



SPICe Briefing

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Social Security (Amendment) (Scotland) Bill

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The Social Security (Amendment) (Scotland) Bill would make a variety of changes to the administration of Scottish social security, including: powers to create new benefits in future; changes to some of the rules for overpayments and challenging decisions; introducing compensation recovery; and a creating a new requirement to provide information to Social Security Scotland.

Social Security (Amendment) (Scotland) Bill [AS INTRODUCED]

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Summary

The [Social Security \(Amendment\) \(Scotland\) Bill](#), a [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.”

Scottish Government, 2023¹

New benefits. Part 1, sections 1 and 2 are regulation-making powers that would allow new benefits for people with care experience (for example, young people who were in foster care), and new benefits for families with children to be introduced in future. Examples of how these powers could be used are the proposed ‘Care Leaver Payment’ and changing the legislative footing of the Scottish Child Payment.

Late applications. Part 2, section 3 repeals COVID-19 measures that allowed late applications for benefits.

Challenging decisions. Part 3, sections 4 to 8 make changes to the processes for re-determination and appeal including:

- Allowing requests for re-determination and applications for appeal to be made more than a year late in exceptional circumstances (section 4).
- Allowing requests for re-determination to be withdrawn (section 5).
- Requiring Ministers (in practice, Social Security Scotland) to complete a re-determination even if they have missed the deadline for doing so (section 6).
- Allowing Social Security Scotland to offer a better award to a claimant who has lodged an appeal. This would end the appeal. This is known as a ‘lapsed appeal’ (section 7).
- Clarifying the powers of a Tribunal in a process appeal and Ministers’ duties following their decision. The changes reflect existing practice (section 8).

Overpayments. Part 4, sections 9 to 13 make changes to the rules on ‘assistance provided in error’:

- Some people have a formally appointed representative, such as an appointee or guardian, who manages benefits for them. Sections 9 and 10 would make such representatives liable for overpayments, but only where they act in breach of their duties, such as using the money for themselves. Section 9 would extend the individual's liability for their representative's errors.
- As with other Scottish social security overpayments, Ministers would have [up to five years to start to recover overpayments](#) (Section 11). Section 12 clarifies that overpayments can be recovered from an individual's or their representative's estate after they have died.

- Section 13 would introduce review and appeal rights against the decision that an individual or their representative is liable to repay an overpayment.

Appointees. Part 5, sections 14, 15

- 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 its own checks (section 14).
- 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 (section 15).

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. Ultimately, if information was not provided, an individual's benefit could be suspended. Eligibility could then be reviewed, which would either confirm eligibility or end payments.

Compensation recovery. Part 7, section 17 would apply where a person who gets social security payments as a result of injury, accident or disease, is awarded compensation for the same incident. The person making the compensation payment must deduct the value of relevant social security payments from the compensation due to the individual and pay it instead to Scottish Ministers. The provisions mirror those of the current DWP scheme, with the intention that Social Security Scotland benefits will be treated in the same way.

Scottish Commission on Social Security (SCoSS). Part 8, sections 18 to 21 would bring additional regulations into the scope of SCoSS scrutiny and make changes to governance arrangements following recommendations from an independent review.

Financial Memorandum

Total implementation costs are estimated at between £10.2 million and £27.8 million. The Bill may then generate net savings of £1.1 million to £4.5 million per year (ignoring money paid out in benefits) (Table 5, Financial Memorandum). Most of the estimated savings arise from compensation recovery.²

Consultation

The Scottish Government consulted on most measures in the Bill in 2022, receiving [34 responses](#). Most of the proposals received a generally positive response. Not all the consultation proposals were taken forward in the Bill. Despite being supported, the proposal to allow late applications and the proposal for alternatives to prosecution for low value fraud were not taken forward.

Not all the proposals in the Bill were consulted on – notably the proposal in Part 6 to require people to provide information for audit. These proposals raised some concerns in responses to the Social Justice and Social Security Committee Call for Views. The Call for Views received [27 responses](#), 10 of whom also responded to the Scottish Government consultation. Again, there was a generally positive response albeit with some detailed suggestions for amendments and some concern to ensure that vulnerable clients would always be supported.

Background: Scottish Social Security

This Bill would amend the framework legislation for Scottish social security established by the Social Security (Scotland) Act 2018 (the 2018 Act). The 2018 Act sets out the overarching principles, the types of benefits that can be created and much of the administrative detail. Of particular relevance for this Bill are the provisions on:

- Defining different types of 'assistance' and creating individual benefits using regulations. For example, Adult Disability Payment and Child Disability Payment are created by regulations as types of 'disability assistance'.
- Making decisions (called 'determinations') about benefits (called 'assistance').
- Challenging decisions by asking Social Security Scotland to look at it again (a 're-determination') or by appeal to the First-tier Tribunal. Appeals can be about a benefit decision (such as the amount awarded) or about 'process decisions' such as whether an application is made in the right way.
- Appointing someone to act on someone else's behalf – 'appointees'. This might be because the benefit recipient is a child or has difficulty managing their own affairs.
- Recovery of overpayments, i.e 'assistance given in error.'
- Establishing the Scottish Commission on Social Security (SCoSS) and the process for independent scrutiny of regulations.

New social security benefits (Part 1)

Part 1 of the Bill provides for new types of social security benefit to be introduced in future through regulations. This follows the legislative framework for Scottish social security whereby different types of benefits (or ‘assistance’) are created by regulations under the 2018 Act. This Bill would add childhood assistance and care experience assistance. In the responses to the Call for Views, there was strong support for these provisions, with suggestions for how the powers could be used.

Childhood Assistance

Currently, the Scottish Child Payment (SCP) is legislated for as a top-up to reserved benefits, for example, Universal Credit. It is not possible to pay SCP if Universal Credit or other qualifying benefit payments stop for even a short time. Nor is it possible to extend eligibility to anyone not entitled to reserved benefits (such as many students). Introducing Childhood Assistance would allow the Scottish Government to change the eligibility criteria for SCP, although, at present, there are no concrete plans to do so. Respondents to the Call for Views made suggestions for extending eligibility including:

- adding additional qualifying benefits
- adding a ‘taper’ so that the amount reduced gradually as earnings increase
- extending eligibility to students and those with no recourse to public funds.

Care Experience Assistance

The other new type of assistance is for people with care experience. The Bill creates regulation-making powers which could be used in future to introduce the proposed £2,000 Care Leaver Payment.

The payment would be created by regulations under Part 5 of the 2018 Act. Placing it in this part of the 2018 Act gives Ministers the option of whether to deliver it via Social Security Scotland or some other agency, such as local authorities. It also gives them the option to decide how much of the social security framework would apply. Because it would be legislated for under Part 5 rather than Chapter 2 of Part 2, Care Experience Assistance would not be part of the ‘[social security system](#)’ as currently defined in the 2018 Act under [section 23](#). This means it would not automatically be subject to scrutiny by the Scottish Commission on Social Security, nor be included in the benefit take-up strategy or covered by the principles or the Social Security Charter.

The Child Poverty Action Group (CPAG) recommended that: “unless there is a very good reason”, social security should be delivered by Social Security Scotland because:

“ this ensures that the development and delivery of the assistance is in keeping with the Scottish social security principles”

A [consultation for a new care leaver payment](#) was held between November 2023 and January 2024.

Late Applications (Part 2)

Currently all Scottish benefit applications are accepted late if the reason they are late relates to COVID-19. Part 2 of the Bill would remove this. Other flexibilities for late application would remain - but these other flexibilities are particular to individual benefits.

In responses to the Call for Views, several organisations suggested that late applications should be allowed if there was good reason. (eg [CPAG](#), [Social Work Scotland](#), [Scottish Action for Mental Health \(SAMH\)](#), [Disability Equality Scotland](#), [One Parent Families Scotland \(OPFS\)](#)). Similarly in the Scottish Government's consultation, 16 of the 17 who answered supported allowing late applications for reasons other than COVID-19. In a [survey of the Social Security Experience Panel](#), 48% agreed with allowing late applications for benefits.

The Policy Memorandum states that it is not necessary to allow for late applications and any flexibilities are better placed in regulations than on the face of the Bill. It explains that:

“ There are already a range of flexibilities specific to the forms of assistance where they apply, and which offer scope for the circumstances of the individual case to be taken into account. For example, an application can already be accepted after the initial 8-week deadline for completing an application for ADP has passed, provided the applicant has a ‘good reason’ for being late.”

Policy Memorandum, para 55

Benefits which have an application deadline include:

- Best Start Grant – which has ‘application windows’ related to the age of the child. (For example until the child is six months old for the pregnancy and baby payment). There is some flexibility if the family gets awarded a qualifying benefit up to [10 days](#) after the ‘application window’ closes.
- Adult Disability Payment – In order to get payments starting from the date the claim is first registered Part 2 of the application form must be submitted within eight weeks of Part 1, or [later with ‘good reason’](#). [Otherwise, the ‘date of claim’ will be the date that Part 2 is submitted.](#)
- Funeral Support Payment – application must be [within six months](#) of the funeral, with some flexibility provided to account for backdated award of qualifying benefits.

NB: These provisions relate to the initial application for benefit. There are separate provisions in this Bill which provide for late requests to challenge decisions – whether by requesting a re-determination or submitting an appeal.

Challenging Decisions (Part 3)

Part 3 of the Bill would change some of the rules for challenging social security decisions through re-determinations and appeals.

Background

If an individual wishes to challenge a decision (a ‘determination’) by Social Security Scotland they must first ask for a re-determination before they can appeal to the First-tier Tribunal. There are deadlines for requesting a re-determination, deadlines for Ministers to complete a re-determination and deadlines for submitting an appeal. There are two kinds of appeal:

- Appeals on determinations of entitlement under section 46 of the 2018 Act. For example, if a person disagrees with the amount of benefit awarded then they could appeal under section 46.
- Process appeals under section 61 of the 2018 Act. For example, if Social Security Scotland refuse to make a determination because a person applies for a benefit in the wrong way, then the person could appeal under section 61.

Late requests

Requests for re-determination must be made within either 31 or 42 days, depending on the benefit. The timescale is set in regulations for each benefit. Applications for appeal must be made within 31 days. This is set out in the 2018 Act. For both, requests are accepted for up to one year with good reason.

Section 4 of the Bill would allow requests for re-determinations and appeals to be made after a year in exceptional circumstances. Examples will be provided in guidance (Policy Memorandum para 63).

In responses to the [Social Justice and Social Security Committee’s Call for Views](#), this change was welcomed, with the exception of the Law Society who suggested that the provisions “run the risk of unnecessarily complicating the review and appeal provisions.” They considered that there are unlikely to be many cases needing extension beyond a year which was “already generous enough.” The far more common view was that the additional flexibility was helpful.

Several organisations were concerned that ‘good reason’ and ‘exceptional circumstances’ should be clearly defined – either in the Act or in guidance. (For example, National Carer Organisations, Cerebral Palsy Scotland and others).

Social Security Scotland guidance already provides examples of what ‘good reason’ is. See, for example, [p.4 of the ADP Decision Makers guide](#) which gives examples of a hospital stay or delays in being able to get support from a Citizen’s Advice Bureau.

Guidance on ‘exceptional circumstances’ will include examples such as;

“ Severe physical or mental illness, unstable housing, abuse or detainment” [but] “guidance will not prescribe a limited number of scenarios.”

Policy Memorandum, para 63

In responses to the Call for Views, the current timescales were criticised. [National Carer Organisations](#) thought that 31 days was too short a deadline for appeals and [CPAG](#) recommended that the timescales for requesting a re-determination should be the same for all benefits.

Right to withdraw re-determination request

Section 5 of the Bill would allow an individual to withdraw their request for a re-determination.

In responses to the Scottish Government’s consultation, all but one of the 25 people answering this question agreed with the proposal. Similarly in responses to the Call for Views, the measure was widely supported, although there was some concern that people should not withdraw simply because they found the process too stressful ([SAMH](#), [RNIB](#), [Alzheimer’s Scotland](#)). The Policy Memorandum, at paragraph 74, notes that “the rate of and reasons for withdrawing will be monitored.”

Several organisations suggested that an individual should be able re-instate their re-determination request ([CPAG](#), [OPFS](#), [RNIB](#)). [RNIB](#) suggested a 14 day ‘cooling off’ period.

Duty to complete a re-determination

Section 6 of the Bill would require Ministers to complete a re-determination unless there is an on-going appeal.

Currently Ministers must complete a re-determination within a certain timescale – for example [16 days for Best Start Grants](#), and [56 days for Child Disability Payment](#). If Ministers do not complete the re-determination within this time, then an individual can lodge a ‘process’ appeal. Once a re-determination is ‘out of time’ there is no legal duty on Scottish Ministers to complete it.

The Policy Memorandum states that, in practice, Social Security Scotland does complete these ‘out of time’ re-determinations and section 6 of the Bill would clarify this in law.

This was not included in the public consultation but the Policy Memorandum, at paragraph 85, states that written input was sought from stakeholders. In responses to the Call for Views, the proposal received little comment, but was welcomed by those who did, such as [CPAG](#).

Lapsed appeals

Section 7 of the Bill would introduce provision for appeals to ‘lapse’. If a client lodges an

appeal but, before it is decided, they agree to a more advantageous award - in other words a 'better offer' - from Social Security Scotland, then the appeal would end or 'lapse'.

The new award must leave the client in a better position, but it would not necessarily be the best possible outcome that they could have got from continuing with the appeal. However, the client could then challenge that new determination by first requesting a re-determination and then appealing.

In responses to the Call for Views, this was generally supported, but with some caveats. For example, [Glasgow City Council](#) welcomed the proposal, but said it "should not become a form of bargaining to encourage applicants to withdraw their appeal." CPAG also welcomed the provision but suggested some modifications – such as removing the requirement to request a further re-determination and instead allowing a client to go straight to appeal if they wanted to challenge the new award.

The Scottish Government consultation had put forward a slightly different policy. It asked whether an appeal should be allowed to lapse only if the 'new offer' represented the *maximum* amount that a Tribunal could decide on. 40% agreed, 44% disagreed and 16% didn't know. Most agreed that the client should be able to challenge the new determination.

This ability to 'lapse appeals' exists in the DWP system, and their practice has been criticised. For example, in 2023, South West London Law Centre drew attention to a high number of lapsed PIP appeals. While they acknowledged that the ability to lapse appeals was sensible in principle, they were concerned about practice. They stated:

" The practice of the DWP pressuring appellants into making quick decisions on revised offers compounds this distress and can see appellants accepting a lapse of their appeal just so as to end the process"

Disability Rights UK, 2023³

Latest statistics show that [22 per cent of PIP appeals were lapsed in 2022-23](#).

The Policy Memorandum 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."

Policy Memorandum, para 91

Lapsing appeals will save administration costs and Tribunal time. Based on an assumption of 14% of appeals lapsing, the Financial Memorandum, at paragraph 76, suggests that cost savings would be in the region of £1 million per year. However, initial implementation costs are estimated between £1.39 million and £3.78 million so it would be several years before the savings recouped the implementation costs. The implementation costs are for updating guidance and changes to the technical interface between Social Security Scotland and the Scottish Courts and Tribunal Service.

Process appeals

Process appeals are about whether an application or request for redetermination was

made in the right way or whether a late request for redetermination should be accepted.

Section 8 of the Bill clarifies the actions that a Tribunal can take in relation to 'process' appeals. That is – they can either uphold Scottish Ministers' decision or set it aside. If they set it aside, there are various decisions they can take, depending on the type of process appeal:

- If they decide that the application was made in the right way, then Ministers must determine entitlement. (The same applies to requests for re-determination).
- If they decide that further information is required, then Ministers try to obtain it. If they cannot, then they can reject the application but must inform the client of their right to make another process appeal.
- If they decide that a late request for redetermination should be accepted (because there is good reason or exceptional circumstances) then Ministers must complete the re-determination.

There was little comment on this proposal in responses to the Call for Views and the proposal was not consulted on by the Scottish Government. CPAG said that the proposal provides "some clarity" and suggested some further modifications, including allowing process appeals to be referred to the Upper Tribunal "to help develop case law around process decisions".⁴

Overpayments (Part 4)

Part 4 of the Bill would make changes to provisions on overpayments. Social Security Scotland calls overpayments ‘assistance given in error’.

Some individuals, who are unable to manage benefits themselves, have a representative, such as an appointee, to manage their benefits for them. Part 4 of the Bill would make these formal representatives liable for overpayments, but only in cases where they misuse the funds (Sections 9 and 10).

The Bill would also introduce review and appeal rights against the decision that an individual is liable to repay an overpayment (Section 13).

Liability of individuals and their representatives

Currently an individual benefit recipient is liable to repay any overpayments, but only if the error was:

- their fault, or
- not their fault, but was the kind of error it would be reasonable to expect a person to notice ([section 64, 2018 Act](#)).

This means that, currently, individuals would be liable for ‘noticeable’ errors made by their representative. Section 9 of the Bill would extend the meaning of ‘fault’ so that the individual would be liable if an error was either their fault or their representative’s fault - so long as the representative was acting within their statutory duties. (Section 9 amending section 64(2) and inserting new 64(5) of the 2018 Act).

Currently, the individual’s representative has no statutory liability for overpayments under the 2018 Act. Section 10 of the Bill would change this, making them liable in some circumstances. These are:

- they misused the money (new Section 64A) and either;
- the error was the individual’s or the representative’s fault,
- or it was not their fault but was the type of overpayment it would be reasonable to have noticed (new Section 64B).

For example, if an appointee or guardian made an ‘honest mistake’ resulting in an overpayment and then kept the money for themselves then they would be liable to repay it. If they spent the money on the individual they represent, then it would be the individual who would be liable to repay.

As with other Scottish social security overpayments, Ministers have [up to five years to start to recover overpayments](#) from representatives (Section 11).

The Policy Memorandum states that it’s expected that this new liability of representatives:

“ will only occur in a minority of complex cases where financial abuse is identified.”

Policy Memorandum, para 113.

Isn't that fraud?

Some respondents to the Committee's Call for Views suggested that if a representative used funds for themselves then that would be fraud. Fraud is deliberately obtaining benefits by deceit ([Section 71, 2018 Act](#)). If someone makes an 'honest mistake', then that is not fraud, regardless of how the overpaid money is then used. This means that if a representative uses funds in breach of their obligations, it is not necessarily fraud. It might, however, be financial abuse of the individual entitled to the benefit payment.

Getting the balance right

These provisions are intended to strike a balance between:

- not discouraging people from becoming representatives - such as appointees or guardians - for fear they will be held liable for overpayments, and
- not making vulnerable clients responsible for the actions of their representative.

The dilemma is illustrated in some of the responses to the Committee's Call for Views. On the one hand, Sight Scotland and Sight Scotland Veterans referred to "having to trust another individual with their bank details." Therefore:

"The proposed change that an individual receiving benefits would be liable for overpayment due to actions of their representative causes us concerns."

Sight Scotland and Sight Scotland Veterans, 2024⁵

As things stand, the individual might already be liable – if the overpayment is something a person could be expected to notice. The Bill doesn't change this.

On the other hand, PAMIS were concerned that:

"The provisions in part 4 could very likely deter a third party or family member or other appointee from volunteering to act on behalf of someone else and the majority of families we represent would be affected by this."

PAMIS (Promoting a More Inclusive Society), 2024⁶

Instead, PAMIS suggest that:

"Where a family member has made an honest mistake inadvertently, they should not be held liable"

As mentioned, representatives would only be held liable for honest mistakes if they used the money in a way that didn't benefit the individual they are representing.

CPAG query whether the right balance has been achieved saying:

"We would not want to discourage people from being representatives if they thought their mistakes could leave them liable for any overpayment, but as drafted this section could make representatives careless (or worse) and leave a vulnerable person paying for their representative's error or misinformation."

Child Poverty Action Group, 2024⁴

The Scottish Government believe they have got the balance right by:

“ ensuring that the person who benefited from the overpaid sums will, ultimately, be liable to repay them.”

Policy Memorandum, para 118

Liability of the individual's estate

Section 12 of the Bill clarifies and extends the ability to recover overpayments from an individual's estate after they have died.

The policy intention is that benefit paid out for periods after someone has died is recoverable from their estate (section 69, 2018 Act). Also, if a liability for overpayment arises and the individual concerned then dies, that liability transmits to the individual's estate. (Explanatory notes paragraph 52).

At the moment, the 2018 Act refers to recovering money that someone is entitled to be given under section 24. However, if they are entitled to be given it, then it can't be an overpayment, which could put in doubt the ability to recover the money. The Bill clarifies this at section 12(2)(b) by referring instead to recovering money paid out as a result of a determination about entitlement. If that determination was wrong, that could create an overpayment which could be recovered.

This Bill adds in a new ability to recover overpayments from an individual's estate where the decision on liability occurs after the individual has died. This applies to the estate of the person liable for the overpayment – whether that is the estate of the individual benefit recipient or their representative.

In their response to the Call for Views, CPAG point out that there are no challenge rights provided to the executors of an estate in this situation in contrast to challenge rights created for individuals and their representatives.

Challenge rights

Currently, when there has been an overpayment, Social Security Scotland makes a new determination (decision) setting out the correct level of benefit. This decision can be appealed. What can't be appealed is the decision that an individual is liable to re-pay an overpayment.

This Bill would change this, introducing new review and appeal rights against a decision that a person is liable to repay an overpayment.

In the Scottish Government consultation, everyone who responded agreed with the principle that there should be challenge rights. For example, Glasgow City Council said:

“ Social Security Scotland should introduce a right to challenge recoverability decisions. This exists with [UK Government] benefits and as such the Scottish provisions should give appellants the same rights not less. The current situation where claimants of Scottish benefits need to have the question of recoverability considered in the court while other factors relating to the overpayment (quantification) can be determined by a tribunal is too complicated and intimidating. The tribunal is the best place to consider all the aspects of an overpayment.”

Glasgow City Council, 2022⁷

Rather than providing for ‘re-determination’ followed by appeal, as is normal for Scottish social security, the Bill provides for a ‘review’ followed by appeal. The ‘review’ is, to all intents and purposes, the same as a re-determination. The Policy Memorandum, at paragraph 131, states that ‘review’ is intended to be analogous to a ‘re-determination.’

CPAG welcome the introduction of appeal rights but consider that having ‘reviews’ rather than ‘re-determinations’ could be confusing. They say:

“ If an individual wishes to challenge whether there is an overpayment and whether they are liable to repay it, they may have to request a review and a re-determination. This could be confusing and cumbersome [...] unless these provisions are combined in practice.”

Child Poverty Action Group, 2024⁴

A decision under section 63 or section 64A that a person is liable for an overpayment is not a ‘determination of entitlement to benefit’, and so is not something that can be ‘re-determined’ given the way the 2018 Act is drafted. Rather than change or extend the definition of a determination, the Scottish Government has chosen to introduce a system of reviews.

Other issues about overpayments

In responses to the Committee’s Call for Views, there were some suggestions for further changes.

OPFS think that overpayments due to honest mistakes should not be recoverable.

Citizens Advice Scotland (CAS) would like to see an income threshold for debt recovery, similar to the approach used for student loans. They explain:

“ This would involve setting a threshold under which no payment for recovery of an SSS debt is deducted and amounts over it are deducted at a fixed percentage. Payment will either be sufficient to clear the debt over time or written off at the end of the payment period.”

Citizens Advice Scotland, 2024⁸

Appointees (Part 5)

If an individual is unable to manage their own affairs, then both Social Security Scotland and DWP can authorise an ‘appointee’ to manage that individual’s benefits.

Part 5 of the Bill would make two changes to arrangements for appointees:

- extending the situations in which a DWP appointee can act for Social Security Scotland benefits (section 14)
- requiring appointees who misuse funds to repay those funds to the individual they represent (section 15).

Recognising DWP appointees (section 14)

Anyone wishing to be an appointee for someone getting a Social Security Scotland benefit must be [authorised by Social Security Scotland](#).

When someone moves from a DWP benefit to a Social Security Scotland benefit they may already have an appointee, approved under DWP rules.

Social Security Scotland already recognises DWP appointees for those individuals who have transferred from Disability Living Allowance or Personal Independence Payment to [Child Disability Payment](#) or [Adult Disability Payment](#).

This Bill would create a regulation-making power to allow this arrangement in other situations. For example:

- when someone moves from England or Wales to Scotland
- when someone has an appointee for reserved benefits (e.g. Universal Credit) and makes an application for a devolved benefit (e.g. Scottish Child Payment).

The Bill would require that, “as soon as reasonably practicable”, the appointee is assessed under Social Security Scotland procedures. (Section 14 inserting s.85F(3)(b) to the 2018 Act).

In the Scottish Government consultation, 23 of the 24 responding agreed with this proposal. Similarly, the measure was supported by almost all respondents in the Committee’s Call for Views, with the proviso that people are assessed under Social Security Scotland rules as soon as possible. [PAMIS](#) (Promoting A More Inclusive Society) referenced the [death of Margaret Fleming](#) in underlining the importance they attach to safeguarding.

There was one organisation who disagreed – [Social Work Scotland](#) considered that;

“ if appropriate checks have been undertaken for the purposes of DWP that those should be accepted by Social Security Scotland.”

Social Work Scotland, 2024⁹

The submission from SAMH explains that they “were instrumental in shaping the provisions” in 2020 introducing a separate Social Security Scotland process. They

“ are pleased that the Scottish social security appointee provisions are more rigorous than the equivalent DWP system.”

Scottish Action for Mental Health, 2024¹⁰

They recognise the practical need for temporary recognition of DWP appointments and welcome the requirement that the Scottish process must apply as soon as reasonably practicable.

Liability to repay funds (section 15)

If an appointee uses benefit payments in ways that are

- outwith their authority,
- in breach of any duty or responsibility of their appointment, or
- after their appointment has ended,

then under section 15 of the Bill they would have to repay the money *to the individual* for whom they are acting. This wouldn't apply if the appointee was acting reasonably and in good faith.

A key point here is that the liability to repay is to the individual claimant not to Social Security Scotland.

However, if the misused funds were an overpayment then the provisions of Part 4 apply and the representative could be liable to repay Social Security Scotland.

This provision was not consulted on and received little comment in responses to the Committee's call for views. The Policy Memorandum, at paragraph 147, points out that other legislation - [section 10 Children \(Scotland\) Act 1995](#) and [section 29 of the Adults with Incapacity Act](#)“make other types of representatives liable to the individual for mismanagement of their property” and the Scottish Government is seeking to apply similar requirements on social security appointees.

Requirement to provide information (Part 6)

Currently Scottish Ministers can only request information for the specific purpose of determining entitlement to assistance. Part 6 of the Bill would give Ministers the power to require information in order to audit the social security system as a whole. (Explanatory Notes para 74).

Importantly this is not about deciding an individual's eligibility or checking suspected instances of error or fraud but would be a sampling exercise where individuals are chosen at random for checks. Ministers will have the power to suspend a client's benefit if they persistently fail to meet the deadline to provide information. (Explanatory Notes paras 78, 80). Suspension could lead to an unscheduled review, which would either confirm entitlement or end payment.

Estimating rates of error and fraud

Audit Scotland has emphasised the importance of estimating rates of error and fraud. [Audit Scotland's 2022-23 audit of Social Security Scotland](#) stated that:

“ If Social Security Scotland is unable to accurately disclose the level of fraud and error that exists there may be an impact on the audit opinion.”

Audit Scotland, 2023¹¹

The National Audit Office has [issued a qualified opinion on DWP accounts](#) for the last 35 years because of the level of fraud and error.

Audit Scotland stated in their annual audit that Social Security Scotland:

“ cannot estimate client induced error or fraud using the identified methodology without making changes to legislation which would mandate client participation and provision of information.”

They recommended that:

“ Social Security Scotland must continue to develop processes to measure the level of fraud and error within the range of benefits being delivered. This includes working with the Scottish Government to remove the barriers that exist in assessing the level of client induced error and fraud.” (Recommendation 4)”

Social Security Scotland already has the power to estimate rates of official error. They have already used random sampling of cases to [estimate levels of official error in Scottish Child Payment](#).

This Bill would introduce the legal change required to allow Social Security Scotland to use their chosen methodology to estimate *client induced* error and fraud.

How powers will be used

The powers will be used to conduct random sampling exercises in Social Security Scotland's caseload for audit purposes. (Financial Memorandum paragraph 99). At the Social Justice and Social Security Committee on 1 February, James Wallace (Social Security Scotland) explained that:

“ They will be statistical estimates, not a deterrent to fraud and error. It will be an audit process to understand our case load and what statistical estimates of fraud and error in that case load might be. [...] We must speak to the client because we will have data in our system that might not be current. It might not have been updated by the client in previous years, so we need to speak to the client to understand whether what they told us two years ago or five years ago or 10 years ago is still the case. The Social Security (Amendment) (Scotland) Bill will allow us to interact with the client. [...] It is the only way of measuring fraud and error, because clients would otherwise self-select out, but the values of dignity, fairness and respect will run right through the process and no one will lose eligibility as a result of being in a sample. The agency's existing processes will apply.”

Scottish Parliament, 2024¹²

UK Process

The [UK Government measures fraud and error](#) based on a random sample of benefit claims. DWP's Performance Measurement team contact the benefit claimants to arrange a review. There are some exclusions – e.g. those who are terminally ill, the claimant is in hospital or has had a benefit review in the last six months. If the client fails to engage, then action is taken to suspend their payment and subsequently terminate their claim.

The DWP also has a [programme of targeted case reviews](#) to identify cases of error and fraud.

Getting the balance right

The approach to estimating error rates requires balancing the principle of 'value for money' and the public finance duty of accountable officers against the other social security principles.

Part 6 of the Bill would enable Social Security Scotland to suspend someone's benefit payments – i.e. suspend payment to which they have a right (under principle b) not because they are no longer eligible, but because they have persistently failed to comply with an auditing process for which they have been chosen at random. The intention is that after suspension, a further request would be sent with a new timescale. If they still fail to provide the information then an unscheduled review could be held (this would require new regulations under section 52 of the 2018 Act), which could either confirm their entitlement or end the payment.

These provisions therefore require balancing 'value for money' and 'efficient use of resources' against an individual's right to Scottish social security.

Social security principles

There are [eight statutory social security principles](#). These include:

- (b) social security is itself a human right and essential to the realisation of other human rights,
- (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,
- (g) opportunities are to be sought to continuously improve the Scottish social security system in ways which— (i) put the needs of those who require assistance first, and (ii) advance equality and non-discrimination,
- (h) the Scottish social security system is to be efficient and deliver value for money.

Public finance duties

Section 15 of the Public Finance and Accountability (Scotland) Act 2000 (the 2000 Act) section 14 makes accountable officers personally answerable to Parliament for the exercise of their functions. This is also set out in the [Scottish Public Finance Manual para 2.1.4 Annex 1](#) which states that the accountable officer is responsible to Parliament for:

“ensuring that the resources of the Scottish Administration are used economically efficiently and effectively”

Scottish Government, 2023¹³

Safeguards in the Bill

In seeking to balance the right to social security against the duty to use resources efficiently and effectively, the Bill sets out various safeguards, which are that:

- Regulations could set out that certain categories of client are exempt (Section 16(2) introducing section 87B(5) to the 2018 Act).
- Clients could ask for the information request to be withdrawn. They would have to show ‘good reason’ and Ministers’ decision on ‘good reason’ is final. (Section 16(2) introducing section 87C to the 2018 Act).
- Clients would have a right to have a supporter with them during any interviews (section 16(2) introducing section 87D to the 2018 Act).
- Disabled clients have a right to advocacy (section 16(2) introducing section 87D to the 2018 Act).
- The existing power to suspend includes a requirement to consider financial circumstances and a right to review the suspension (section 51(2)(aa) of the 2018 Act).

- Under existing provisions in the 2018 Act, if entitlement is brought to an end following a review under section 52 of the 2018 Act, then there is a right to re-determination and appeal.

Consultation views

The Scottish Government did not consult on these provisions. The Policy Memorandum states that:

“ this provision is a 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, user-friendly and accessible.”

Policy Memorandum, para 159

In the responses to the Committee’s Call for Views, CPAG suggest that providing information for audit should be voluntary “to avoid unintended consequences for vulnerable individuals.” The [Law Society](#) called the provisions ‘draconian’ saying;

“ The withdrawal of benefits from vulnerable people for an 'audit' is draconian and undermines the dignity of the claimant and should be rethought. Neither the explanatory notes to the Bill nor the policy memorandum explain why these provisions are thought to be necessary, other than as stated ‘for the purpose of auditing the monetary value of error and fraud in the system’. The policy memorandum states that ‘this provision aligns with the practice of other government departments’, though it does not specify which departments. No public consultation took place around this provision because of its ‘high priority and it being fundamental to the functioning of the system’. Being of such high priority and so fundamental would suggest there is even greater reason for consultation.”

The Law Society, 2024¹⁴

Others, such as the [Health and Social Care Alliance](#), suggested that these kinds of powers should only be used in cases of suspected fraud. SAMH recognised the need for audit but were concerned about the proportionality of the provisions.

The Policy Memorandum explains why it is not voluntary:

“ Provisions of this nature are necessary to meet the requirement of the 2000 Act. An alternative to the right to seek exemption would be allow individuals to opt-out of providing information [...] even where they do not have a good reason. The Scottish Government considers that this would prevent reliable estimates [...] and would create a self-selecting rather than random statistical sample. In addition it is unlikely that individuals engaged in fraudulent activity would willingly participate.”

Policy Memorandum, para 156

Recovery of compensation payments

(Part 7)

Part 7 of the Bill would introduce a system of compensation recovery which would mirror the process that already exists for DWP benefits.

What is compensation recovery?

If a person gets social security benefits as a direct result of an accident, injury or disease and is then awarded compensation for the same thing, some of that compensation is paid to the government.

For example, Alice Jones is disabled following an accident at work. As a direct result of the injury she gets Adult Disability Payment (ADP) to support her for loss of mobility and cost of care. She is also awarded compensation from her employer's insurer, also for loss of mobility and cost of care. Because she is getting ADP for the same thing, the insurers will pay Scottish Ministers an amount equivalent to what Alice received in ADP payments and she will receive a lower amount of compensation.

This is settled between the insurers and the government - the injured person would never have to pay anything. Instead they receive less compensation that they would have done had they not received relevant social security payments.

The Bill provisions are closely based on the DWP system, which is administered by the [Compensation Recovery Unit \(CRU\)](#) under the [Social Security \(Recovery of Benefits\) Act 1997](#).

Benefits included

The Bill sets out the following benefits to which compensation recovery applies (Section 17 of the Bill inserting new Schedule 12 to the 2018 Act). Ministers can add to this list by regulations:

- for loss of earnings - Scottish Child Payment
- for cost of care – care components of Child Disability Payment (CDP), daily living ADP
- for loss of mobility – mobility components of CDP, ADP.

As new 'Scottish versions' of DWP benefits are created they are likely to be added to this list. For example, it is likely that Pension Age Disability Payment and Employment Injury Assistance will be added, as these are used as examples in Table 4 of the Financial Memorandum.

How much compensation goes to Scottish Ministers?

The Financial Memorandum (table 4) estimates that up to £5.5 million in benefits payments could be recovered from an estimated 1,385 cases per year.

The amount paid to Scottish Ministers is the total amount of relevant social security assistance paid in the period between the date of the accident or injury and the settlement of the claim. (In the case of disease, the relevant period begins from when a person applies for a recoverable benefit.)

The maximum that can be recovered is five years' worth of relevant benefits. (See definition of 'relevant period' in section 94B of the 2018 Act, introduced by section 17 of the Bill. For the calculation see section 94J).

For example:

- Judy Smith gets a total £100,000 compensation for an injury at work, of which £30,000 is general damages (pain and suffering), £40,000 is for 'loss of earnings' and £30,000 for 'cost of care.' It has taken five years to reach a settlement.
- The £30,000 for pain and suffering can't be recovered, and would be paid in full to Judy.
- As a result of the injury she has been getting ADP 'daily living' at the standard rate of £68.10 per week. Over five years that comes to approximately: £17,700 (In reality it would be more than this as benefits are uprated each year).
- The £30,000 'cost of care' part of the compensation would be reduced by the £17,700 ADP already received, resulting in £12,300 being paid to Judy for 'cost of care'.
- Her lower earning capacity means she claimed Universal Credit. In the five years since the injury she received £25,000 in Universal Credit and £13,000 in Scottish Child Payment.
- The £40,000 'loss of earnings' award would be reduced by £38,000 (£25,000 Universal Credit and £13,000 Scottish Child Payment), resulting in £2,000 being paid to Judy.
- In total, Judy would therefore receive £44,300 compensation out of the £100,000 initial award.

This is summarised in Table 1 below:

Table 1: Example of compensation recovery

| Compensation heading | Compensation award | Relevant benefits | Compensation received |
|----------------------|--------------------|-------------------|-----------------------|
| Pain and suffering | £30,000 | n/a | £30,000 |
| Loss of earnings | £40,000 | £38,000 | £2,000 |
| Cost of care | £30,000 | £17,700 | £12,300 |
| Total | £100,000 | £55,700 | £44,300 |

Applying for a certificate and making payments

Before making a compensation payment, the compensator must get a ‘certificate of recoverable assistance’ from Scottish Ministers (section 94C). This certificate will set out how much should be paid to Scottish Ministers (section 94D). The compensator has 14 days to make the payment (section 94E).

Before the payment is made the injured person or the compensator can ask for a review. The grounds for review will be set out in regulations (section 94M).

There is also 30 days to ask for the injured person or the insurer to ask for reconsideration (section 94N), which can be followed by appeal to the First-tier Tribunal (section 94O)). Grounds include that:

- the amount, rate or period specified in the certificate is incorrect
- the benefits listed are not ones which are recoverable
- the payment is not a compensation payment.

Implementation issues

In the responses to the Committee Call for Views, there was little comment on the legal provisions as they are very closely modelled on the existing system. There was, however, some concern about whether there might be confusion between the UK and Scottish systems.

The Forum of Scottish Claims Managers was concerned that:

“ compensators are being asked to register claims for compensation twice – once with the Secretary of States (Section 4 of the Social Security (Recovery of Benefits) Act 1997 for UK benefits and then again with Scottish Ministers under 94C of the Draft Bill.”

Forum of Scottish Claims Managers, 2024¹⁵

They therefore suggest that Scottish benefits be recovered alongside UK benefits. Similarly, the Association of British Insurers wanted to have one system in practice.

“ We [...] would expect [...] an extension to the current DWP CRU to apply to social security assistance in Scotland.”

Association of British Insurers, 2024¹⁶

The same issues were raised in the Scottish Government's consultation with insurers, insurance lawyers and personal injury lawyers. As the Business and Regulatory Impact Assessment notes:

“ There was a strong preference expressed for having one unit or platform handling the generation of certificates of recoverable assistance for the whole of the UK.”

Scottish Government, 2023¹

This is indeed the Scottish Government's preferred solution:

“ officials are currently working with the DWP to explore the possibility of the DWP delivering a service by agreement on behalf of Scottish Ministers.”

Scottish Parliament, 2023¹⁷

The Financial Memorandum discusses three policy options:

- not recovering benefit payments from compensation awards
- using DWP systems under an agency agreement
- setting up separate Scottish systems.

The preferred option is using DWP systems under an agency agreement. These costs are estimated as:

- £1.39 million to £3.78 million implementation costs
- £1.67 million to £5.0 million running costs
- Up to £5.5 million payments recovered annually by 2028/29.

Scottish Government Officials have told SPICe that work on a more detailed impact analysis has started and that:

“ Until a detailed impact analysis of the requirements necessary to carry out this unique function is completed in partnership with officials from the DWP and Scottish Government, an accurate account of the costs cannot be predicted.”

Scottish Commission on Social Security

The Scottish Commission on Social Security (SCoSS) was established under the Social Security (Scotland) Act 2018 to scrutinise regulations relating to Scottish social security.

A [recent independent review of SCoSS](#) made 15 recommendations. Part 8 of the Bill would implement the two recommendations that require legislative change. These were:

- to increase the types of regulations that SCoSS can scrutinise
- to remove the requirement to prepare audited accounts.

Regulations

SCoSS was established to provide expert scrutiny of the regulations that create devolved social security benefits. Its remit does not extend to all regulations made under the 2018 Act. For example, it cannot currently consider regulations setting advocacy service standards or specifying the deadline for requesting a re-determination. The review explained:

“ It would seem sensible to regularise the situation by ensuring that the administrative regulations on which SCoSS is likely to feel compelled to comment come within the formal scope for SCoSS scrutiny.”

Scottish Government, 2023¹⁸

Annex B of the review report sets out in detail which regulations should be added to SCoSS’s remit.

“ Recommendation 1: The regulations which fall within SCoSS’s scrutiny remit under section 97 of the 2018 Act should be expanded to include regulations made under sections 11(2), 13(3), 41(4)(a), 43(5), 51, 52, 81(8), 84A and 95.”

Scottish Government, 2023¹⁸

These cover matters such as: advocacy standards, deadlines for re-determination and qualifications for people undertaking disability consultations.

Section 18 of the Bill would add these regulations to the remit of SCoSS, as well as regulations for Best Start Foods which are made under the Social Security (Administration) Act 1988.

The Bill creates many new regulation-making powers but makes only two of these subject to SCoSS scrutiny. These are regulations connected with the new power to request a review of liability for an overpayment.

Other new regulation-making powers are not covered by SCoSS. In their response to the Call for Views, CPAG suggested that they should be. These include matters such as:

- Care Experience Assistance. CPAG argues that SCoSS should consider these regulations whether or not it is delivered by Social Security Scotland.
- Exemptions from the requirement to provide information for audit. CPAG argues that independent scrutiny should be built in, as these regulations “could impact

significantly on people in vulnerable situations.”

- Various provisions under compensation recovery – including provision for offences. CPAG points out that the UK scheme is subject to the scrutiny of the Social Security Advisory Committee, which is the UK equivalent of SCoSS.

Accounts

The independent review of SCoSS concluded that it was unnecessary for such a small organisation to have a requirement to produce audited accounts and section 20 of the Bill would remove this requirement. The review recommended:

“ Recommendation 11: Primary legislation should be changed at the first opportunity to remove the requirement on SCoSS to prepare accounts and to submit these for external audit (currently paragraph 12 to Schedule 1 of the 2018 Act). This should be replaced by a requirement to prepare an annual report on SCoSS’s work for submission to the Scottish Ministers and the Scottish Parliament and also for publication.”

Scottish Government, 2023¹⁸

Sections 20 and 21 of the Bill would implement this recommendation.

Body corporate

Section 19 of the Bill would remove SCoSS’s status as a body corporate. While the independent review commented that corporate body status was unusual for a body of this size, it did not recommend that it lose this status, saying:

“ One way to reinforce the continued independence of SCoSS would be for it to retain its status as a body corporate. Although this is unusual for an advisory NDPB, there is one other advisory NDPB – Boundaries Scotland – which has been a body corporate for many years. As a body corporate, SCoSS can enter into contracts in its own name rather than in the name of the Scottish Ministers, for instance if it decides to commission independent research. This seems a helpful, practical and symbolic independence for SCoSS to retain.”

Scottish Government, 2023¹⁸

Nevertheless the Scottish Government proposed removing its status as a corporate body. The Policy Memorandum explained that retaining corporate body status:

“ would mean that the body operates differently to that of a typical body with such status.” [...] The Scottish Government considers it to be necessary that SCoSS’s status reflects how it operates in practice, with recognition that its independence is emphasised through its scrutiny work and reinforced through the Framework Agreement and operating arrangements.”

Policy Memorandum, para 246-247

Financial memorandum

The Financial Memorandum states that:

“ the overarching policy objective of the Bill is to enhance the Scottish system of social security in line with the social security principles highlighting the principles of ‘continuous improvement’ and ‘value for money’.”

Scottish Parliament, 2023², paragraph 4

The proposals in the Bill are mostly administrative in nature. The main proposal that would have resource implications is provision for compensation recovery.

Table 2 below summarises the costs and savings for individual measures in the Bill.

It is notable that almost all the expected savings are from the implementation of compensation recovery. This is expected to generate up to £5.5 million of savings in 2028/29 albeit with potentially up to £5.1 million annual running costs. Therefore the net saving from compensation recovery could be under £1 million per year. The implementation cost (assuming an agency agreement with DWP) is estimated as between £1.4 million to £3.8 million. As noted above, there is still a lot of detailed work required to identify accurate costs.

The other measure that creates savings is provision for ‘lapsing appeals’ – estimated to generate £1.1 million savings for an implementation cost of between £1.4 and £3.8 million and no annual running costs.

Requiring information for audit and recognising DWP appointees could each cost up to £3.8 million to implement and are not expected to generate savings. The Care Leaver Payment could cost up to £5.7 million to implement and is expected to pay out between £1 million and £1.3 million to care leavers after the first year.

Table 2 summarises total costs and savings set out in table 5 of the Financial Memorandum and Table 3 shows how these are split up between the different provisions in the Bill.

Table 2: Summary of total costs and savings, £ million

| | Lower | Higher |
|----------------------------------------------------|-------|--------|
| Implementation | 10.2 | 27.8 |
| Annual running costs (not including benefit spend) | 2.0 | 5.5 |
| Annual Savings | 6.5 | 6.7 |

These figures are for implementation costs and annual running costs/savings once fully implemented.

Table 3: Summary of costs and savings by individual measure, £ million.

| Bill | Measure | Implementation | Annual | |
|------|----------------------------------------------|-----------------------------|----------------------------------|-----------------------|
| | | costs | cost | saving |
| s.2 | Care experience assistance | £2.0 to £5.7 | £0.2 not including benefit spend | n/a |
| s.4 | Deadline extension | £0.3 to £0.9 | n/a | n/a |
| s.5 | Withdraw re-determination request | £0.7 to £1.9 | n/a | n/a |
| s.7 | Lapsed appeals | £1.4 to £3.8 | n/a | Up to £1.1 |
| s.9 | Individual's representative liability | £0.4 to £0.9 | n/a | n/a |
| s.13 | Reviews and appeals on overpayment liability | £1.4 to £3.8 | £0.02 to £0.2 | n/a |
| s.14 | DWP appointees | £0.6 to £1.6 | n/a | n/a |
| s.15 | Liability of appointees | £0.6 to £1.6 | n/a | n/a |
| s.17 | Compensation recovery | £1.4 to £3.8 | £1.7 to £5.1 | Up to £5.5 |
| s.16 | Information for audit | £1.4 to £3.8 | £0.1 | n/a |
| s.20 | Removal of SCOSS accounting duty | n/a | n/a | £0.08 |
| | | Implementation costs | Annual costs | Annual savings |
| | Total | £10.2 to £27.8 | £2.0 to £5.4 | up to £6.7 |

Summarised from Table 5, Financial Memorandum. Provisions not mentioned are not expected to have financial implications.

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