



**CONSULTATION SUBMISSION:  
A New Future For Social Security  
Social Security in Scotland  
October 2016**

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The Scottish Human Rights Commission was established by The Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the national human rights institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

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**Summary of key points**

**Human rights context in Scotland**

The development of Scottish social security legislation provides a timely opportunity for the Scottish Government to fulfil recent public commitments by the First Minister to respect, protect and fulfil human rights and further develop economic and social rights in Scotland.

**A Principled Approach**

Social security is a human right, which provides for access to benefits without discrimination in order to secure protection from social risks and contingencies. The fact that social security is a basic human right should be reflected in the vision and on the face of the forthcoming legislation.

Human rights provide a legal and objective foundation to the concepts of “dignity” and “respect” to be built into the social security system. Human rights also assist in reframing the conceptual basis for the provision of social protection as a universal right and therefore entitlement, to be realised in support of the

realisation of all other human rights and broader social justice, as opposed to a welfare model tainted by perceptions of charity, stigma and discrimination and punitive practices.

In addition to the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, there are additional specialised human rights instruments and guidance such as the Council of Europe's Code of Social Security, Art. 12 of the European Social Charter, Art. 34 of the EU Charter of Fundamental Rights and General Comment 19 of the UN Committee on Economic, Social and Cultural Rights that provide detailed standards and commentary regarding the State's obligations to respect, protect and fulfil the right to social security. The International Labour Organisation Convention No. 102 also provide the 'Minimum Standards' for social security.

The key elements of a social security system, according to human rights norms, are: availability (and sustainability to provide benefits to address relevant impacts on livelihood); inclusion of the main social risks (including health care, sickness, old age, unemployment, employment injury, family and child support, maternity, disability), adequacy (in both amount and duration to ensure that recipients may realise their rights to family protection and assistance), accessibility (which involves five key features: coverage, eligibility, affordability, participation and information, and physical access) and affordability (so if a social security scheme requires contributions, those contributions should be stipulated in advance, and must not compromise the realisation of human rights).

These instruments and key elements of a social security system (as well as rights based principles, outcomes, calculations of payments, material and personal scope and indicators) provide support to the Scottish Government in developing legislation on the right to social security.

Explicit connections should be made to explain the relevance not only of human rights to social security but also of social security to the Sustainable Development Goals. Social security can be seen as a component of a development strategy. Scotland was one of the first countries in the world to adopt the UN Sustainable Development Goals.

## **A human rights based approach to design and implementation**

Human rights obligations relate not only to the final outcome of social protection programmes but also to the design and implementation process.

The Scottish Government should adopt a human rights based approach to the development, delivery and monitoring of Scottish social security to enable the development of a system that respects, protects and fulfils everyone's right to social security.

## **Human rights based monitoring, measurement and scrutiny**

The current short, medium and long term outcomes (and future indicators) will benefit from being redrafted as rights based outcomes (and indicators).

The current partial Equality Impact Assessment does not adequately address the potential cumulative<sup>i</sup> and intersectional<sup>ii</sup> impacts of the devolved social security powers. The Commission recommends that the Scottish Government take fresh approach and undertake a Human Rights and Equality Impact Assessment.

An independent statutory body to oversee the scrutiny of social security regulations is integral to a rights based approach. Where the independent oversight is set in law this provides for security from arbitrary decisions which have disproportionate impacts on certain groups, are retrogressive and potentially breach international human rights law.

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## 0 Introduction

The right to social security is a fundamental human right.<sup>iii</sup> It is also essential as a stepping stone to ensure other rights are fulfilled for both the individual and their families, such as: the right to an adequate standard of living, including food, clothing and adequate housing; the highest attainable standard of physical and mental health; the right to private and family life; the rights to education and to work; and the right to take part in public decision making. While the rights guaranteed by the European Convention on Human Rights and the protocols are essentially civil and political rights, many of them have implications of a social and economic nature. Social security issues have been considered by the European Court of Human Rights in its jurisprudence in relation to Articles 3 (prohibition of torture), 6 (the right to a fair hearing), 8 (right to respect for private and family life) and Article 1 Protocol 1 (protection of property).

States are subject to legally binding domestic and international obligations to ensure that human rights guide the design, implementation and monitoring of all public policies – and social protection systems are not an exception. A concerning aspect of the current social security discussion is the lack of a systematic discussion of it from a human rights perspective. This limits the full potential and impact of social security on reducing poverty, addressing inequality and allowing for the full enjoyment of all human rights. The Commission, therefore, recommends considering the specific human rights obligations in this area as a means of changing the terms of the discussion around social security; designing, developing, delivering and monitoring the new system; and ensuring human rights are realised in practice.

The First Minister has in recent times spoken repeatedly about the importance of economic, social and cultural rights. In December 2015, she spoke of the necessity for progressive governments not to find ways to avoid human rights responsibilities, but rather to find ways to embed those responsibilities across different policy areas.<sup>iv</sup> She further noted in May 2016 in her Priorities Speech to Parliament that in addition to defending the Human Rights Acts, the Scottish Government would “work with civic Scotland to establish a set of social and economic rights for all of Scotland’s citizens. By valuing and strengthening human rights, we can empower citizens and encourage better government.”<sup>v</sup>

The newly devolved powers relating to social security offer an excellent opportunity to further the protection and promotion of economic, social and cultural rights within law, policy and practice in Scotland. The Commission would like to see a rights based approach embedded within the forthcoming legislation on social security and its associated framework of vision, principles and outcomes, as well as in how social security payments are delivered in practice and their impact monitored. Human rights provide a legal and objective basis as a foundation to the concepts of “dignity” and “respect” which are sought to be achieved in the delivery of the new system.

The Commission considers a human rights based approach and a rights based culture within all public services is key to supporting this aim. This means that the rights of the “rights-holders” and their perspectives become central to all decision making. That requires an understanding that people are not passive recipients or beneficiaries of services, but rather that public service organisations exist to support the realisation of people’s rights as enshrined in law.

The Commission welcomes the opportunity to comment on the future of social security in Scotland and hopes the following comments provide a helpful basis for enhancing and better fulfilling the right to social security in practice. The Commission has not answered all questions in this consultation, but rather has focused on Part 1 of the consultation document.

## **1 A Principled Approach [Consultation Questions - Part 1: A Principled Approach]**

### **1.1 Human rights & social security vision and principles**

Before commenting on the specific questions relating to how the principles should be embedded in the legislation, the Commission would first like to address the content of the vision and principles themselves. Given the importance of the vision and principles in setting out what the people of Scotland can expect from these new powers, and the reach and importance of this consultation, it is concerning that there is no opportunity offered to reflect on whether these are indeed the right vision and principles.

As noted in the introduction, the Commission has welcomed the recent focus on economic, social and cultural rights by the First Minister and the Scottish Government. This legislation presents a key opportunity for this administration to explicitly embed some of these rights within law, policy & practice and help to further the realisation of economic, social and cultural rights for the people of Scotland.

The Commission welcomes the placement of respect for dignity at the core of the new social security principles; the genuine effort this consultation is making to facilitate the participation of a wide range of stakeholders in the design of the use of the new powers, as well as the focus on the availability of advice, advocacy and the need for a transparent and timely process for appeal. However, if these powers are to have a truly transformative effect on the people of Scotland and bring about the shift that the Scottish Government desires in the way in which the public currently views social security and its recipients<sup>vi</sup>, the promotion of social security as a basic human right must feature within the vision, and the principles should be rights focused. This would, first and foremost, enable the promotion of a wider understanding of the role that human rights play in our daily lives, which is part of the obligation to promote social security that lies with the Scottish Government. In addition, taking a human rights based approach to the entire process of design, implementation and monitoring, will place the human rights principles of participation,

empowerment, non-discrimination and equality, accountability and legality at the core of these new powers, ensuring the system is fully responsive to the rights of people.

## 1.2 Methodology

In preparing this submission, Commission staff met twice with the Adequate Standard of Living Reference Group from Scotland's National Action Plan for Human Rights (SNAP)<sup>vii</sup> to discuss this consultation. This group is making its own submission to the consultation and so their responses will not be duplicated here. However, with their permission, some of their points of general discussion are worth highlighting.

First and foremost, of the two day-sessions set out to discuss their consultation response, one entire session was dedicated (at the group's direction) to discuss and question the appropriateness of the vision and principles. They felt that whilst it is always difficult to agree on how to phrase often high-level principles, the way things are worded is critical to get right. They felt that the language used needs to be accessible and meaningful. They did not feel that there was sufficient clarification of what these principles meant in practice, and that the language used was ambiguous. For example, a lot of emphasis is placed on respect for the dignity of individuals; however, there is little clarification as to what that actually means in practice for front line staff (beyond using language that doesn't stigmatise) and no reference to the training needs of those front line staff to help make respect for dignity more than a nice concept. The group also struggled with the use of phrases such as evidence based. This led the group to ask, whose evidence is best? If the experience of applicants/recipients differs from what has been classed as 'best evidence' (the assumption being that the evidence of academics or government researchers is what is meant by 'best evidence') would the voices of applicants recipients be equally valued?

The group also struggled particularly with Principle 5 which they described as a "get out of jail free card". In other words, whilst the other principles talked of respect and dignity, investment in people and putting the user experience first, when it comes down to it, if the resources are not there 'efficiency' and 'value for money' would take precedence.

This is not to say that the idea of a high-level vision and principles was not welcomed, quite the opposite. However, the group were of the same opinion as the Commission in that 'human rights' needs to feature front and centre in the vision and principles. There was a degree of confusion as to why the vision and principles for social security, a basic human right, were not phrased explicitly as such.

Four sections are set out in this part of the response: a) the human rights framework; b) what the Commission means by a human rights based approach; c) social



security and the Sustainable Development Goals; and d) how the Commission believes the vision and principles could be further developed to be rights focused.

### **1.3 Human Rights Framework for Social Security**

There is a significant body of (human rights) law and standards on social security. This includes the Universal Declaration of Human Rights (UDHR); UN Convention on Economic, Social and Cultural Rights (ICESCR); UN Committee on ESC Rights General Comment 19; International Labour Organisation's Conventions; Human Rights Act and the European Convention on Human Rights (ECHR); the Council of Europe's European Social Charter and European Code of Social Security; and the EU Charter of Fundamental Rights.

#### **1.3.1 The Universal Declaration of Human Rights**

The right to social security has been strongly affirmed in international law. Social security was declared as a human right in Article 22 of the Universal Declaration of Human Rights (1948), which states that:

*“Everyone, as a member of society, has the right to social security” and in Article 25(1) that everyone has the “right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”.*

#### **1.3.2 The International Covenant on Economic, Social and Cultural Rights**

The right was subsequently recognised in a range of binding international and regional human rights treaties<sup>viii</sup> including the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>ix</sup> which was ratified by the UK in 1976. It requires the UK to respect, protect and fulfil the rights known as economic, social and cultural rights. Article 9 of this Convention says:

*The States party to the present Covenant recognise the right of everyone to social security, including social insurance.*

ICESCR has an immediate minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of all economic, social and cultural rights such as the right to social security for all members of society.

#### **1.3.3 General Comment 19 of the UN Committee on Economic, Social and Cultural Rights**

General Comment 19 of the UN Committee on Economic, Social and Cultural Rights provides comprehensive guidance regarding the State's obligations to respect, protect and fulfil the right to Social Security.<sup>x</sup> It states that:

*“The right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents”.*

It further explains what is required in relation to availability, social risks and contingencies, adequacy and accessibility (involving five key elements: coverage, eligibility, affordability, participation and information, and physical access) of social security.<sup>xi</sup>

As with all economic, social and cultural rights contained within this Convention, the UN Committee acknowledges that not all countries are in the same position to fully realise these rights at the same pace. The principle of “progressive realisation” acknowledges that the full realisation of certain rights will take time to achieve and will be subject to constraints on the state’s resources, however, it also entails a prohibition of deliberate retrogression, namely, of measures that directly or indirectly lead to backwards steps in the enjoyment of rights. State parties to the ICESCR have an immediate core obligation to ensure the minimum standards and to secure progressive improvements in the living conditions of, in particular, the most economically vulnerable in society.

Article 2 of the ICESCR creates a duty on all parties to:

*“take steps... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”*

Even during times of severe resource constraints, when available resources are demonstrably inadequate, the obligation remains for States parties to demonstrate that every effort has been made to use all resources that are at its disposal in an effort to satisfy, as matter of priority, minimum essential levels and to protect the most marginalised members of society by adopting relatively low-cost, targeted programmes.

#### **1.3.4 General Obligations: Non-discrimination**

There is also an obligation on the State to guarantee that the right to social security is enjoyed without discrimination (Article 2, paragraph 2, of the Covenant), and equally between men and women (Article 3). The right to social security is also enshrined in the Convention on the Elimination of All Forms of Racial Discrimination (Article 5); the Convention on the Rights of the Child (Article 26) and the Convention on the Elimination of All Forms of Discrimination Against Women (Articles 11 and 14). Article 24 of the Refugee Convention also recognises the right to social security for refugees subject to national laws.

#### **1.3.5 Procedural obligations**

International human rights also require certain procedural obligations related to participation, access to information and effective monitoring. Fundamentally, human rights require that the voices of people whose rights are affected by a decision, are heard throughout the process of making and implementing that decision. The

procedural legal obligation of participation of individuals in decision making and the design of services helps ensure that systems are responsive to the particular needs of disadvantaged groups. A failure to include mechanisms to satisfy these procedural requirements of participation, access to information and transparency and due process in decision making, may amount to violations of these international obligations.

Human rights protections, therefore, give weight to participation, involvement and transparency in the delivery of public service provision and models of co-production being adopted. Participation is well reflected within the consultation process and this should be built on and strengthened in practice, as well as explicitly embedded into monitoring and inspection processes.

Taking a rights based approach inherently changes the nature of people's relationship with the social security system; rather than being an act of charity or welfare, social security payments are an entitlement of the people of Scotland to support the realisation of their rights. This will in turn help to end the stigma and discrimination which people who receive social security payments can sometimes face, and which has been exacerbated through negative media coverage throughout the term of the current and previous UK Governments.

### **1.3.6 The International Labour Organisation Conventions**

The ILO Social Security (Minimum Standards) Convention, 1952 (No. 102) provides detailed guidance for the definition of the content of the right to social security under the ICESCR and regional instruments in various parts of the world. The basic social security guarantees constituting national social protection floors, according to the ILO Social Protection Floors Recommendation, 2012 (No. 202) can be considered as reflecting the minimum core content of the right to social security.

In 2001, the General Conference of the International Labour Organisation (ILO) referred for the first time to the original vision of the ILO Constitution, namely the

*“extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care”.*

The General Conference affirmed social security as a basic human right and noted the importance of improving and extending social security coverage to all.

### **1.3.7 The Human Rights Act and the ECHR**

Human Rights Act 1998 (HRA) provides that all legislation must be compatible with European Convention on Human Rights (ECHR) and that all public bodies, or those performing a public function, must act in compliance with the ECHR rights protected by the HRA. This includes all local authorities and any future social security agency (or providers of social security).

Furthermore, the rights guaranteed by the ECHR and the protocols to it enjoy extensive protection and, while they are essentially civil and political rights, many of

them have implications of a social and economic nature. The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. Therefore, social security falls within its scope. Social security rights under the Convention depend crucially both on recognition of procedural guarantees and substantive protection of certain rights. Moreover certain provisions of the European Social Charter have been echoed in the rulings of the European Court of Human Rights. This includes:

- The right to freedom from cruel, inhuman and degrading treatment (The ECtHR's judgments reflect a trend towards improved protection for people living in destitution, poverty or social exclusion)<sup>xii</sup> (Article 3) See for example *D v. the United Kingdom* (1997).
- The right to a fair hearing in any proceedings which determines your civil rights (such as an eviction hearing)<sup>xiii</sup> (Article 6) See for example *Deumeland v. the Federal Republic of Germany* (1986) and *Schuler-Zgraggen v. Switzerland* (1993) and *M.B. v. France* (2005)
- The right to privacy and protection of the home, family life and correspondence (including also "aspects of an individual's physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world". Or more broadly "to conduct one's life in the manner of one's choosing" (Article 8) See for example *Evans v UK*, Grand Chamber (2007) citing *Pretty v UK* (2002).
- The right to peaceful enjoyment of property (social security as property) (Protocol 1 Article 1)<sup>xiv</sup>. See for example *Gaygusuz v. Austria* (1996) *Willis v. United Kingdom* (2002).
- The right to freedom from discrimination - especially in conjunction with Protocol 1 A1<sup>xv</sup>. See for example *Willis v. the United Kingdom* (2002).

Further to the HRA and ECHR obligations set out above under the Scotland Act 1998, both the Scottish Government and Parliament must observe and implement all of the UK's international human rights obligations<sup>xvi</sup> such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) as well as acting compatibly with the ECHR.<sup>xvii</sup>

### **1.3.8 The European Social Charter**

Article 12 of the European Social Charter, which is a Council of Europe treaty that guarantees fundamental social and economic rights as a counterpart to the European Convention on Human Rights, guarantees a right to social security. In this treaty:

*"the Contracting Parties undertake:*  
*1. to establish or maintain a system of social security;*

2. *to maintain the social security system at a satisfactory level at least equal to that required for ratification of International Labour Convention (No. 102) Concerning Minimum Standards of Social Security;*
3. *to endeavour to raise progressively the system of social security to a higher level;*
4. *to take steps, by the conclusion of appropriate bilateral and multilateral agreements, or by other means, and subject to the conditions laid down in such agreements, in order to ensure:*
  - a. *equal treatment with their own nationals of the nationals of other Contracting Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Contracting Parties;*
  - b. *the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Contracting Parties.”*

In 2013 the European Social Committee found the minimum level of incapacity benefit, the state pension and job seeker’s allowance to be manifestly inadequate and in breach of Article 12 of the Charter (right to social security).<sup>xviii</sup>

### **1.3.9 The European Code of Social Security**

The European Code of Social Security and its Protocol are the basic standard-setting instruments of the Council of Europe in the field of social security. The underlying idea of these instruments is to promote a social security model based on social justice. The Code defines norms for social security coverage and establishes minimum levels of protection which Parties must provide in such areas as medical care, sickness benefits, unemployment benefit, old-age benefits, employment injury benefits, family benefits, maternity benefits, invalidity benefits, survivors’ benefits, etc.

### **1.3.10 The EU Charter of Fundamental Rights<sup>xix</sup>**

Article 34 of the EU Charter of Fundamental Rights, which is a European Union Treaty spells out the rights to social security and social assistance recognised as protected as a matter of EU law. It is important to note that Title IV Solidarity rights are not confined to the workplace but apply in society at large. The principle set out in Article 34 are based on Articles 153 and 156 of the Treaty on the Functioning of the European Union, Article 12 of the European Social Charter and point 10 of the Community Charter on the rights of workers.

## **1.4 A Human Rights Based Approach**

Taking a human rights based approach to conceiving, drafting, implementing and monitoring policy is about using international human rights standards to ensure that people’s human rights are put at the very centre of policies. A human rights based approach will empower people to know and claim their rights and increase the ability of organisations and public bodies to fulfil their human rights obligations. It creates

solid accountability so people can seek remedies when their rights are violated. It is clear that the consultation document has thought through a number of these principles (as noted below). However, the consultation would benefit greatly from acknowledging them explicitly as human rights principles.

The PANEL principles are one way of breaking down what a human rights based approach means in practice. PANEL stands for Participation, Accountability, Non-Discrimination and Equality, Empowerment and Legality.

In relation to the new social powers security this means, inter alia, the following:

**Table 1. PANEL approach**

<p>Participation</p>	<p>People should be involved in decisions that affect their rights.</p>	<p>The Commission commends the government’s commitment to a participative consultation. However, the right to participate will be strengthened in practice if there is a cultural shift to embed participation not only in key decision making around the design of the new system, but also to facilitate applicant/recipient scrutiny of the implementation and longer-term monitoring of the new powers.</p> <p>Participation should not stop at the design stage. It should be meaningful, non-tokenistic and should aim both at informing decisions, but also at holding ‘duty-bearers’ such as Government to account.</p> <p>Social protection programmes must ensure that the information and participation about the programme is disseminated by culturally appropriate and accessible methods, and are adapted to the needs of vulnerable groups.</p> <p>To ensure the adequacy of the social security system the Government should regularly monitor the criteria used to determine it. When a person makes contributions to a social security scheme that provides benefits to cover lack of income, there should be a reasonable relationship between earnings, paid contributions, and the amount of relevant benefit.</p>
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<p>Accountability</p>	<p>There should be monitoring of how people's rights are being affected, as well as remedies when things go wrong.</p>	<p>Accountability is one of the central pillars of the human rights approach. Independent and effective mechanisms to monitor the administration of programmes, as well as the establishment of built-in mechanisms to collect and process complaints, are essential.</p> <p>The Commission welcomes the commitment to continuous improvement to ensure policy and practice remain fit for purpose. However, how this will be achieved in practice, and the degree to which applicants/recipients will be involved, needs to be equally transparent and participatory.</p> <p>The collection of disaggregated data on protected characteristics to ensure that the right support is going to the right places is acknowledged, and the Commission welcomes this commitment to improve the availability of disaggregated data.</p> <p>The Commission welcomes the outcomes-focused approach. However, utilising rights based outcomes and indicators would better support the promotion and protection of people's right to social security in practice.</p> <p>Complaint mechanisms are crucial in, for example, eligibility for the programme, the maintenance of the programme (to report instances of inappropriate demands or threats) and the supervision of payment procedures.</p> <p>Complaint mechanisms should also be put in place to monitor the level of social service delivery, particularly when access to a programme is conditional upon the use of social services.</p> <p>Human rights and equality impact assessments are also important tools to monitor the implementation and impact of human rights in practice.</p>
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		<p>The social security system must be administered or regulated by the State, and should be sustainable to provide continuity over generations.</p>
<p>Non-Discrimination and Equality</p>	<p>Nobody should be treated unfairly because of their age, gender, ethnicity, disability, religion or belief, sexual orientation, gender identity or any other personal characteristic. People who face the biggest barriers to realising their rights should be prioritised when it comes to taking action.</p>	<p>Article 2 (ICESCR) places an obligation on the state to guarantee that the right to social security is enjoyed without discrimination.</p> <p>The right to social security is also enshrined in the Convention on the Elimination of All Forms of Racial Discrimination (Article 5); the Convention on the Rights of the Child (Article 26) and the Convention on the Elimination of All Forms of Discrimination Against Women (Articles 11 and 14). The 1951 Refugee Convention also recognises the right to social security for refugees.</p> <p>There is a cost to bad decision making and a clear benefit for all, including governments and public authorities, in getting policies and budgetary decisions right the first time. A rights based approach ensures there is no disproportionate impact upon the most vulnerable by requiring a reasonable balance to be struck between any such impact and the potential cost savings. The use of a robust integrated equality and human rights impact assessment will ensure that human dignity and rights are placed at the heart of decision making. Such an approach enables the intersectional and cumulative impact of social security to be examined. This is not only good governance but is also the approach required to be taken by the tribunals and courts which come to adjudicate on specific cases.</p> <p>Despite some awareness of equality issues exemplified by the partial EQIA, nowhere in the vision or principles is a commitment to non-discrimination and equality made explicit.</p>



		<p>States should make sure that everyone can physically access social security services to access benefits and information and make any required contributions, with particular attention given to people with disabilities, migrants, and people living in remote or disaster-prone areas.</p>
<p>Empowerment</p>	<p>Everyone should understand their rights, and be fully supported to take part in developing policy and practices which affect their lives.</p>	<p>As highlighted above, the Commission believes that a wider awareness and understanding of the right to social security and indeed of human rights in general would further support the empowerment of social security applicants and recipients as rights-holders, able to hold the government to account in fulfilling their human rights obligations. The principles and outcomes themselves could be amended to reflect this.</p> <p>Accessing your rights also requires adequate resourcing, to facilitate access to information, advocacy services and funding for advice agencies (e.g. CAB). Current advice and advocacy agencies cannot be expected to incorporate this role without appropriate resourcing.</p> <p>Transparency is also an essential human rights principle to create both empowerment and effective participation. Transparency must not be limited to the financial management and administration of the system, but in relation to all core components of the social security system and programmes.</p> <p>With regard to engagement with the new social security system itself, a heavy emphasis is placed on Digital First as the primary method of engagement. Whilst acknowledging that other formats of engagement must be made available, the 'how this will be achieved' is not well explained. The 'digital divide' must be accepted as a serious potential barrier to the realisation of rights. It is often the most marginalised (and in need of the</p>

		support of these new powers) that have the least reliable access to suitable IT.
Legality	Approaches should be grounded in the domestic legal rights that are set out in domestic and international law.	<p>The consultation contains some implicit references to some human rights principles. The forthcoming primary legislation (and any secondary legislation, policy and any statutory or non-statutory guidance) needs explicitly to reflect the human rights standards as outlined above.</p> <p>An example of legality can be found on the qualifying conditions, which must be reasonable, proportionate and transparent. Any termination, suspension or reduction of benefits should be prescribed by law, based on reasonable grounds, and subject to due process.</p>

## 1.5 Social Security and the Sustainable Development Goals

Social protection can also be seen as a component of a development strategy. The key contribution of human rights to development strategies, in this case social protection, is to ensure that they are designed and implemented to maximise the enjoyment of human rights by people living in poverty. Scotland was one of the first countries in the world to adopt the UN Sustainable Development Goals (SDGs), which is a global effort to tackle poverty and inequality and promote sustainable development for all.<sup>xx</sup> The First Minister noted her delight in Scotland's ambition and ability to provide international leadership on reducing inequality.<sup>xxi</sup>

A number of the SDGs have an explicit reference to the right to social security or to aspects of the new powers being discussed in this consultation, as set out below:

### Goal 1: End poverty in all its forms everywhere

1.3 Implement nationally appropriate social protection systems and measures for all, including floors, and by 2030 achieve substantial coverage of the poor and the vulnerable.

1.4 By 2030, ensure that all men and women, in particular the poor and the vulnerable, have equal rights to economic resources, as well as access to basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance.

### **Goal 3: Ensure healthy lives and promote well-being for all at all ages**

3.8 Achieve universal health coverage, including financial risk protection, access to quality essential health-care services and access to safe, effective, quality and affordable essential medicines and vaccines for all.

### **Goal 5: Achieve gender equality and empower all women and girls**

5.1 End all forms of discrimination against all women and girls everywhere

5.4 Recognize and value unpaid care and domestic work through the provision of public services, infrastructure and social protection policies and the promotion of shared responsibility within the household and the family as nationally appropriate.

### **Goal 7: Ensure access to affordable, reliable, sustainable and modern energy for all**

7.1 By 2030, ensure universal access to affordable, reliable and modern energy services

### **Goal 8: Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all**

8.5 By 2030, achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value

8.6 By 2020, substantially reduce the proportion of youth not in employment, education or training

8b By 2020, develop and operationalize a global strategy for youth employment and implement the Global Jobs Pact of the International Labour Organization

### **Goal 10: Reduce inequality within and among countries**

10.2 By 2030, empower and promote the social, economic and political inclusion of all, irrespective of age, sex, disability, race, ethnicity, origin, religion or economic or other status.

10.3 Ensure equal opportunity and reduce inequalities of outcome, including by eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and action in this regard.

10.4 Adopt policies, especially fiscal, wage and social protection policies, and progressively achieve greater equality.

### **Goal 16: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels**

Goal 16.b Promote and enforce non- discriminatory laws and policies for sustainable development.

The new social security powers are a key opportunity to realise economic, social and cultural rights and thus tackle poverty and inequality for many people living in Scotland. Situating the potential of these powers explicitly within the context of the SDGs, would further support the Scottish Government's established commitment to the SDGs and human rights.

### **1.6 Social Security Vision and Principles**

As noted above, there are a number of key human rights principles, obligations and procedural rights, as well as clear and explicit guidance on the right to social security for States within UN CESCR General Comment 19, all of which the government could draw on, to transform the current vision and principles, putting human rights at their core.

Table 2. below, sets out what the Commission believes the vision and principles could look like if they were rights based (PANEL).

Table 2. Potential rights based vision and principles		
Current Vision & Principles	Rights Based Vision & Principles	Commentary on proposed changes
<p>Vision: Social Security is important to all of us and able to support each if us when we need it</p>	<p>Social Security is a basic human right to which all people in Scotland are entitled at times when circumstances deprive them of their capacity to fully realise their rights (Legality)</p> <p>Or</p> <p>Social Security is a basic human right to which all people in Scotland are entitled to access when required (Legality)</p>	<p>The fact that social security is a basic right should be at the core of the vision for the Scottish social security powers.</p>
<p>Principle 1: Respect for the dignity of individuals is at the heart of everything we do</p>	<p>The social security system (law, policy and practice) will treat everyone (applicants, recipients and staff) with human dignity grounded in human rights. (Human dignity)</p>	<p>The principle relating to human dignity should feature as the primary principle if the true intention of the new ethos is to be that of dignity and respect. From the Commission's experience of exploring the use of a human rights based approaches in other public sector settings<sup>xxii</sup> it has been of key importance that the rights of everyone are recognised and valued. It is clear from a number of whistleblowing reports that many staff at the DWP struggled with the culture of sanctioning to target and effectively treating people in such a way as to degrade them.<sup>xxiii</sup> Therefore, in the case of a new Scottish social security agency, it would be critical for the ethos of the new agency to reflect the importance of respect for the human dignity of their staff as much as the applicants and recipients.</p>

<p>Principle 2: Social security is an investment in the people of Scotland</p>	<p>Social security is an investment in everyone, provided without discrimination and is an integral component of a fair society. (Non-discrimination &amp; equality)</p>	<p>Social security is indeed an investment in everyone in Scotland. Emphasising the role that social security plays in realising everyone's right to human dignity, rather than as an act of charity or welfare, will help to end the stigma and discrimination that many in receipt of current benefits feel. Following years of negative media reporting (fuelled by unhelpful rhetoric) demonising the use of social security, it will take time to change the nature of the public's relationship with social security.</p>
<p>Principles 3 &amp; 4: Our processes and service will be evidence based and designed with the people of Scotland</p> <p>We will strive for continuous improvement in all our policies, processes and systems, putting the user experience first</p>	<p>Our processes, policies and service/s will be rights based and designed, implemented and monitored for continuous improvement with the people of Scotland (Participation &amp; Accountability)</p> <p>People will have timely, accessible information about their right to social security and access when required to advocacy and support services to help them realise their rights. (Empowerment)</p>	<p>When a policy, process, or service is rights based, it is by its very nature required to be evidence based. It also requires them to be developed through the genuine participation of 'duty-bearers' and 'rights-holders' and independently monitored. If the ethos of respect for human dignity is to be fully realised, the new Scottish social security agency needs to be a learning organisation. Staff must be well trained and supported by a rights based ethos and practice. It needs to accept critique and review internal complaints, to examine its own policies and processes for improvement and to ensure it remains fit for purpose. Ensuring the participation of applicants and recipients within the monitoring process would strengthen the accountability of the system. Accountability also means judicial and non-judicial remedies and these are only useful if people know they can use them, and have effective access to them.</p> <p>Part of the ethos of the new Scottish security agency is to ensure that everyone is able to access the social security that they are entitled to, to support everyone to maximise their income. In order to do this, people must know their rights, know how to claim their rights and be able to access</p>

		<p>them. The system must be accessible to all and information, advocacy and support are critical to this. A principle dedicated to accessibility and empowerment was a noted omission.</p>
<p>Principle 5: We will demonstrate that our services are efficient and value for money</p>	<p>Our service will make maximum use of available resources in order to progressively realise the right to social security. (Progressive realisation ICESCR)</p>	<p>It is true that services should be efficient and value for money. However, this terminology reflects a current UK government focus on 'efficiency' savings often at the expense of basic public services and with a disproportionate impact on the most vulnerable in society. If the ethos of the new Scottish security agency is to place human dignity at its core, then the Scottish government needs to make best use of maximum available resources and provide transparency in its decision making and prioritisation. A governments' effort to promote human rights is meaningless without an adequate effort to collect the necessary funds and to make best use of those funds to progressively realise people's rights. Re-conceptualising the use of resources in this way, will help to improve the transparency of decision making and fulfil the state's pre-existing commitment to progressive realisation, made when the UK signed and ratified ICESCR in 1976.</p>

## 1.7 Fixing the principles in legislation [Consultation Question 1]

The Commission agrees with the consultation document's suggestion that an 'implicit or unwritten commitment' between the state and its people regarding their right to social security, should be an explicit one. It is of key importance that the fact that social security is a fundamental human right is on the face of the Bill and features throughout secondary legislation and any statutory or non-statutory guidance that follows. This makes an explicit commitment by the Scottish Government and Parliament of their duty to respect, protect and fulfil human rights in Scotland a reality. As stated within UN CESCR General Comment 19:

"The system should be established under national law and ensure the right of individuals and organizations to seek, receive and impart information on all social security entitlements in a clear and transparent manner."<sup>xxiv</sup>

Moreover, in the event of the devolution of further social security powers in the future or changes to the way the block grant is delivered, this increases the rationale for setting human rights based principles within the legislation. This will guide future administrations in delivering on their obligations.

As mentioned above some of the key elements of the right to social security require that:

### **P – Participation**

Meaningful and effective participation is facilitated. Participation is a key element of the human rights framework. Information and transparency are not enough. The right to participation in public life is enshrined in human rights law. Participation is also an essential prerequisite to the enjoyment of other human rights.

### **A – Accountability**

Transparency and access to information are entrenched. A human rights approach emphasises that transparency and access to information are vital safeguards against corruption and wastage, and represent a critical tool to increase beneficiaries' access to and participation in social protection programmes.

Access to complaint mechanisms and effective remedies are available. There should be clear standards concerning a person's right to appeal the refusal of a social security benefit, the quantity (amount) of a benefit or the quality of a benefit (in relation to benefits in-kind).

The responsibility for the administration of social security is the State. Under international human rights law, States are legally obligated to establish social protection systems. This duty flows directly from the right to social security, which is articulated in the international and regional documents above.



## **N – Non-Discrimination and Equality**

The principles of equality and non-discrimination are respected, including gender equality. Non-discrimination and equality are core elements of the international human rights framework. These principles impose upon Scotland several obligations that, as seen above, can improve the effectiveness of social protection systems and strengthen the human rights protection of the beneficiaries. Social protection programmes must be available to all individuals without discrimination of any kind. To ensure that men and women benefit equally, social protection systems must address women’s life-cycle risks and the burden of care that women bear in society, particularly in relation to children and the elderly.

## **E – Empowerment**

The standards of accessibility, adaptability, acceptability and adequacy are met. Ignoring these standards can prevent people living in poverty from accessing the social protection benefits to which they are entitled.

## **L – Legality**

The financing of social security should not cause hardship to the people and ensuring that the implementation of conditionalities does not undermine the human rights of beneficiaries, these should be clear in the law.

### **1.7.1 Claimants Charter**

If a Claimants’ Charter is to be developed in addition to embedding the principles within the legislation, the Commission recommends that a rights based approach is taken. As noted in the UN CESCR General Comment 19:

*“The formulation and implementation of national social security strategies and plans of action should respect, inter alia, the principles of non-discrimination, gender equality and people’s participation. The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to social security should be an integral part of any policy, programme or strategy concerning social security.”*

In 2009 the Commission undertook a review into the human rights based approach at The State Hospital. This research found that although the hospital had embarked on the development of a ‘patient’s charter of rights’, they quickly realised that part of the effectiveness of taking a human rights based approach to their service was the recognition of everybody’s rights, be they patients, carers or staff. Creating a patient’s charter in isolation was seen as privileging one group’s rights over another’s, which was the opposite of their intention. This plan was therefore disregarded in favour of promoting respect for everyone’s rights.<sup>xxv</sup>

A key theme throughout social security consultation events run by other organisations that were attended by Commission staff was the general excitement at

the prospect of a truly progressive agency. The idea that it would show respect for people, place the preservation of dignity at its core and would have a genuine interest in ensuring that everyone who was entitled to Scottish social security was able to realise that right, was truly inspirational. This also made discussions about the nature of specific entitlements quite interesting because participants had to keep reminding themselves not to be cynical and think about the current DWP culture of stigma, sanctions and indignity. This highlighted above all else, and was repeated over and over during these events – that a service with a progressive rights respecting culture cannot happen overnight and would require proper investment by government in staff pre-service training and CPD, if it were to be realised. For the State Hospital an important key to unlocking the transformation of its culture to be progressive and rights respecting was ensuring that staff understood that it was as much about their rights and how they were treated (with dignity) as it was about their patients' rights. This is an important lesson for the development of the Scottish social security agency, if it is to be truly transformational (see further comments on page 38).<sup>xxvi</sup> This was also an issue raised by the Scottish Government's Independent Advisor on Poverty and Inequality, Naomi Eisenstadt who commented in her report:

*It's very difficult to deliver services that are under constant strain. After my poverty lecture in Glasgow, a DWP manager approached me asking how he could change the culture of the staff he manages, given the pressure they're under to meet targets. Nonetheless, much more effort could be made to provide in-service and pre-employment training to ensure that public services are provided with courtesy and respect for the user. It's likely that such a culture change would improve staff morale as well as the services themselves.*<sup>xxvii</sup>

In this regard, where the consultation asks 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

The answer is all of the above but in addition, and most importantly, must be all of the staff of this new agency.

## **2 Outcomes and the user experience [Consultation Question 2]**

The Commission welcomes the outcomes-led approach that is proposed in this consultation. However, it believes that this process would be best supported by taking a human rights based approach. This requires independent monitoring and the use of rights based outcomes and indicators. Human rights principles and standards align with the core central objectives of a progressive approach to Scottish social security, providing both a legal and value base for the realisation of a more socially just society.

These outcomes would benefit from for an overarching directive statement to guide interpretation of the outcomes which must be read in accordance with all internationally recognised human rights as set out above. All of the outcome areas have a grounding in human rights law and practice and human rights should be considered an element of each and every outcome as could be made explicit in the overarching directive statement. Such a statement may include wording such as:

*“the social security outcomes should be read in the context of progressing a socially justice and fairer Scotland in full accordance with all internationally recognised human rights standards.”*

Such a statement reflects the legal obligations and existing commitments of the First Minister to the promotion of a social just society and the promotion and protection of human rights.

In the table below are some suggestions of how the outcomes could be reworded, drawing again on the principles of a human rights based approach and in particular from the guidance contained within the UN CESCR General Comment 19 on Social Security.<sup>xxviii</sup> One consistent suggestion is to change the wording of any outcome which uses “needs” based to “rights” based, thereby recognising that subjective needs are often in fact legal human rights entitlements.

It is not clear from the consultation document if the Scottish Government has considered how this new system will be monitored. General national progress will likely be channelled through the vehicle of the national performance framework (NPF); however, it will be necessary to independently monitor the implementation and impact of these outcomes in conjunction with the NPF.

Where rights based outcomes are defined, best practice would then allow for three types of human rights indicators – structural indicators, process indicators and outcome indicators. This is based on the OHCHR Indicators Framework<sup>xxix</sup> and conceptually accords with indicators that provide evidence on: the human rights standards to which Scotland is committed in principle (‘structural indicators’), the ‘efforts’ that are being made by duty bearers to meet the obligations that flow from human rights standards (‘process indicators’) and the position and experiences of individuals and groups in practice (‘outcome indicators’).

It is worth noting that on-going work between the Scottish Government and the Commission is currently exploring how to embed human rights within the NFP (and SDG) outcomes and indicators and so adopting this method of monitoring framework would be in keeping with the current direction of the national monitoring of progress.

Table 3, below, sets a number of indicative outcomes that illustrate the integration of a human rights based approach into the social security outcomes. In doing so the outcomes become grounded in the legal standards outlined above and reflect an objective translation of dignity and respect in the delivery of social security.

**Table 3: Indicative indicators illustrating the integration of a HRBA into social security outcomes**

**Original outcomes**

**Rights Based Outcomes**

<p><b>The short/medium-term outcomes are that people applying for or in receipt of Scottish benefits are:</b></p>	<p><b>The short/medium-term outcomes are that people applying for or in receipt of Scottish social security:</b></p>
<p>treated with dignity and respect.</p> <p>can access help and advice to claim the benefits they are entitled to.</p> <p>supported throughout the application assessment process.</p> <p>given a choice about how their benefits are administered.</p> <p>have positive experience of the Scottish social security system.</p>	<p>understand their right to social security as a basic human right.</p> <p>have their right to human dignity respected.</p> <p>participate in decisions about their right to social security,</p> <p>are able to seek, receive and impart information on all social security entitlements in a clear and transparent manner.</p> <p>are supported throughout the application assessment process.</p> <p>are given a choice about how their social security payments are administered.</p> <p>have positive experience of the Scottish social security system.</p> <p>regularly monitor the criteria used to determine availability, affordability, accessibility and adequacy.</p> <p>provide for independent and effective mechanisms to monitor the administration of programmes, as well as complaint mechanisms.</p>

## Original outcomes

## Rights Based Outcomes

The Scottish social security system:	The Scottish social security system:
<p>administered in a swift and streamlined manner which meets the needs of recipients.</p> <p>accessible, user friendly and simple to access.</p> <p>aligned effectively as possible with the reserved benefit system.</p> <p>aligned effectively as possible with other services to help ensure recipients get the support they need.</p>	<p>is established under domestic law, and public authorities take responsibility for the effective administration and supervision of the system.</p> <p>contributes to poverty reduction and social exclusion in Scotland.</p> <p>is available and in place to ensure that payments are provided for the relevant social risks and contingencies.</p> <p>promotes a rights respecting culture which respects the human dignity of its staff as well as applicants and recipients and is adapted to the needs of vulnerable groups.</p> <p>delivers enjoyment of the right to social security without discrimination and equally between men and women.</p> <p>is administered with speed and efficiency fulfilling the rights of recipients.</p> <p>is accessible, user friendly and transparent.</p> <p>is aligned as effectively as possible with the reserved social security system.</p> <p>is aligned as effectively as possible with other services to help ensure recipients get the support they are entitled to.</p>

### Original outcomes

### Rights Based Outcomes

<b>Scottish benefits:</b>	<b>Scottish social security payments:</b>
<p>target the right people and seek to impact on poverty and inequality.</p> <p>make a positive difference to recipients.</p> <p>are paid to as many of those who are entitled to them as possible.</p> <p>are paid at the right time and at the right amount to make a positive difference to recipients.</p>	<p>are available to all, but are targeted at individuals belonging to the most disadvantaged and marginalised groups, without discrimination on any prohibited grounds.</p> <p>play an important role in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion.</p> <p>have a positive impact on a recipient's ability to realise his or her right to family protection and assistance, an adequate standard of living and adequate access to health care and services and all other rights.</p> <p>maximise the income of as many recipients who are entitled to them as possible.</p> <p>are provided in a timely manner.</p> <p>whether in cash or in kind, are adequate in amount and duration in order that everyone may realise his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care.</p> <p>Include an independent monitoring and complaint systems.</p>

**Original outcomes**

**Rights Based Outcomes**

<p><b>People resident in Scotland:</b></p>	<p><b>People resident in Scotland understand:</b></p>
<p>have an awareness of benefits and who and what they are for. view the benefit and those who receive them positively . see Scottish benefits as providing value for money .</p>	<p>that social security is a basic human right that all people in Scotland are entitled to at times when circumstances deprive them of their capacity to fully realise their rights. the role that social security plays in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion. that everyone has the right to live with human dignity free from discrimination. that a fair and just society benefits everyone in Scotland. that the Scottish Government will use maximum available resources to progressively realise people’s right to social security.</p>
<p><b>Other public and third sector services:</b></p>	<p><b>Other public and third sector services:</b></p>
<p>experience less pressure due to the changes to social security in Scotland.</p>	<p>experience less pressure due to the changes to social security in Scotland.</p>
<p><b>Alongside the health and social care system:</b></p>	<p><b>Alongside the health and social care system:</b></p>
<p>social security has a part to play in enabling wellbeing, and in particular, to enable people to live healthier lives in their community.</p>	<p>social security has a part to play in enabling wellbeing, and in particular, to enable people to fulfil their right to the highest attainable standard of physical and mental health.</p>

**Original outcomes**

**Rights Based Outcomes**

<p><b>The long-term outcomes are that people in receipt of Scottish benefits and their families are enabled to have:</b></p>	<p><b>The long-term outcomes are that people in receipt of Scottish social security and their families are enabled to:</b></p>
<p>an increased sense of control and empowerment over their lives.  an increased sense of confidence and security.  are happier and are more resilient  are better able to participate in society and fulfil their potential in life.</p>	<p>realise their rights to family protection and assistance, an adequate standard of living and adequate access to health care.  have an increased sense of control and empowerment over their lives.  an increased sense of confidence and security.  are happier and are more resilient.  are better able to realise their right to participate in society and fulfil their potential in life.</p>

<p><b>The Scottish social security system is:</b></p>	<p><b>The Scottish social security system:</b></p>
<p>works effectively with the reserved benefit system.  effectively integrated with other services to ensure a person-centred service where recipients get the support they need when they need it.  advances equality by how it operates and what it delivers.</p>	<p>works effectively with the reserved social security system.  is effectively integrated with other services to ensure a rights based service where recipients get the support they are entitled to when required.  promotes a rights respecting culture which respects the human dignity of its staff.  delivers enjoyment of the right to social security without discrimination and equally between everyone.  is sustainable, in order to ensure that the right to social security can be realised for present and future generations.</p>



**Original outcomes**

**Rights Based Outcomes**

<b>Scottish benefits continue to:</b>	<b>Scottish social security payments continue to:</b>
<p>target the right people and are impacting on poverty and inequality.</p> <p>be paid to as many of those who are entitled to them as possible.</p> <p>be paid at the right time and at the right amount to make a positive difference to recipients.</p>	<p>be available to all, but target individuals belonging to the most disadvantaged and marginalised groups, without discrimination on any prohibited grounds.</p> <p>maximise the income of as many recipients who are entitled to them as possible.</p> <p>be paid in a timely manner and be adequate in amount and duration in order that everyone may realise his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care and all other rights.</p>

<b>People resident in Scotland:</b>	<b>People resident in Scotland:</b>
<p>view benefit recipients positively and without stigma.</p> <p>recognise the vital role that carers fulfil in society and to the economy.</p> <p>value social security as they do other public services.</p>	<p>value social security as a basic human right and the role it plays in reducing poverty and promoting an inclusive and fair society.</p> <p>understand that everyone has the right to live with human dignity free from discrimination.</p> <p>view recipients of social security positively and without stigma.</p> <p>recognise the vital role that carers fulfil in society and to the economy and that carers also have the right to family protection and assistance, an adequate standard of living ,adequate access to health care and all other rights.</p>

**Original outcomes**

**Rights Based Outcomes**

<b>Other public and third sector services:</b>	<b>Other public and third sector services:</b>
experience less pressure due to the changes to social security in Scotland.	experience less pressure due to the changes to social security in Scotland.

<b>Alongside the health and social care system:</b>	<b>Alongside the health and social care system:</b>
social security has a part to play in enabling wellbeing, and in particular, to enable people to live healthier lives in their community.	social security has a part to play in enabling wellbeing, and in particular, to enable people to fulfil their right to the highest attainable standard of physical and mental health.

## 2.1 Embedding Dignity and Respect

Human rights provide a legal and objective foundation to the concepts of “dignity” and “respect” to be built into the social security system. Human rights also assist in reframing the conceptual basis for the provision of social protection as a right and entitlement to be realised in support of the realisation of all other human rights and broader social justice.

Taking a human rights based approach (as described above) would support the Scottish Government in answering these questions. Again, the very nature of this approach entails working in equal partnership with people who have lived experience of social security and are, therefore, best placed to help the government to develop a system that truly places respect for human dignity at its core. Moreover, a range of guidance on these issues is also contained within UN CESCR General Comment 19 and the European human rights instruments explained above.<sup>xxx</sup>

## 2.2 Specific Language

The fact that social security is a basic human right should be reflected in the vision and on the face of the forthcoming legislation. There are specialised human rights instruments and guidance on social security as explained above which provide the minimum standards for social security.

It will be an important task of the new social security system to change how social security is viewed at present in Scotland. This will begin with the protection and respect for human dignity running through everything that the new system does. The language chosen should be done with people with lived experience and should be consistent. Social security rather than welfare, applicants and recipients rather than claimants, payments rather than benefits are all good suggestions; consistent use will be key.

## 2.3 ‘Access’ First [Digital First]

Human rights play a key role in both helping to deliver and assess the accessibility and quality of services. Human rights require that social protection programmes are accessible. There are administrative and physical obstacles which prevent people and often the most marginalised people from reaching the system. Furthermore, those obstacles can overlap due to age, disability, ethnic background and geographical location. This is a considerable disadvantage in accessing social protection programmes. Fees payable to state or private entities to obtain a claimant’s own bank or other records can also be prohibitive, as can public transport costs to access free public internet services.<sup>xxxii</sup>

Social protection programmes must be physically accessible, and those entitled to social protection must be able to access their benefits in a convenient place and timely manner without encountering disproportionate costs and safely. This is particularly important as those more in need of social protection are usually those

removed from urban centres and with limited mobility - for example, older people or disabled people.

The Commission is pleased to note the current plans to engage with people with lived experience in testing the new systems, and to ensure that the technology works well for the people who use it. Access to the internet is increasingly required to exercise the right to access information, and consequently for the right to participate in decisions. The Commission does have concern, however, with the primary focus on the Scottish Government's 'Digital first' approach. Rates of connectivity in Scotland remain low in comparison to England. Furthermore, while access to the internet is improving between rural and urban areas in Scotland, differential rates do exist for older people, those on lower incomes, those with fewer educational qualifications, unemployed people, disabled people or those with long-term illnesses.<sup>xxxii</sup>

The evidence base which informed the development of Scotland's National Action Plan for Human Rights (SNAP)<sup>xxxiii</sup> also found that whilst technological development has enabled improved access to information for many, this advancement had also created a digital divide.<sup>xxxiv</sup> An overreliance on internet access (especially for access to jobs and social security) and a reduction in information and resources available in print had in fact resulted in a rollback of accessibility of information at central and local government level, particularly in rural areas, where the speed at which broadband access is available falls significantly short of that in urban areas. More often than not the digital divide impacted most on those who were already the most marginalised.<sup>xxxv</sup> It is therefore crucial that as the new social security system develops and embraces new technology, it must always give due consideration to those who cannot make ready use of such technology, and facilitate their access to the system in other ways. It will more often than not be those most in need of these social security entitlements who will have the least access to technology. Regardless of regional connectivity, there must be a paper based alternative for all procedures, with no extra charges levied on those who use that system. Mobile vehicle based systems should also be considered as currently used by banks, libraries etc in the islands and other rural communities.

## 2.4 Co-production

Co-production is an integral part of a human rights based approach. Therefore it should be informed by the human rights analysis explained above. Furthermore, co-production is not a tokenistic process which engages solely 'the usual suspects', or with groups or agencies that the government believes represent the views of certain vulnerable groups. Co-production requires an open process and transparent invitation to participate in those decisions that impact on people's everyday life. Involvement fails when participatory structures are too selective, are too short term to have any impact, don't facilitate a real shift in power relations and are not adequately resourced. Co-production is a very specific process and it is important that what is undertaken is a true reflection of the principles of co-production.

## 2.5 User panels

In relation to the terminology ‘user panels’, a rights based approach and co-production tell us that it would be beneficial for the groups to consider what they themselves would like to be described as. This will not only answer this question, but will do so in a manner that provides some empowerment to those on the group.

## 3 Delivering social security in Scotland [Consultation Question 3]

### 3.1 Delivery options

Human rights require that delivery options are designed and implemented in ways that ensure that they comply with core obligations of the right to social security as explained above. Whilst social security is a right in itself, it should also be understood in the context that human rights are interdependent and interrelated – i.e. the exercise of one depends on the fulfilment of the others. Through its redistributive character, social security, from a general perspective, plays an important role in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion as well as, from a particular perspective, facilitating the realisation of the right to an adequate standard of living.

The UN CESCR General Comment 19 notes the following guidance in relation to the adequacy of provisions:

*“...whether in cash or in kind, must be adequate in amount and duration in order that everyone may realize his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care, as contained in articles 10, 11 and 12 of the Covenant. States parties must also pay full respect to the principle of human dignity contained in the preamble of the Covenant, and the principle of non-discrimination, so as to avoid any adverse effect on the levels of benefits and the form in which they are provided. Methods applied should ensure the adequacy of benefits. The adequacy criteria should be monitored regularly to ensure that beneficiaries are able to afford the goods and services they require to realize their Covenant rights”.*

It is paramount that any type of delivery option and payment model follows the human rights principles of equality and non-discrimination, accountability and transparency, access to information and participation. Whether developing a new social security agency or bringing together an arrangement of existing providers and extending their remit to take on this role, critical to the development of a truly transformational service will be the level of investment in its staff. The staff that deliver this service will provide the front line experience for applicants and recipients and it is the staff that will be best placed to embed the desired ethos and bring about the necessary cultural change.

Where the UN CESCR General Comment 19 states *“methods applied should ensure the adequacy of benefits”* this also means that decisions must never be: linked to

staff career development; based on staff incentive schemes (formal or informal); or made under any pressure on staff to 'save money'. This is also a matter of staff and client dignity.

The Scottish Government will have to balance the development cost of a brand new service with that of expanding existing services. It will also have to give serious consideration as to how best to develop the ethos that it wants for this transformational service. Given how critical the ethos is to the success of the service, in changing how the public views social security, and in ensuring people are able to realise their right to social security, can this be done within a system that has entrenched views on 'welfare'? It may be that starting a new agency with in effect a 'clean slate', would be a more efficient way of developing and nurturing the right ethos within the workforce needed for this cultural change.

The Scottish Government should also consider the importance of consistency of delivery of advice and social security. This is a large undertaking and the benefits of a consistent approach that is nationally led should be explored in detail. If delivery is devolved to the local level there exists the risk of local interpretation of rules and guidance that has been witnessed within the delivery of the existing Social Welfare Fund.<sup>xxxvi</sup>

## **4 Equality and low income [Consultation Question 4]**

### **4.1 Improving the partial Equality Impact Assessment**

The Commission is concerned that the subject of equality and non-discrimination features neither in the core principles, nor permeates the consultation, but rather is siloed in its consideration within the impact assessment.

A key concern of the partial impact assessment as it stands, is the lack of consideration given to human rights or to the potential cumulative and intersectional impact of the range of new powers and how the payments may interact.

Considerable work on this has been undertaken by the Commission and the Equality and Human Rights Commission in the development of an Equality and Human Rights Impact Assessment (EQHRIA).<sup>xxxvii</sup>

Introducing human rights while having due regard to equality in policy analysis will assist the Scottish Government in meeting its compliance obligations under the Scotland Act. It will also ensure that delivery organisations meet duties under the Human Rights Act 1998 by broadening the scope of impact assessment beyond protected characteristics groups; providing a framework for balancing competing rights, interests and risks and highlighting the most serious impacts.<sup>xxxviii</sup>

**Table 4. Sets out the key HRBA principles in relation to impact assessment.**

PANEL	Principle	What this means for impact assessment
Participation	Everyone has the right to participate in decisions which affect their human rights. Participation must be active, free, meaningful and give attention to issues of accessibility, including access to information in a form and a language which can be understood.	Who are the groups or individuals most likely to be affected by the proposal?  What methods would you use to ensure that those affected by the policy are involved in decisions that affect their human rights, in an active and meaningful way?
Accountability	Accountability requires effective monitoring of human rights standards as well as effective remedies for human rights breaches.	Who is responsible for making sure that human rights are respected, protected and fulfilled?  What sources of evidence (qualitative and quantitative) are you aware of that would help to inform the policy?  Are there procedures in place for staff or service users who feel that their human rights have been or are in danger of being breached to hold the organisation to account?
Non-discrimination and equality	All forms of discrimination on grounds such as age, gender, sexual orientation, ethnicity or "other status" (such as health status or poverty) in the realisation of rights must be prohibited, prevented and eliminated. Human rights also requires the prioritisation of those in the most marginalised or vulnerable situations who face the biggest barriers to realising their rights.	Have individuals or groups who are more vulnerable to human rights breaches been identified?  How might the policy impact on these individuals or groups?  Can you identify any actions that you could recommend that would lessen the negative impact of the policy?
Empowerment	Individuals and communities should understand their rights, and be supported to participate in the development of policy and practices which affect their lives. Individuals	What information will those affected by the policy need in order to be able to effectively influence the decision?

	and communities should be able to claim their rights where necessary.	
Legality	An HRBA requires the recognition of human rights as legally enforceable entitlements, and is linked in to national and international human rights law.	What are the possible human rights impacts of the proposal? (Which rights might be engaged? What is the nature of those rights (are they absolute, qualified, limited or to be fully realised progressively)? If they are qualified rights, is any interference necessary to achieve a legitimate aim, and proportionate- that is the minimum necessary interference)

The Commission recommends that the Scottish Government consider the assessment of the cumulative and intersectional impact of these new powers through a Human Rights and Equality and Impact Assessment. Proactively taking account of human rights and equality in the exercise of public functions will provide assurances rather than assumptions that actions are fair, not arbitrary, and that they comply with the law, preventing human rights violations before they require redress and added expense.

#### 4.2 Disaggregated data

The effective monitoring of human rights and equality outcomes requires access to a range of disaggregated data. It is an accepted norm that:

*“the collection and dissemination of disaggregated data is a necessary requirement for states to comply with their legal obligations to ensure equality and non-discrimination in progressively realising economic , social and cultural rights”.*<sup>xxxix</sup>

A number of international treaty bodies have made recommendations regarding improved availability of disaggregated data in order to assess progress.<sup>xi</sup> In its most recent review of the UK, the UN CSECR raised the issue of disaggregated data specifically in relation to social security. As such General recommendation 41 (d) calls upon the State party to:

*“Provide in its next report disaggregated data on the impact of the reforms to social security on women, children, persons with disabilities, low-income families and families with two or more children.”*<sup>xli</sup>

In order to properly assess the impact of these new powers, it will be necessary to improve the availability of disaggregated data in Scotland, in particular in relation to ethnicity.



## 5 Independent advice and scrutiny [Consultation Question 5]

### 5.1 Independent scrutiny body

Any national social security strategy and its implementation should also be based on the principles of accountability and transparency.<sup>xlii</sup> The UN CESCR General Comment 19 notes that :

*“States parties are obliged to monitor effectively the realization of the right to social security and should establish the necessary mechanisms or institutions for such a purpose”.*<sup>xliii</sup>

The role of implementing an effective new Scottish social security system does not end with the operationalisation of the system. It is critical that the system seeks to use a variety of methods both internal and external to ensure it continues to improve and deliver as intended.

While the independent scrutiny bodies can take different shapes from independent review boards and audit offices to public ombudsman and complaint commissions, the Commission recommends that an independent scrutiny body should comply with the principles below. The following list is not exhaustive:

1. Independence - this means external oversight which secures and maintains public trust in the social security system, but also operational and financial independence.
2. Statutory creation - the scrutiny body should function on the basis of statutory law and report to Parliament directly, thus in turn ensuring proper independence.
3. Broad mandate - the scrutiny body should be provided with sufficient and effective powers to enable it to carry out its mandate. This includes monitoring, undertaking investigations from complaints, visiting remote areas and providing recommendations to Scottish Ministers and/or public authorities at its own initiative, and instituting proceedings in court.
4. Public accountability – this includes publishing its findings in annual and other thematic reports as well as collecting, disaggregating and widely publishing data.

### 5.2 Scottish social security decision making standards

Decision making standards are an important element for ensuring consistency throughout a service which delivers services on a scale such as that of the new social security agency. It is crucial that a human rights based approach is reflected in the development of the decision making standards. Taking a rights based approach to the development of the standards will ensure that the individual is placed firmly at the centre of the decision making process, which will better support the ability of the social security agency to make the appropriate decisions in line with international and national human rights standards.

End.

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### Endnote:

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i Cumulative impact refers to the overall impact of a set of changes to government policies (such the introduction of changes in social security provisions) on the population as a whole and on the basis of specific characteristics (e.g. age, gender, income level, family type, ethnicity, disability etc.)

ii People's identities and inequalities are complex: characteristics such as age, gender, income level, family type, ethnicity, disability etc intersect in intricate ways. They shape people's social identities and impact on their everyday life experiences. Giving consideration to the intersectional impact of the new social security powers will help to identify where social identities and inequalities overlap.

iii As contained within a number of international treaties to which the UK state is signatory: See Article 9 of the International Covenant on Economic, Social and Cultural rights; article 5(e)(iv) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) , articles 11(1)(e) and 14(2)(c) of the Convention on the Elimination of All Forms of Discrimination Against Women , article 26 of the Convention on the Rights of the Child (CRC) ; article 28 of the Convention on the Rights of people with disability (CRPD) and Articles 12 and 13 of the European Social Charter.

iv <http://news.scotland.gov.uk/Speeches-Briefings/SNAP-Human-Rights-Innovation-Forum-2040.aspx>

v <http://news.scotland.gov.uk/Speeches-Briefings/Priorities-speech-Taking-Scotland-Forward-24f8.aspx>

vi Evidence from the Scottish Attitude Survey over the last 15 years continue to show that the majority of people in Scotland believe that large numbers of people falsely claim benefits (in 2013 48% strongly agreed and a further 27% slightly agreed with the statement – Do you agree or disagree that large numbers falsely claim benefits?) see: <http://whatscotlandthinks.org/questions/do-you-agree-or-disagree-that-large-numbers-falsely-claim-benefits-4#line>

vii The ASoL reference group are a group of people with lived experience of poverty. They have come together as a reference group on the right to an adequate standard of living supported by the Scottish Human Rights Commission. They take a human rights based approach to tackling poverty in Scotland.

They each have experience of using, or supporting others to use, the social security system. Their collective experiences include (but are not limited to): disability and poverty; mental health and poverty; caring and poverty; homelessness; in-work poverty; rural poverty; food poverty; and fuel poverty.

viii As contained within a number of international treaties to which Scotland via the UK state is signatory: See Article 9 of the International Covenant on Economic, Social and Cultural rights; article 5(e)(iv) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) , articles 11(1)(e) and 14(2)(c) of the Convention on the Elimination of All Forms of Discrimination Against Women , article 26 of the Convention on the Rights of the Child (CRC) ; article 28 of the Convention on the Rights of people with disability (CRPD) and Articles 12 and 13 of the European Social Charter.

ix <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

x See [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)

xi Availability: The right to social security requires, for its implementation, that a system, whether composed of a single scheme or variety of schemes, is available and in place to ensure that benefits are provided for the relevant social risks and contingencies. Adequacy: Benefits, whether in cash or in kind, must be adequate in amount and duration in order that everyone may realize his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care. Accessibility: All persons should be covered by the social security system, especially in individuals belonging to the most disadvantaged and marginalized groups, without discrimination on any of the grounds prohibited. Social security services must be affordable, and should have physical access. See <http://www.ohchr.org/EN/Issues/RightSocialSecurity/Pages/SocialSecurity.aspx>

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- xii According to the Working Group on Social Rights (GT-DH-SOC), “The prospect of case-law developing further in this direction seems to reflect the principle of respect for human dignity and the concerns expressed in Recommendation R (2000) 3 of the Committee of Ministers of the Council of Europe”.
- Recommendation R (2000) 3, on the right to satisfaction of basic material needs of persons in situations of extreme hardship, was adopted by the Committee of Ministers on 19 January 2000, at the 694th meeting of the Ministers’ Deputies.
- xiii See Social security as a human right The protection afforded by the European Convention on Human Rights, CoE Human Rights File No. 23, Strasbourg [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)
- xiv See Social security as a human right The protection afforded by the European Convention on Human Rights, CoE Human Rights File No. 23, Strasbourg [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)
- xv Ibid.
- xvi Scotland Act 1998, Schedule 6, para 7(2).
- xvii Scotland Act 1998, s29 (2), s57.
- xviii European Social Charter, European Committee of Social Rights, Conclusions XX-2 (2013), (GREAT BRITAIN) Articles 3, 11, 12, 13 and 14 of the 1961 Charter, January 2014. In association with the other rights under the thematic review ‘Health, social security and social protection’ the Committee concluded 11 incidences of conformity in relation Articles 3§1, 3§2, 3§3, 11§1, 11§2, 11§3, 13§1, 13§2, 13§3, 14§1, and 14§2 and one incidence of non-conformity under Article 12§1.
- xix See <http://www.scottishhumanrights.com/news/latestnews/euref> for the implications on their Charter from the Brexit vote.
- xx <http://news.scotland.gov.uk/News/Leading-the-way-in-tackling-inequality-1b49.aspx>; First Minister Nicola Sturgeon, Dynamic Earth, Edinburgh, 9 December 2015 <http://news.scotland.gov.uk/Speeches-Briefings/SNAP-Human-Rights-Innovation-Forum-2040.aspx> ;
- xxi <http://news.scotland.gov.uk/News/Leading-the-way-in-tackling-inequality-1b49.aspx>
- xxii See: <http://www.scottishhumanrights.com/humanrights/humanrightsbasedapproach> and <http://www.scottishhumanrights.com/careaboutrights>
- xxiii See <http://www.theguardian.com/politics/2011/apr/01/jobcentres-tricking-people-benefit-sanctions>; <http://www.dailyrecord.co.uk/news/scottish-news/vulnerable-easy-targets-job-centre-6320363>; <http://www.theguardian.com/politics/2013/dec/09/ain-duncan-smith-dwp-stop-benefits-whistleblower>
- xxiv UN CESCR General Comment 19 See [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GC/19&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GC/19&Lang=en)
- xxv See: <http://www.scottishhumanrights.com/humanrights/humanrightsbasedapproach>.
- xxvi See: <http://www.scottishhumanrights.com/humanrights/humanrightsbasedapproach>.
- xxvii See: <http://www.gov.scot/Resource/0049/00492430.pdf>
- xxviii UN CESCR General Comment 19 See [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GC/19&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GC/19&Lang=en)
- xxix See [http://www.ohchr.org/Documents/Publications/Human\\_rights\\_indicators\\_en.pdf](http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf)
- xxx Ibid.
- xxxi It is a common current practice for applicants/recipients to have to pay fees to their banks just to get paper copies of past statements that are demanded by a social security agency and if they cannot afford it, they are not complying with DWP procedures. The new Scottish social security system will have to look at alternatives to ensure accessibility.
- xxxii See SHRC 2012, Getting it Right? An Overview of Human Rights in Scotland, Edinburgh, SHRC. <http://www.snaprights.info/how-snap-was-developed/getting-it-right>
- xxxiii See <http://www.snaprights.info/wp-content/uploads/2016/01/SNAPParticipationReportJune2013final.pdf>
- xxxiv See ICT and the Emerging 'Fourth World': where does the responsibility lie? Aitken & Quiroz (2008) International Journal of Private Law, 1, (1-2): 14-21
- xxxv See <http://www.snaprights.info/wp-content/uploads/2016/01/SNAPParticipationReportJune2013final.pdf>
- xxxvi CPAG Social Security Consultation Event, Edinburgh, 21st September 2016.

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xxxvii The following information on EQHRIAs is drawn directly from the work of SHRC and EHRC – and can be accessed here:

<http://www.scottishhumanrights.com/eqhria>

xxxviii See SHRC response to the Welfare Reform Committee in May 2013 re IA available at <http://scottishhumanrights.com/resources/policysubmissions>

xxxix See <https://www.essex.ac.uk/hrc/careers/clinic/documents/disaggregated-data-and-human-rights-law-policy-and-practice.pdf>

xl See CEDAW, General Recommendation No 9 on Statistical data concerning the situation of women (1989), General Recommendation No 19 on Violence against Women (1992), and General Recommendation No 23 on Article 7, political and public life (1997); CRC, General Comment No 4 on Adolescent Health (2003), and General Comment No 5 on General measures of implementation of the Convention on the Rights of the Child (2003); CERD, General Recommendation No 25 on related dimensions of racial discrimination (2000), General Recommendation No 34 on Racial discrimination against people of African descent (2011); and General Recommendation No 14 on Data collection and policies to tackle racial discrimination (2016); CESCR General Comment 20 on Non-discrimination in economic, social and cultural rights; and General Recommendation 41 (d) on Social security (2016).

xli UN CESCR 2016, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/6.

xlii See Social security as a human right The protection afforded by the European Convention on Human Rights, CoE Human Rights File No. 23, Strasbourg [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)

xliii UN CESCR General Comment 19 See [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GC/19&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GC/19&Lang=en)