SOCIAL SECURITY (SCOTLAND) BILL
POLICY POSITION PAPER

RE-DETERMINATIONS AND APPEALS

Introduction

This paper is one of a series of papers in which the Scottish Government wishes to set out and (where appropriate) provide an update on its position on various matters relating to the Social Security (Scotland) Bill (the Bill). The purpose of this paper is to set out the Scottish Government’s current policy position on its proposals for dispute resolution process for challenging entitlement decisions, which are referred to as re-determinations and appeals.

Our Position

The proposals set out in sections 23 to 29 of the Bill are the result of careful consideration of the views from the large scale and widespread consultation carried out in summer 2016. The Scottish Government is aware that some stakeholders are supportive of these proposals whereas some have expressed concerns on how they will operate in practice. The Scottish Government is committed to co-designing with the people of Scotland a system for dispute resolution that adheres to our principles for social security. We will build on the excellent process of engaging with the people across Scotland to understand their concerns and design and build a system that meets the needs of the user.

Our process will have clearly published procedures and timescales with meaningful redress should those procedures and timescales not be adhered to by the social security agency. Our approach to decision making will place the individual at the heart of everything by engaging with them to seek out any further evidence to help focus on getting the decision right first time and having processes in place to put things right quickly where there has been an error. Where an individual wishes to challenge a decision, they will first request a re-determination, which will be carried out by the social security agency within specified timeframes that will be set out in regulations.

If an individual disagrees with the re-determination outcome, or it is taking an unreasonable time, then they will have a right to take their dispute to the First-tier Tribunal (FIT). The Tribunals (Scotland) Act 2014 allows for separate entitlement Chambers to be created in the Scottish Tribunals, that are administered by Scottish Courts and Tribunals Service (SCTS). It is the intention of Scottish Ministers to set up a new Chamber in the Scottish Tribunals that will hear appeals for devolved benefits.
The Re-determination Stage

The detailed service design and modelling work to co-design the new processes for challenging decisions as part of the development of the new social security system (working with Experience Panels, users and stakeholders) is still to be undertaken. That said, our intention in having the re-determination stage is not to discourage appeals, but to focus on getting the decisions right thereby removing the need for an appeal. The intention of how the re-determination process will operate will include the following features:

Independent re-run

During the re-determination process, the initial decision by the social security agency will be put aside and will be a complete re-run of the decision process, carried out by an official in another part of the social security agency. The Bill provides for a decision that will be retaken, as new, from first principles. The officer dealing with the re-determination will take an interactive approach and keep the individual informed throughout the process.

To ensure the approach and culture of the agency places the individual at the heart of everything it does, there will be extensive and on-going training for re-determination officers. This will support quality and consistency of decision making. It will also provide a more supportive environment as part of the inquisitive approach that re-determinations officers will undertake to ensure an evidenced based decision is reached quickly, effectively and considers the individual’s concern in each case.

Simple process

The re-determination process will allow the individual to ask for a re-determination without having to supply further evidence, but the agency will take into consideration any new evidence which they want to provide. Our intention is to ensure any request for a re-determination can be made simply, in a manner that is convenient for the individual without the need for complicated forms. The involvement of users in the service design process will help us to understand how to design the process of asking for a re-determination which is easy to navigate and understood by users. But if the individual gives grounds for why they consider the initial determination to be incorrect, then those will of course be considered.

Clear procedures and timescales

The re-determination process will have clearly published procedures and timescales in place, to ensure that decisions are made quickly. The Scottish Government will set out the timescales for requesting a re-determination and the time limit for the agency to carry out a re-determination in regulations. We want to ensure that the timescales are appropriate so that it does not lead to service delivery failure or individuals having to wait long periods before having the option to access a tribunal, should that be required.
We will also allow for consideration of late requests - beyond the timescales set out in regulations and up to a maximum of 12 months from the date of the determination - if the individual can set out good reasons why they were not able to request a re-determination sooner. To further strengthen the access to justice, any decision to refuse a late request to be raised would carry a right of an appeal to the FtT. This will ensure the Scottish system is fair and in line with a rights based approach.

**Meaningful re-dress**

The optimum outcome for the individual will be to have any mistakes corrected by the social security agency as quickly as possible. We will work with users to understand their needs and co-design our processes to deliver this optimum outcome, wherever possible. It is simply not conceivable that a tribunal decision could correct any mistake on behalf of the individual as quickly as the agency could. Therefore, the individual’s interests are best served by giving the agency the immediate opportunity to put right any errors.

The re-determination process will also provide meaningful re-dress if the re-determination is not completed within set timescales. People will then have a right to take their case to a tribunal immediately, if they do not wish to wait for the re-determination. This redress is not available in the DWP system where an individual has to await the Mandatory Reconsideration and receive the notification before they are allowed to seek re-dress with the tribunal. Our process seeks to avoid unnecessary barriers.

**Short term assistance**

The Bill makes clear that we are protecting individuals' rights. If payments are being made (i.e. if the determination being challenged is a decision to reduce the payment level of a continuing payment), the Bill makes provision in section 18 which will allow payments to continue at their original level in the form of short-term assistance. The Scottish Government recognises that stakeholders have welcomed the inclusion of short-term assistance to be available but have highlighted concerns on how the short-term assistance may not protect underlying entitlement to other benefits.

As part of the further development of policy, consideration will be given to how the short-term assistance may operate to provide that dependent entitlements are also safeguarded.

**Appeal to the Tribunal**

It is intended that the re-determination will ensure that the individual’s entitlement is correctly calculated. However, if the individual is dissatisfied with the re-determination outcome, they will be able to decide whether to take their claim to the FtT, where it will follow the tribunal’s process for challenging the decision.
Some stakeholders have expressed concern that the two stage process should be streamlined into a single stage by placing a responsibility on the agency to forward the appeal to the FitT. This would apply to anyone that receives a negative decision unless they opt out, as is the case in the process used by local authorities for Housing Benefit appeals.

We have considered this proposal but deemed it inappropriate as our system is built differently from Housing Benefit appeals and is not directly comparable. The automatic forwarding of appeals would place a significant administrative burden on the agency. It would also take away an individual’s right to choose, as they would not have the option to decide how they want to proceed at the conclusion of the re-determination stage.

Conclusion

We have made a clear commitment to co-designing the new processes for challenging decisions as part of the development of the new social security system. Our service design process will be user centric; working with users on an on-going basis to design and test processes to ensure they are accessible and efficient. Once those processes are designed, the Scottish Government is further committed to using outcomes of re-determinations and appeals to improve decision making and embed a culture of continuous improvement.

Scottish Government
Social Security Directorate
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SOCIAL SECURITY (SCOTLAND) BILL
POLICY POSITION PAPER

SOCIAL SECURITY FRAUD AND OFFENCE PROVISIONS

Introduction

This paper is one of a series through which the Scottish Government aims to support scrutiny of the Bill by setting out its current policy thinking on key matters to be examined during stage 1. This specific paper is focused on the fraud offence provisions in the Bill.

Background

The Scottish Government's social security system will be based on a number of core principles, where social security is an investment in the people of Scotland and that they should be paid in the right amount at the right time. The scale of the task of developing a social security system, where regular payments of assistance will be made to 1.4 million people, means that there is a risk of fraudulent activity taking place. This could result in an incorrect payment being made and potentially less resource available for those who need it most.

As set out in the principles of the Scottish Public Finance Manual (and in line with the wider Scottish public sector), the Scottish Government believes that a zero-tolerance approach to social security fraud should be taken. While the main focus will be on prevention of fraud through the deployment of robust systems and procedures in the social security Agency, enforcement action will be required where fraudulent activities do take place.

Equally important, however, is that individuals will be treated with dignity and respect. Therefore, any suspicions of fraud will be treated sensitively. Within this context, much of what will be developed for fraud will be an administrative issue for the Agency, which will involve developing a culture, underpinned by robust internal processes, that presumes innocence and treats people with dignity and respect.

The Bill provision on fraud offences has been developed taking into account the views expressed in the social security consultation. The majority of respondents to the questions on fraud felt the existing Scottish Government approach to fraud should be adopted for use by the social security Agency. Of those respondents who answered questions on penalties, the majority felt the current list of offences people could be found guilty of should be retained, with others feeling it should be kept under review. There was some discussion of new offences that should be added and also around penalties and punishments – with varying views around issues like alternatives to jail (e.g. community service, paying back the fraud), but also the importance of reserving severe punishment for those deliberately defrauding.

The proposed approach to offences, through the legislative provisions in the Bill, will allow a clear distinction to be drawn between fraud which (if proved) is a criminal offence, and an unintentional error by the individual, which they could not have reasonably expected to affect their entitlement.
Bill Provisions – Fraud Offences

Chapter 5 of Part 2 of the Bill (sections 39 to 44) deals with offences and investigations into them. Three offences are created:

- Section 39 establishes an offence of trying to obtain assistance to which the person is not entitled by providing false or misleading information (or causing someone else to do so);
- Section 40 establishes an offence of not notifying a change of circumstances which the person has been told to notify, resulting in the individual getting more than the individual is entitled to;
- Section 41 creates an offence of causing someone else to fail to notify a change of circumstances;
- Section 42 allows the manager of an organisation to be prosecuted if the organisation has been involved in committing any of the offences described;
- Section 43 gives the Government powers to make regulations enabling the Agency to carry out investigations into the offences described above;
- Section 44 requires the Government to produce a code of practice governing the use of the investigatory powers

Fraud Offences – Obtaining Assistance by Deceit

There has to have been an intention to cause a benefit to be overpaid, for the offence of trying to obtain assistance by providing false or misleading information under Section 39 to apply. This would adequately cover the fact that if someone has the intention of committing the offence, then it is being done with a degree of knowledge. Therefore, those people who may have provided false or misleading information, but had not intended to do so, will not be criminalised. This could be where an individual has misunderstood an element of an application form, or has made a genuine error.

In terms of current UK social security legislation, set out in the Social Security Administration Act 1992, it is important to note that the use of the word “dishonestly” does not apply to the current Scottish offences. The current Scottish offence is “knowingly” doing something. This is effectively the same as the test set out in Section 39 of the Social Security (Scotland) Bill of doing something with a particular intention.

Fraud Offences – Failing to Notify a Change in Circumstances

The policy intention is not to criminalise genuine errors made by individuals, for the offences of failing to notify changes in circumstances to apply. In Section 40, the provision has been carefully framed to provide that the person must know, or ought to have known, that the change they failed to notify could impact adversely on their entitlement. There are effectively three elements which must be met:

- the person was told by the Agency that the change in circumstances needs to be reported;
- the change in circumstance is one which would, if reported, have led to a reduction in assistance, and
• the person knew, or ought to have known, that not notifying the Agency of the change of circumstances may result in the individual getting more than he or she should.

Therefore, in the proposed Scottish system, an offence is only committed if the individual has failed to notify a change in circumstances which the Agency told the individual to notify it about. Importantly, the person entitled to benefit will have been told that it is a type of change they have a duty to notify the Agency about.

In this regard, the provisions as set out will leave no-one in doubt about what should be notified as a change in circumstance and, therefore, people should not be pursued for being unaware of the rules. In the Scottish system, the Agency will have to be clear with people upfront about what the rules are.

Additionally, the Bill sets out that a person must be advantaged from a failure to notify a change in circumstances, where they would have received less or no entitlement to assistance. This means an offence will only be committed where there is an adverse impact.

**Fraud Offences – Convictions**

Proceeding to recommend prosecution will not be done lightly and it will be incumbent on the Agency to fully consider the facts of any case and any mitigating factors before deciding if a case should be reported to the Procurator Fiscal (PF). The PF will consider whether it is economic and in the public interest to prosecute. That will include the scale of the overpayment and whether a person appears to have acted fraudulently.

Sections 39 - 41 of the Bill set out the maximum fines and maximum periods of imprisonment that can be imposed upon a successful fraud conviction. However, these are not the only sanctions available to the courts - the full range of disposals including community sentencing will still be available to judges.

Where fraud is suspected, the approach to dealing with individuals will be important and, while not set out in the Bill, will be explicit in terms of the behaviours exhibited by the Agency. Ministers will also be under a duty to publish and consult on a Code of Practice on investigations (Section 44 of the Bill), which will be published.

Detailed operational policy development is still on-going and the Scottish Government will continue to work closely with the Crown Office and Procurator Fiscal Service (COPFS), justice colleagues and other key stakeholders.

**Conclusion**

The Bill creates fraud offences where overpayments arise as a result of two situations. These are where a person:

(a) intentionally provides false or misleading information; or
(b) fails to notify a change of circumstances that they have been told must be notified.
In both cases, there is no offence unless the act or failure advantages the person who is seeking or receiving assistance. In practice, the agency will consider whether to report a potential offence to the Procurator Fiscal, who will decide if prosecution is in the public interest.

We will give further consideration as to whether the fraud offence provisions could operate unfairly or inappropriately, and whether they can be improved.

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