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An t-Ionad Fiosrachaidh

Social Justice and Social Security Committee

**8th Meeting, 2024 (Session 6), Thursday, 14
March**

Social Security (Amendment) (Scotland) Bill

Introduction

This is the second of five panels on the Social Security (Amendment) (Scotland) Bill. Today's session will hear from organisations representing disabled people.

The Committee will hear from:

- Kirstie Henderson, Policy Officer (Scotland), and Claire Andrews, Legal Rights Officer, Royal National Institute of Blind People (RNIB)
- Craig Smith, Scottish Association for Mental Health (SAMH)
- Allan Faulds, Policy and Information Officer, The Health and Social Care Alliance Scotland (the ALLIANCE)

Background

[This Scottish Government Bill](#) was introduced on 31 October 2023. It has eight substantive parts, each dealing with a different aspect of social security administration. All the changes are by amendment to the framework legislation - the [Social Security \(Scotland\) Act 2018](#). The overarching aim is:

"to create efficiencies and enhance the administration of the Scottish social security system, with a focus on measures to improve the client experience and to deliver value for money."

[Last week's SPICe paper](#) and the [SPICe bill briefing](#) provide more background.

The Committee held a 'call for views' which received [27 responses](#), 10 of which also responded to [the Scottish Government consultation](#). There was a generally positive response albeit with some detailed suggestions for amendments and some concern

raised about ensuring vulnerable clients would always be supported. All of today's witnesses responded to the Call for Views.

Today's session will focus on Parts 3 to 6 of the Bill.

- **Challenging decisions** - Part 3, sections 4 to 8 make changes to the processes for redetermination and appeal.
- **Overpayments** - Part 4, sections 9 to 13 make changes to the rules on liability for 'assistance provided in error'.
- **Appointees** - Part 5, sections 14 and 15 concern arrangements where someone who cannot manage their own benefit payments (such as a child or an adult with incapacity) has an appointee to manage their benefits for them.
- **Providing information** - Part 6, section 16 would require individuals to provide information to Social Security Scotland in order to estimate the amount of fraud or error in the system as a whole.

Themes for discussion

The following suggests five themes for discussion:

- Theme 1: Challenging decisions (Part 3 of the Bill)
- Theme 2: Overpayments (Part 4 of the Bill)
- Theme 3: Appointees (Part 5 of the Bill)
- Theme 4: Information for audit (Part 6 of the Bill)
- Theme 5: Social security principles and aims of the Bill

Theme 1: Challenging Decisions (Part 3 of the Bill)

If someone is unhappy with the decision about their benefit entitlement, they [can ask for a redetermination](#). A different decision maker at Social Security Scotland will make a new decision. The benefit awarded could go down as well as up. Timescales for redeterminations are set in regulations for each benefit.

Part 3 of the Bill would:

- Allow requests for redetermination and appeal to be submitted after a year in exceptional circumstances (section 4)
- Allow individuals to withdraw their redetermination request (section 5)
- Require Ministers to complete a redetermination (section 6)
- Allow an appeal to 'lapse' where the client consents to a more advantageous award offered by Social Security Scotland (section 7)
- Clarify the actions that a Tribunal and Ministers can take following a process appeal (section 8).

Previous consideration

Key points made by witnesses on Part 3 at last week's Committee meeting were:

- Overall the provisions in Part 3 would improve the client experience.
- Deadlines for redetermination should be extended and be the same for all benefits.
- If someone withdraws a redetermination or appeal, they should be allowed to re-instate it within a fixed time period.
- The Bill would require the individual to give consent before an appeal is lapsed. Witnesses had different opinions on this. Michael Clancy (Law Society of Scotland) emphasised the need for informed, written consent. On the other hand, Jon Shaw (CPAG) said that consent to lapse an appeal should not be required because: “that simply adds a bit more confusion and debate. Because there is that protection that [the new award] must be more favourable it makes it more administratively simple.”
- Witnesses from CAS, CPAG and Glasgow City Council thought that a further improvement would be to allow someone to go straight to appeal. If Social Security Scotland offered a more advantageous award, then the appeal could lapse. On the other hand, Diane Connock (Stirling Council) thought that this might be too stressful for people.

Witness submissions

In their written submissions, all of today’s witnesses were broadly supportive of the provisions in Part 3 of the Bill, but emphasised the need for clear guidance, and to ensure individuals did not feel pressurised into decisions.

Late requests in exceptional circumstances

SAMH emphasise the need for clear guidance on what ‘exceptional circumstances’ mean, and that the redetermination process should be evaluated as part of the independent review of Adult Disability Payment (ADP). (The Policy Memorandum at para 63 gives examples of ‘exceptional circumstances’ as severe physical or mental illness, unstable housing, abuse or detainment).

Right to withdraw a redetermination request

RNIB propose a 14 day ‘cooling off period’ when withdrawing a redetermination request and suggest that the number or and reasons for withdrawing redetermination requests should be monitored. (The Policy Memorandum states that: “The rate of, and reasons for, withdrawing requests for redetermination will be monitored” ([PM para 74](#))).

Lapsing appeals

In their written submissions, the witnesses agree with lapsing appeals – although they emphasise the importance of consent and robust guidance. RNIB state:

“Claimants should not feel pressurised into accepting the proposed new decision straight away and be given time to seek independent advice or advocacy support.”

The Policy Memorandum at para 91 states that: “Robust guidance will be put in place so that Social Security Scotland staff can support clients and their

representatives to understand their options and the implications of accepting a new determination, and to understand their challenge rights on the new determination.”

RNIB also consider that if a client wishes to challenge the new determination, they should not have to get a redetermination before appealing.

Members may wish to ask:

1. **What sorts of things should be considered ‘exceptional circumstances’ that would justify a request for redetermination or appeal being more than a year late?**
2. **What needs to be in place to ensure clients aren’t pressurised into withdrawing their redetermination or appeal? Does the Policy Memorandum offer sufficient re-assurance on this point?**
3. **Should lapsed appeals be allowed even if what is offered isn’t the *best possible* award that could be achieved at Tribunal?**
4. **Last week, Erica Young (CAS) argued that clients ought to be able to go straight to appeal without having to do a redetermination first. On the other hand Diane Connock (Advice Services, Stirling Council) thought that might be too daunting for people. What are witnesses’ views?**

Theme 2: Liability for overpayments (Part 4 of the Bill)

Background

Who is a representative?

Part 4 of the Bill makes ‘representatives’ liable for overpayments in certain circumstances. There was some discussion at last week’s committee meeting about welfare rights advisers acting as representatives. However, the policy intention is that the Bill would apply to more formal representatives. Regulations will set out who a representative is. The [Explanatory Notes](#) states that:

“This might include legal representatives of children, people appointed under section 85A or 85B of the 2018 Act (which allow the Scottish Ministers to appoint people to act on behalf of children and other individuals in certain circumstances) and guardians under the Adults with Incapacity (Scotland) Act 2000 amongst others.” (Ex notes para 40).

Liability for overpayments

The legislation calls overpayments ‘assistance provided in error’.

The individual who is entitled to the benefit is liable for overpayments if:

- the error was the individual’s fault, or
- it was the kind of overpayment it would be reasonable to notice.

This means they could already be liable for noticeable overpayments caused by their representative. The Bill would also make them liable for non-noticeable overpayments caused by their representative so long as the representative hadn’t misused the funds.

An individual's representative (such as an appointee) is not currently liable under the 2018 Act for overpayments. The Bill changes this and would make them liable in certain circumstances but only if they misused the funds.

The [Policy Memorandum](#) states that:

112. The provisions at section 9 of the Bill will make provision that an individual is liable where their representative has been the one who was at fault for the error. However, an individual will not be liable so far as the assistance given in error was used for a purpose which was a breach of the duties or responsibilities of their representative, for example, where the representative has not used the money in the interests of the client.

[...]

118. The Scottish Government does not think it is fair to seek recovery from vulnerable clients where due to the bad faith of another person they saw no benefit from those overpayments. However, nor does the Scottish Government consider that people should be deterred from volunteering to act on behalf of a friend or family member by a risk to their personal finances. The Scottish Government considers the provisions in the Bill successfully strike this balance by ensuring that the person who benefited from the overpaid sums will, ultimately, be liable to repay them.”

Currently, the 2018 Act does not include any rights to challenge a decision on liability. The Bill would enable reviews and appeals.

Last week, witnesses suggested that it was confusing to create separate provisions for reviews and appeals for challenging a decision on overpayment liability. It would be simpler if a decision on liability was another form of ‘determination’ ([under s.50 of the 2018 Act](#)) which could then be redetermined and appealed using the provisions already set out in that Act.

Recovery of overpayments

If someone is considered liable for an overpayment, Social Security Scotland has discretion whether to recover it. Before doing so, Social Security Scotland must [consider the financial circumstances of the person that owes the money](#).

Their [Debt Management Strategy](#) also states that:

- No individual will knowingly be placed into hardship
- Overpayments resulting from official error will not be recovered, unless in specific circumstances.

Social Security Scotland's annual report 2022-23 notes £295,000 overpayments in Best Start Grant, Best Start Foods and Scottish Child Payment due to client error and states that:

“Where client induced error results in an overpayment of benefit, we or the Department for Work and Pensions would recover that debt where appropriate.” ([Annual Report](#) p.66).

[...]

“Social Security Scotland will normally seek to recover all overpayments where there is a legal basis to do so and recovery is cost effective. For those benefits directly administered by Social Security Scotland, current debt levels are minimal.” ([Annual Report](#) p.77)

Part 4 of the Bill would:

- Make representatives liable for overpayments in some circumstances but only if they had misused the funds (sections 9 to 11)
- Extend what is considered to be the individual’s fault to include errors caused by or contributed to by their representative - so long as the representative had not misused the funds (Section 9)
- Clarify that overpayments can be recovered from a deceased’s estate and extend this to include decisions on overpayment liability taken after the individual had died (section 12)
- Introduce reviews and appeal right for decisions on overpayment liability (section 13).

Submissions from witnesses

In their written submissions, witnesses welcomed the introduction of challenge rights on liability decisions and emphasised that, whatever the decision on liability, there needs to be a compassionate approach to recovery of overpayments.

On liability, SAMH:

“cautiously accept the rationale that the individual rather than the appointee or representative, should be liable for the repayment in the circumstances of good faith errors by appointees.”

SAMH welcome making representatives liable where overpaid funds are misused.

“We believe this provides an important safeguard to the hopefully small number of claimants who are victims of financial exploitation or harm from their representative.”

Last week, witnesses were concerned about how liability would be identified in practice. For example, Erica Young (CAS) said that it may be difficult to delineate who has had benefit of any overpayment.

Erica Young also gave an example of someone being asked to repay £195 per month for a £600 overpayment of ADP. They therefore suggested an income threshold for debt recovery and agreed that clearer guidance would be helpful.

Members may wish to ask:

5. **Do you agree with the general principle set out in the Policy Memorandum that “the person who benefited from the overpaid sums will, ultimately, be liable to repay them”? Does this justify making individuals liable for overpayments caused by their representatives?**

6. **Last week witnesses were unsure how these provisions would work in practice. What are your views?**
7. **Do witnesses think that making representatives liable for overpayments where they misused the money will affect people's willingness to become a representative?**
8. **Will these provisions help tackle instances of financial abuse?**

Theme 3: Appointees (Part 5 of the Bill)

Section 14 of the Bill provides that an individual appointed to manage a person's Department for Work and Pensions (DWP) benefits would also manage their Social Security Scotland benefits until Social Security Scotland completes their own checks (section 14).

This is already in place for individuals transferring from Personal Independence Payment (PIP) or Disability Living Allowance (DLA) onto Child Disability Payment (CDP) or Adult Disability Payment (ADP). The Bill would enable it to be put in place for other situations, such as when someone moves from England or Wales to Scotland.

Section 15 of the Bill provides that where an appointee uses any funds outwith their common law or statutory duties, and does so in bad faith, they would be liable to repay those funds to the individual they represent.

Submissions from witnesses

In the written submissions, witnesses agreed with these provisions while emphasising that Social Security Scotland should complete their approval process as soon as possible. SAMH explain how they were:

“instrumental in shaping the provisions [...] around the process for appointing appointees. We successfully lobbied for safeguards [...] We are pleased that the Scottish social security appointee provisions are more rigorous than the equivalent DWP system.

[..]

“While we accept that the provisions are proportionate in a limited number of cases, we believe that the appointee should, as soon as practically possible, be subject to the Scottish appointee process.”

Last week, witnesses suggested that clear, publicly available guidance was needed.

Members may wish to ask:

9. **SAMH were instrumental in shaping the Social Security Scotland provisions for authorising appointees. Can they explain what the problems are with the DWP process and how the Scottish process differs?**

10. Do witnesses have any insight about how quickly the authorisation process is working for those transferring from DLA or PIP onto CDP and ADP?

Theme 4: Information for audit (Part 6)

Part 6 of the Bill would give Ministers the power to require clients to provide information so they can establish estimates of error and fraud.

If the information provided suggests that an award ought to be changed, then Social Security Scotland will do a new determination which the client could then challenge through redetermination and/or appeal.

If the client fails to provide the information, then the Bill would allow for their benefit to be suspended. If further attempts to get the information fail, then entitlement could be reviewed which would either confirm eligibility or end payments.

Safeguards are:

- Regulations will set out who is exempt from being asked to provide information.
- Clients can ask for the request to be withdrawn if they have a 'good reason'.
- Ministers define 'good reason', and their decision is final.
- Clients can have a supporter present during interviews and phone-calls.
- Disabled clients have a right to independent advocacy.

These provisions were not consulted on. The Policy Memorandum states that:

“This provision is high priority, fundamental to the functioning of the Scottish social security system and aligns with the practice of other government departments. No public consultation was therefore conducted on the provisions at section 16. Stakeholder engagement will inform the processes used to capture information for audit to ensure that they are clear.” (PM para 159).

The existing provisions on suspension require that:

- Financial circumstances are considered;
- The client is informed of the suspension, the reason for it and how they could end it;
- The client has a right to a review of the suspension;
- When a suspension ends, clients are paid what they ought to have been paid while benefit was suspended.

See Section 51 and Schedule 11 to [the 2018 Act](#).

Submissions from witnesses

SAMH recognise the importance of the provisions but are concerned about proportionality and say:

“We believe the decision to suspend or ultimately end someone’s entitlement risks the health and wellbeing of the claimant as well as risking financial harm.”

They wish to see consultation with those with lived experience, and a ‘generous’ interpretation of having a ‘good reason’ for the request to be withdrawn.

The ALLIANCE say the provisions “should be strictly limited and applied only in cases of genuine concern.” (NB: the proposal is that clients will be picked at random).

RNIB oppose the provisions saying:

“It is RNIB’s concern that those claimants most in need of financial assistance due to the severity of their disability or long term health condition could equally be those who, for a variety of reasons, have the most significant barriers preventing them from engaging with such a request. To this end, we do not support the suspension of benefit.”

Last week witnesses expressed concerns about Part 6 including that:

- The provisions appear to conflate fraud and error.
- Suspending benefit for failure to provide information where there is no suspicion of fraud “seems to be a harsh penalty.
- There may be other ways to get the information required without going to the extent of measures like these.
- The potential impact on vulnerable people, who may, for example, feel that an interview in person is an interview under caution for fraud even if it isn’t is of concern.
- SCoSS should scrutinise all the regulations under this Part of the Bill.

On the other hand, Diane Connock agreed with the government that “if it’s voluntary, they may struggle to get enough of the information back” although she also emphasised the need to safeguard vulnerable individuals and ensure that they are sufficiently supported to participate.

Audit Scotland provided a written submission to the Committee setting out the background to these provisions. This stated that:

“It is vital that that Social Security Scotland develops a strong understanding of the different benefit streams it administers and the associated risks of error and fraud within them. It is the agency’s responsibility to assess the levels of error and fraud in the benefits in its accounts.”

NB: These provisions are not about investigating fraud. People will be chosen at random and asked to provide information. There is no suspicion of wrong doing. If

the information suggests that their benefit award is wrong then Social Security Scotland will re-determine their benefit. However, the main point of providing the information is to produce statistically robust estimates of error. If they do not provide the information, then their benefit can be suspended.

Members may wish to discuss:

- 11. Do witnesses agree with suspending a person’s benefit payments if they repeatedly fail to provide information to Social Security Scotland?**
- 12. What kinds of support would clients need to help them meet deadlines for providing information?**
- 13. The Scottish Government argues that it cannot produce robust estimates of client induced error if clients are able to ‘opt out’ of the audit process. What are witnesses views?**
- 14. Regulations will set out who should be exempt from having to provide information for audit. Do witnesses have views on who should be exempt?**

Theme 5: Social security principles

The Policy Memorandum sets out the overarching policy objectives of the Bill, with reference to the statutory social security principles. The measures in the Bill are intended:

“to enhance the Scottish system of social security in line with those principles, laid out in section 1 of the 2018 Act, particularly the principles which require that ‘opportunities are to be sought to continuously improve the Scottish social security system in ways which put the needs of those who require assistance first, and advance equality and non-discrimination’ and that ‘the Scottish system of social security is to be efficient and deliver value for money.’” (PM para 5).

The full list of statutory principles is:

- a) social security is an investment in the people of Scotland,
- b) social security is itself a human right and essential to the realisation of other human rights,
- c) the delivery of social security is a public service,
- d) respect for the dignity of individuals is to be at the heart of the Scottish social security system,
- e) the Scottish social security system is to contribute to reducing poverty in Scotland,
- f) the Scottish social security system is to be designed with the people of Scotland on the basis of evidence,
- g) opportunities are to be sought to continuously improve the Scottish social security system in ways which—put the needs of those who require assistance first, and advance equality and non-discrimination,
- h) the Scottish social security system is to be efficient and deliver value for money.

The preceding themes focused on Parts 3 to 6 and did not cover Part 1 (new benefits), Part 2 (late applications), Part 7 (compensation recovery) or Part 8 (SCOSS). In addition to discussing the overarching aims of the legislation, this final theme might be an opportunity to ask whether there are any further comments on any part of the Bill.

Last week comments from witnesses on these other parts of the Bill included:

- Suggestions for how the flexibilities around SCP could be used – including a ‘run-on’, a ‘taper’ and adding additional qualifying benefits (Part 1)
- Care experience assistance should be assistance within Part 2 of the 2018 Act so that the social security framework can apply to any benefits created under these powers (Part 1)
- There needs to be more flexibility to allow for backdated payments if clients have good reason for missing an application deadline or application window (Part 2)
- Compensation recovery is consistent with the social security principles (Part 7)
- SCOSS should scrutinise all social security regulations unless there is a good reason why not (Part 8).

Members may wish to ask:

- 15. Do witnesses have any comments on specific measures in the Bill not already discussed?**
- 16. To what extent does the Bill as a whole align with the social security principles?**
- 17. Overall, in what ways will this Bill improve the client experience? Are there any provisions that would make the client experience worse?**

Camilla Kidner
SPICe
7 March 2024