treated as made on time where they are made late and the reason for that delay is related to COVID-19?.

Don't know

Question 36. Please give reasons for your answer.

As detailed in our answer to a previous question, The ALLIANCE recommends that the Scottish Government conducts research using cases where either of these situations have occurred, and consultation with the Social Security Experience Panels in deciding whether it would be valuable to make changes to the rules around timescales.

Question 37. Do you agree or disagree that the ability to apply late, where deadlines for making applications for assistance apply, should be extended to reasons other than COVID-19.

Agree.

Question 38. Please give reasons for your answer.

If exceptions to the late application rules exist, these should apply equally across the whole social security system. This would provide consistency for individual applicants, who if they were eligible for multiple payments would be working within a single framework, as well as for administrative staff and for similar reasons of consistency.

About the ALLIANCE

The Health and Social Care Alliance Scotland (the ALLIANCE) is the national third sector intermediary for a range of health and social care organisations. We have a growing membership of over 3,000 national and local third sector organisations, associates in the statutory and private sectors, disabled people, people living with long term conditions and unpaid carers. Many NHS Boards, Health and Social Care Partnerships, Medical Practices, Third Sector Interfaces, Libraries and Access Panels are also members.

The ALLIANCE is a strategic partner of the Scottish Government and has close working relationships, several of which are underpinned by Memorandum of Understanding, with many national NHS Boards, academic institutions and key organisations spanning health, social care, housing and digital technology.
Our vision is for a Scotland where people of all ages who are disabled or living with long term conditions, and unpaid carers, have a strong voice and enjoy their right to live well, as equal and active citizens, free from discrimination, with support and services that put them at the centre.

The ALLIANCE has three core aims; we seek to:

- Ensure people are at the centre, that their voices, expertise and rights drive policy and sit at the heart of design, delivery and improvement of support and services.
- Support transformational change, towards approaches that work with individual and community assets, helping people to stay well, supporting human rights, self management, co-production and independent living.
- Champion and support the third sector as a vital strategic and delivery partner and foster better cross-sector understanding and partnership.

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