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A new future for social security: response to the consultation document

Professor Paul Spicker

1. This submission covers general issues related to the statement of principles, broader issues of policy and general administrative arrangements. The key points are these:

- The aims of benefit systems are complex. Oversimplification threatens to compromise important principles. (paras 5-7)
- Terminology can be tested to see if it has unexpected implications. (para 11)
- Benefits are only one form of support; sometimes direct provision is preferable. (para 13)
- If benefits are to get to the right people, entitlement needs to be clearer and the terms on which benefits are delivered need to be less sensitive to personal differences. (para 22).
- It should not be assumed that citizens must register claims before they can receive benefits. (paras 3, 21)
- Aspects of administration can be delegated to third sector agencies (paras 14, 15)
- There have to be systems for independent scrutiny, rapid review and redress. (paras 17, 18, 23, 24)
- Interactions with other benefits should be avoided. (paras 7, 8, 25, 26)
- Transitional arrangements create complexities. They can be avoided by buying out rights. (paras 19, 20)

This submission does not include proposals for specific benefits: those will be discussed at future events.

I The statement of principles

A Claimant Charter?

2. The statement of principles puts considerable emphasis on the sensitive use of language. Beyond that, the Scottish Government will need to consider the appropriate terminology, because some words and phrases carry implicit assumptions.

3. One of the key assumptions made in the description of people as ‘claimants’ is that they will be making a claim. The assumption made about almost all benefits is that they are a “subjective right”, which can only be exercised through the initiative of the potential beneficiary or a person acting directly on their behalf. There are similar assumptions in the statement of outcomes, which refer more than once to the process of registering a claim and satisfying an administrative process. The process of claiming creates barriers to service

delivery and receipt: we do not go to people who may have suffered a heart attack and ask, “would you like to fill this form to register a claim for medical services?” The scope for automatic issue of benefits is considered in para 21 of this submission.

4. A more appropriate name for the “Claimant Charter” might therefore be, “A Charter of Rights to Social Security.”

The statement of “outcomes”

5. The ‘outcomes’ described on page 16 include general principles (e.g. dignity, empowerment, entitlement), elements of process and method (e.g. person-centred, targeting, choice), and outcomes (e.g. on poverty, inequality, resilience). Process and method should not be fixed in a statement of principle, because methods may need to be reconsidered as circumstances change.

6. The aims of social security provision are complex and while it is understandable that government might look for a well-ordered presentation, there are dangers in adopting any simple formula. In relation to disability, for example, the consultation notes, correctly, that current tests of eligibility use care and mobility as ‘proxies’ for the impact of a disabling condition and extra costs (pp 39-40), but those are not the only aims which have to be met. They include, amongst others:

- raising low income
- social protection/insurance
- support for carers
- special needs, such as mobility
- extra costs
- support while out of work
- compensation for injury
- compensation for long term low income
- support for rehabilitation
- promoting employment
- desert, and
- paying for social care.

Any reform that is based on a small handful of principles, such as extra costs and care needs, is likely to override others that are equally valid.

7. The suggestion that the social security system should be “effectively integrated with other services to give a person centred service” is well-intentioned but it may be inappropriate. Person-centred benefits are intrinsically complex, and there are times when universal, impersonal benefits are to be preferred.

8. Money payments are ‘fungible’; they can be mixed together from different sources, and becomes indistinguishable in practice from those sources once received. It will almost certainly be better if the service is not “aligned” with the reserved system, but stand apart from it, so that benefits delivered in Scotland were not affected by the rules for reserved benefits or

vice versa.

The use of language

9. The consultation asks whether certain words or phrases should be avoided. Attempts to change stigmatising language rarely succeed, if the condition they refer to is itself stigmatised.¹ In the past, expressions which have been introduced in the hope of marking a new beginning - Unemployment Benefit, National Assistance, Supplementary Benefit, Invalidity Benefit - have come into disfavour in their turn. The last three UK governments have taken to using the word 'welfare' in the American sense to refer to social assistance, and that term should probably be avoided on that basis.

10. "Customers" are often referred to; the term was favoured by the DWP until recently, on the grounds that it could help to orient their work towards personal service. Customers have a relationship with providers that is voluntary and contingent; one of the main options that customers have is the option of exit. The term is not well-chosen; it fails to describe the relationship between citizen and social security provision.

11. Other terms, such as benefits, allowances, and pensions, are well understood and can probably be used without marked problems. It is probably true that "pensions" are understood to be long-term, and if the Scottish Government wished to introduce a long-term benefit for people with disabilities, it is plausible to suppose that it might be called a 'disability pension' (a term which is not currently used in the system). Rather than simply assuming the implications of such terminology, however, it may be helpful to use existing empirical tests (such as the 'semantic differential') to determine whether a term actually does have positive or negative connotations.

II Devolved Benefits

12. The Scotland Act does not, despite appearances, devolve responsibility for specific benefits; it devolves only the power to deliver benefits in general terms, without either a requirement to deliver those benefits on specific terms, or any direct effect on the powers of UK central government to deliver benefits in the same area. The combination of Scotland's new powers, to create supplements to reserved benefits and new benefits within the scope of devolved responsibility, makes it possible for the Scottish Parliament to consider different patterns of delivery from the existing system.

Cash or kind

13. In its nature, social security delivers cash benefits, so that people can buy appropriate goods and services in the economic market. In many circumstances there is a choice to be made between providing the service - free school meals, prescriptions - and offering people social security payments instead. (Some European systems give cash support for health care, rather than providing medical services directly.) There are occasions when services might be

¹ See P Spicker, 1984, *Stigma and social welfare*, Beckenham: Croom Helm.

given in place of cash - for example, funeral payments could be addressed by providing facilities for burial or cremation, rather than through cash payments. It does not follow, however, that the social security agency should deliver the goods itself; the decision needs to be taken at a higher level by the Scottish Government.

The engagement of other agencies in service delivery

14. The system of social security in the UK has developed primarily as a system of social rights established and delivered by government agencies. By contrast, many of the systems in continental Europe offer particular rather than general rights - rights based in individual contracts between individuals and autonomous social security agencies, often operated by employers, trades unions or third sector bodies. The Scotland Act denies to the Scottish Government a range of activities that are open to independent agencies in the third sector - but by the same token, it may be open to the Scottish Government to foster arrangements of that sort.

15. It is possible to envisage circumstances where the Scottish Social Security Agency attempted to establish a nationwide service, with accessible outlets for every community; but the scope of the agency would need to be extensive, diffuse and extremely expensive. Several factors argue against this - the limited remit of the devolved benefits, the geographical dispersion of the population and the need to respond to limited capacity relating to daily activities. There is a good case to extend the Agency's administrative capacity by delegating activity to selected providers. Examples might include

- accepting identification and verification evidence from trusted providers, such as a housing provider, a local authority or an advice agency. (In France this work is recompensed on a fee-for-case basis.)
- encouraging providers or local government to provide access to IT, document copying, telephone links and postal addresses
- delegating personal interviews or domiciliary support to such providers where they have contact with the individual.

These are all examples of providing supplementary services directly to people who engage with social security. This is not the same as privatisation of whole functions (as in the Work Programme), where private operators have strong incentives to select which operations they focus on.

Independent scrutiny

16. Social security legislation is complex - often unnecessarily so. Fimister comments that

"there is a certain macho 'complexity culture' pervading the drafting of benefit law ... As an article in the Law Society Gazette put it ... 'Cross-references – to sub-sections, to other sections, to schedules, to a myriad of regulations and indeed to other Acts proliferate. One finds exceptions to exceptions. Double and even triple negatives almost seem like a badge of honour: No self-respecting section is complete without one' ... Or as Lord Justice Glidewell put it, in a case concerning the severe disability

premium... 'it is deplorable that legislation which affects some of the most disadvantaged people in society should be couched in language which is so difficult for even a lawyer trained and practising in this field to understand.'²

The revised schedule 5 of the Scotland Act is an illustration.

17. The Scottish Parliament has limited capacity to subject regulations to detailed scrutiny and some form of examination is essential. In the UK national system, this work is done by the independent Social Security Advisory Committee. The SSAC is not a perfect model. Its self-imposed emphasis on consensus reports undermines the role of its experts, and the committee consequently declines to record significant disagreements that elected policy-makers should be aware of. Nevertheless, if there were no such body the quality of legislation would be impaired.

18. Subsequent scrutiny depends on systems of redress, primarily the Scottish Public Services Ombudsman and the courts. Both systems have their weaknesses. The marked expansion of the scope of the SPSO and its slow rate of response makes it inappropriate for redress for individual claimants. The courts are expensive and complex. Both systems are of course within the power of the Scottish Parliament to refine and improve. There needs to be rapid recourse to justice. To be consistent with the principles of natural justice, it must offer citizens the opportunity to make their case and hear the arguments put against them.

Transitional arrangements.

19. The consultation document mentions rightly the need to ensure a smooth transition in the operation of benefits. Any alteration or improvement in the structure of benefits is likely to make some people better off, and others worse off. Any change which makes some people better off can only be done without making someone else worse off if the total level of expenditure increases. There is a tendency, too, for reforms to be limited by the 'laid table' - the sense that whatever exists is justifiable and must be maintained in the future.

20. Transitional arrangements can have the unfortunate effect of adding to the complexity and unfairness of the system - examples include the retention of pre-1996 rules in Housing Benefit or the unequal treatment of claimants for the mobility component depending on their age at the time of the claim. An alternative, previously advocated by the House of Commons Work and Pensions Committee, might be to buy out existing rights rather than to maintain multiple transitional strands of entitlement.³

² Cited N Bateman, 2006, *Practising welfare rights*, London: Routledge, p 19.

³ House of Commons Work and Pensions Committee, 2007, *Benefits simplification*, HC 461, at <http://www.publications.parliament.uk/pa/cm/cmworpen.htm>

III Operational Policy

Automatic delivery of services

21. Paragraph 3 refers to the issues raised in the claiming process. The requirement to make a claim is associated with a series of barriers to benefit receipt. At times it may be appropriate not to require the applicant to initiate a claim, but for assistance to be offered proactively (for example by supplementing existing provision). An experiment with the automatic delivery of Pension Credit, delivered without requiring a prior claim, showed some improved takeup but raised questions about the accuracy of payments.⁴ The example is not persuasive in itself: Pension Credit is complex and heavily subject to error. It does however show that automatic delivery is both conceivable and of sufficient interest for the DWP to experiment with it. In the case of benefits for disability, for example, it may be possible to offer payments and services relatively automatically for certain groups, possibly on referral by a recognised professional, or when it appears to a responsible officer that it is appropriate to deliver the service without waiting to be asked - as it would be in the delivery of health services.

Fraud and error

22. It is possible to 'design out' many errors (p 105). We can see, for example, that Pension Credit has more than fifty times the rate of error associated with Retirement Pension, a benefit which goes to people in similar circumstances. In relation to Pension Credit, overpayment through fraud stands at 1.5 per cent, customer error at 1.5 per cent and official error at 2.1 per cent, making 5.1 per cent altogether. By contrast, the equivalent figures for State Pension are 0.0 per cent, 0.1 per cent and 0.0 per cent. (Underpayments in Pension Credit are currently assessed at a further 2.3%. The figures for underpayment are likely to be an underestimate, because DWP estimates of error exclude claimants who are denied the benefit altogether.) The reasons for the difference between the two lie in the complexity of the eligibility rules (especially relating to income and capital), lack of clarity about entitlement, and the liability that circumstances will change. The State Pension works so much better because its purpose is clear, it is delivered long term and it is less sensitive to individual circumstances. If benefits are to get to the right people, entitlement needs to be clearer and the terms on which benefits are delivered need to be less responsive to individual difference. This goes in the opposite direction from many recent reforms in the UK.

Complaints, reviews and appeals.

23. The process of review presents major difficulties. The first problem is in establishing contact to exchange information; the registration of online information, the closure of local offices and increasingly restricted use of telephone contact makes it difficult to enlist the aid of a human being. In the new Universal Credit system, officials in Jobcentre Plus are not

⁴ L Radford, 2012, Quantitative evaluation of the Pension Credit Payment Study, Department for Work and Pensions, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/214583/rrep796.pdf

permitted to take or act on information from claimants, who have to be directed back to the online system if (for example) they move house or find work. The second problem lies in the obstacles to internal review: officials are not trusted to correct errors. It has long been true of the culture of the benefits system that those who operate at the centre complain that officials fail to comply with their instructions, while those who work in the offices have to find ways round the inadequacies of the same centralised systems to make them work. The tendency has been to put the onus of making corrections on claimants: the system of ‘Mandatory Reconsideration’ is mandatory on claimants, who have to go through the formal process of registering a claim for consideration. The Social Security Advisory Committee’s report on MR identifies many of the problems with this process - for example, the need for claimants to put in multiple requests to cover a series of decisions.⁵ The effect of mandating an additional process prior to any appeal does not act to increase official scrutiny (which took place before any appeal in the former system) but it does impose a barrier on claimants seeking redress. Then, because this stage is a mandatory process for claimants, there is a delay in correcting any error: barriers to access are obstacles to justice, and justice delayed is justice denied.

24. The third problem is the most fundamental. Decisions made against a claimant are implemented before any response or contrary case has been considered. It is debatable whether the way that the DWP deals with errors is lawful. One of the central precepts of ‘natural justice’ is *audi alteram partem*, the principle that people must hear the arguments against themselves and have the opportunity to respond to them. This does not happen in social security: sentence first, judgment afterwards. That is why the UN Committee on Economic, Social and Cultural Rights has just condemned aspects of the UK system for “the absence of due process”, in breach of its obligations under the UN Charter.⁶ The Scottish Parliament is responsible for legal system, and has it in its power to offer rapid and appropriate access to judicial review of administrative action.

Residency and cross-border issues

25. The consultation paper asks how it can make sure that no-one is able to make a ‘double claim’. The UK system currently has a number of ‘income replacement’ benefits, preventing people from getting more than one basic benefit. As things stand, if the Scottish Government awards extra payments to carers, the effect may well be to prompt deductions in other payments. This, rather than ‘double payment’, is what needs to be avoided.

26. The most practical way to coordinate the efforts of the Scottish Government and the UK system is for each to operate with minimal coordination, each disregarding income from the

⁵ Social Security Advisory Committee, 2016, Decision making and mandatory reconsideration, London: SSAC.

⁶ UN Committee on Economic, Social and Cultural rights, 2016, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, para 40
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGBR%2fCO%2f6&Lang=en

other. The point was made in para 8 that money benefits are ‘fungible’; they can be sensibly added together from different sources, and do not need to be ‘coordinated’ in any other sense. Any attempt to adjust the interaction of these benefits with other benefits delivered elsewhere and outwith the control of the Scottish Government will lead to complexities, anomalies and potentially some perverse effects (such as the reduction of entitlement as a penalty for attempts to increase benefits).

***Lobbying (Scotland) Act 2016.** This consultation response is by Professor Paul Spicker. Professor Spicker is an Emeritus Professor of the Robert Gordon University, writing and commenting about social security policy. This submission has been prepared in an independent capacity, and is not made for payment; consequently it does not fall within the scope of the Lobbying (Scotland) Act 2016. However, Professor Spicker has previously been retained to advise and represent the interests of the Scottish Federation of Housing Associations; as aspects of this submission overlap with that role it is proper to note the connection here.*