



OFFICIAL REPORT
AITHISG OIFIGEIL

Social Security Committee

Thursday 19 December 2019

Session 5



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SOCIAL SECURITY COMMITTEE

27th Meeting 2019, Session 5

CONVENER

*Bob Doris (Glasgow Maryhill and Springburn) (SNP)

DEPUTY CONVENER

*Pauline McNeill (Glasgow) (Lab)

COMMITTEE MEMBERS

*Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP)
*Jeremy Balfour (Lothian) (Con)
*Michelle Ballantyne (South Scotland) (Con)
*Keith Brown (Clackmannanshire and Dunblane) (SNP)
*Mark Griffin (Central Scotland) (Lab)
*Alison Johnstone (Lothian) (Green)
*Shona Robison (Dundee City East) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Colin Brown (Scottish Government)
Shirley-Anne Somerville (Cabinet Secretary for Social Security and Older People)

CLERK TO THE COMMITTEE

Anne Peat

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Social Security Committee

Thursday 19 December 2019

[The Convener opened the meeting at 09:05]

Subordinate Legislation

Social Security Assistance (Investigation of Offences) (Scotland) Regulations 2020 [Draft]

The Convener (Bob Doris): Good morning. Welcome to the 27th and final meeting in 2019 of the Social Security Committee. I remind everyone present to turn mobile phones or other devices to silent mode so that they do not disturb our meeting. No apologies have been received.

Under agenda item 1, the committee will take evidence on the draft Social Security Assistance (Investigation of Offences) (Scotland) Regulations 2020, which are subject to the affirmative procedure. I welcome Shirley-Anne Somerville, Cabinet Secretary for Social Security and Older People, and her team, which comprises Meg Fowler, head of the fraud and error resolution division at Social Security Scotland; and Paul Curtis, team leader, fraud, overpayments and uprating policy, and Colin Brown, senior principal legal officer; they are both from the Scottish Government. Thank you all for coming along to support our scrutiny. I invite the cabinet secretary to make an opening statement.

The Cabinet Secretary for Social Security and Older People (Shirley-Anne Somerville): Good morning, convener, and thank you for the invitation to come along today. As you will all be aware, the Social Security (Scotland) Act 2018 contains a number of offences that may be committed by individuals or organisations. Section 75 allows the Scottish ministers to make regulations to facilitate the investigation of those offences. I will focus on those regulations today.

Social security is an investment in the people of Scotland and the Scottish Government is fully committed to ensuring that every client is treated with dignity, fairness and respect at all times. We start from the premise that everyone may be entitled to support. However, we have to accept that attempts will be made to defraud the Scottish social security system and we have a duty to protect public funds. That said, I know that fraud in social security is low. The latest Department for Work and Pensions figures show that the total estimated loss to fraud is £2.3 billion a year. That is 2.7 per cent of benefit expenditure, excluding

pensions. Of that amount, £320 million, or 0.37 per cent, is related to fraud in disability and carer benefits. When you compare that with tax evasion, which Her Majesty's Revenue and Customs estimated to be £5.3 billion in 2017-18, you can see that it is a relatively small number of cases.

However, prevention is always better than cure. As outlined in its counter-fraud strategy, Social Security Scotland is focusing on the development of preventative controls to reduce opportunities for fraud to take place, but in cases where fraud may have occurred, we must be able to investigate, gather evidence and take action where appropriate. That is entirely consistent with the principles of respect for the dignity of individuals, efficiency and value for money laid down in the 2018 act.

The regulations are proportionate and necessary. They will allow Social Security Scotland to gather information—in the most efficient and least intrusive way possible—to differentiate between those who make a genuine error and those who seek to gain assistance to which they are not entitled. The gathering of information will always be undertaken by trained professionals with the appropriate skills. They will proceed with the presumption of innocence in all cases. I reiterate that—we have been very clear about this point throughout the development of the regulations—those making genuine mistakes will never be criminalised.

As part of the development of the regulations, the Scottish Government undertook a public consultation. Since then, we have worked closely with a range of stakeholders to understand the wide-ranging views that were raised. We have amended the regulations, where appropriate, following that feedback.

A number of respondents to the consultation noted concerns about the regulatory power to acquire information, including information held in electronic formats, and were concerned about the possible negative impacts that that could have on the relationship between welfare rights organisations and their clients. Although I want to be clear that the intention was never to do that or to otherwise inhibit individuals from seeking support, we have listened to those concerns and amended the regulations accordingly. They can be reassured that they will not be expected to provide any information shared between welfare rights organisations and individuals seeking their support.

A number of welfare rights organisations were concerned that the regulations would allow their premises to be searched against their will. Again, let me be clear that that is categorically not the case. When gathering evidence, Social Security Scotland must seek permission from the occupiers

of any premises before entry and before any search can take place. It may not enter any dwelling house or any part of a premises used solely as living accommodation.

Some stakeholders were also concerned that, by protecting the relationship between themselves and their clients, they may unwittingly be in breach of the provision relating to the delay or obstruction of an investigation. The regulations now make it explicit that any delay or obstruction must be carried out deliberately for that to apply. That change, combined with the exemptions that I referred to earlier, should assuage any concerns in relation to unwittingly committing an offence.

Finally, I draw your attention to section 76 of the 2018 act, which requires the Scottish ministers to develop a code of practice for investigations. The code will lay out how the regulations will be used in practice and what individuals can expect if a fraud investigation takes place. As much of the code relates directly to the content of the regulations, it cannot be finalised until the regulations have been approved by the Parliament. However, I have provided a draft copy to the committee to provide a wider context of how the regulations will be used and to aid the committee in their scrutiny of the regulations.

I am happy to take questions. Thank you.

The Convener: Thank you very much, cabinet secretary. Before we move to questions, I remind members—and myself, I suppose—of the process. After questions, there will be a short formal debate. Therefore, if any members want to speak at length about any aspect of the regulations, as opposed to ask a specific question about them, they will have the opportunity to do so at the next agenda item.

Alison Johnstone (Lothian) (Green): I accept that the system is still developing, but given what you now know to be necessary, what consideration has been given to being more specific about what information will be needed for investigations and what organisations the agency might need to approach, with new regulations introduced later if those aspects need to be expanded, such as if the eligibility criteria were to change? One of the major concerns that has been raised about the regulations is that they have been drawn too broadly. The main concern is to do with the power to request information from any person. How broadly is the term “any person” defined? Are we talking about general practitioners, for example?

Shirley-Anne Somerville: One of the differences between the regulations that the DWP has and those of the Scottish system is that the former has a list of organisations that it can approach. That approach was considered, but it

was rejected for a number of reasons. It is very much due to the fact that we are in the process of setting up our social security system and such aspects will develop and change over time. They may develop and change very quickly as we move through the regulatory developments for disability and carers, for example. Our approach allows the agency to be ready on day 1 for the regular payments that will come from wave 2, and will give it the ability to look into suspected fraud cases in a flexible manner, should it need to do so.

However, the exemptions are very important. They were drawn up after concerns were raised by some third sector organisations in particular, to ensure that there is no concern that we could seek information from, for example, a welfare rights organisation from which a person has received support. The exemptions that I detailed in my opening remarks are the limitations of that power. Any organisation can be approached, with the exception of those types that I mentioned, such as welfare rights organisations and women’s refuges.

09:15

Alison Johnstone: Could medical records could be accessed in some cases?

Shirley-Anne Somerville: Medical records can be accessed if it is determined that that is absolutely necessary, but one important criterion is that the information must be relevant to the investigation that is taking place. It would be wholly inappropriate—and this would not happen under the regulations—for a person’s entire medical record to be asked for or received. This is about allowing access to a specific aspect that relates to the matter under investigation. It must be reasonable for an authorised officer to require information that is in connection with an investigation. That information has to be relevant to that investigation. Many of the benefits that we will have under the devolved settlement will be for disability, for example, and the ability to access some medical information may be a very proper thing to do, if that is reasonable and the information is relevant. However, that would be decided case by case. Access would not happen for every case. It would be up to the officers to decide whether that was appropriate.

Alison Johnstone: Will applicants for those benefits be aware that their personal information, including a part of their medical records, may be accessed at some point, if an investigation is regarded as essential?

Shirley-Anne Somerville: It is certainly referred to in the privacy notices that we have as we move forward with the different benefits. It is there when applicants sign up; it is part of the process of application.

Alison Johnstone: What is your view on the importance of a person being made aware when they have been under investigation? I am concerned that they may not know that that has even occurred, which would make it difficult for them to raise any concerns that they might have about that.

Shirley-Anne Somerville: I appreciate that point and there have been discussions about it. If someone is aware that an investigation has taken place, they would be informed of the conclusion of that investigation, so there is a line drawn under that, or, if there has been a decision to move the case forward, they would be informed of that decision.

I ask the committee to bear it in mind that a number of vexatious claims are made against people. It may be concerning and upsetting for people to know that such complaints have been made against them. The vast majority of complaints under the current system do not then lead to additional proceedings. It may be that something has looked a little different or a little peculiar to staff internally, but once the matter has been looked into, there was nothing in it at all and the investigation was closed very quickly. It may be that some additional investigation was needed, but, again, nothing was found. You need to consider the number of instances where, quite rightly, the system looks at an issue and reassures itself that nothing untoward has happened but where no additional investigations take place and no charges are laid. In many of those cases, it may be quite concerning and upsetting for the individual to know that those investigations have taken place.

Alison Johnstone: Will annual statistics be published on the number of investigations that have been carried out and their outcomes?

Shirley-Anne Somerville: We will look closely at that because people will want to know that there is a great deal of public scrutiny to ensure that we are getting the balance right. It is particularly important in fraud and error, which the agency deals with separately, because we need to be able to demonstrate dignity, fairness and respect in everything that we do, including cases of fraud and error.

Some aspects came out in the agency's annual report. We were at an exceptionally early stage, given the timeframe for the annual report, and we will need much more detail as we move on. We are still looking at what type of detail that would include but I am determined—and I know that the agency is determined—to show how the powers are being used or, more importantly, when they are not being used, to allay any concerns and to demonstrate that we are using our powers responsibly. I will look to have a very transparent

way for the committee, Parliament and stakeholders to be able to access information on the types of investigations that have taken place, and the number of fraud cases that have been determined and looked at.

We will not be setting targets on this, because targets tend to drive behaviour in many ways. If there is an investigation and it shows that fraud has not taken place, that is a good outcome. It is important that we do not set targets for a number of fraud cases in a year because that can drive behaviour in a way that is not good for the client. We will look at how we can present that information but never drive behaviour in a way that would be detrimental to the clients concerned.

The Convener: That is an important line of questioning and I know that members have supplementary questions on it. I would like clarification of one point from Alison Johnstone's line of questioning about the person under investigation being aware that an investigation is taking place. Cabinet secretary, I fully accept your point about vexatious complaints and the stress that they can place on individuals, given the fact that a significantly high number—I think it is over 80 per cent—of benefit fraud complaints are found to have no case to answer. However, within your exchange with Alison Johnstone, you said something about making sure the person under investigation can tell their story. If a fraud investigation establishes that there could be substantial concerns, will the person under investigation always have the opportunity to give their side of the story ahead of any determination of the fraud case?

Shirley-Anne Somerville: Absolutely, convener. That is integral to every case. If the investigation comes to an end because it is determined that no fraud has taken place, that is very different to the case moving forward. In every case, the individual must have the right to explain the circumstances. An important point is that, when the client has the opportunity to come forward, they might well be able to demonstrate that they made a genuine error and explain the circumstances around it. The ability to interview clients under caution is exceptionally important if they are to be able to explain the context, and if a genuine error has been made, it is imperative that they get the opportunity to discuss it in detail.

I go back to the point I made in my original statement, that an investigation will be done on the presumption of a person being innocent as we go through the process. That is why it is important that they are given that opportunity.

Pauline McNeill (Glasgow) (Lab): I have a supplementary question on Alison Johnstone's question about medical records, to which you gave a helpful answer. I want to go a little bit further with

that. You said that the investigator cannot go on a fishing trip; they must make a specific request for specific information, and the medical professional will respond in good faith to the question that has been asked of them. Should a doctor respond to what they think they are being asked and narrow down the scope of the information—I presume that doctors will want to make sure that they have answered the question, and protect their patients at the same time by not giving everything—will that answer be accepted by an investigating officer in good faith or can an investigating officer go back and challenge the doctor by saying that they have not given the information that was asked for? I want to be clear because I do not want medical professionals to be in the firing line. If they have answered in good faith, perhaps that should be accepted as their answer, but it would be helpful to know that.

Shirley-Anne Somerville: Part of the agency's responsibility is to ensure that it is exceptionally clear about what information it is asking for and what it is not asking for. It is the responsibility of the agency to be exceptionally clear about what is relevant to a matter and what is reasonable to be asked for. If the agency has done that correctly, it is assumed that the GP or whoever the request has gone to will answer to the best of their ability with the information that is required. There is a lot of responsibility on the agency to get the detail of the questions right, so that we get the right information back.

You are absolutely right to point out that it is not a fishing exercise that can be done just to see what we can find. That points to the importance of the initial contact with the GP or whoever it is. Given the professionalism of those who are taking part in the process, I am sure they will be doing it in good faith and answering to the best of their ability.

That might not bring the matter to a close. The officer might think that they do not have all the information required, because it might not have been in the medical record, so they might go elsewhere or continue the investigation, but that is not to say that the initial query went wrong in any way. It might just be that the officer feels that further information is required from another source. However, the request has to be reasonable. We cannot continue an investigation just for the sake of it.

Mark Griffin (Central Scotland) (Lab): I want to come back to the people who can be required to give information. It is fair to say that that was the biggest area of concern in the consultation. I take on board what the cabinet secretary is saying. I appreciate that Scottish social security is in its infancy and accept completely the reasons that the cabinet secretary has given for the list of

people who can be required to give information being broad at this point. However, it would give me and the people who responded to the consultation some assurance if the cabinet secretary could say that the broad nature of the regulations is temporary, and that when social security payments are further developed, the agency could confidently give a list of organisations that could be required to give information. Will the cabinet secretary give a commitment to come back and revert from this broad approach to a much more defined list?

Shirley-Anne Somerville: We are absolutely determined to ensure that the system works for the agency and, importantly, for the clients and the stakeholders. To be frank, one of the reasons why we have taken our time since the consultation before presenting the regulations to the committee and Parliament is because a number of concerns were raised, particularly about the different way that the process has been organised without a specific list. That is why the exemptions that I spoke about earlier are so important.

I believe that we have taken account of the concerns of the third sector organisations and other stakeholders on the point. We have reached the point at which, because of the way in which the regulations are drafted, those restrictions on the power to require information are the correct way of ensuring that there are no unintended consequences from a list.

09:30

The method of not using a list like that of the DWP is comparable to what is in the Revenue Scotland and Tax Powers Act 2014, which also does not have a list. It is not the first time that that has been done for the devolution of powers. It is already in place for the 2014 act, but adding the exceptions demonstrates that we have listened to the concerns and have taken our time to go through in detail the nuances of specific concerns, such as those around women's refuges and so on.

Mark Griffin: I appreciate that the consultation was listened to and that exceptions have been put in place. I am asking the question purely because you said that the regulations are drafted in this way because social security payments in Scotland are in their infancy and are still developing. The assumption is then that, as the Government and the agency become more experienced, there could be an opportunity to reflect and scale back to a more appropriate list.

Shirley-Anne Somerville: As with many of these issues, we are always open to looking at whether what has been in place right from the start is the correct way for going forward once there is a steady state operation. Nothing suggests to me

that, when we move to steady state, there will be a requirement to have a list, but we have made a commitment to reviewing those aspects after two years. That will involve an examination of how the regulations work, particularly the regulation that does not have a DWP-type list. Once the regular payment disability and carers packages have been in place for two years, that will enable us to see whether steady state requires something different. I hope that members are reassured that the review will enable us to reflect on the evidence that we have at that point, and to see what stakeholders are feeling about how the regulations are working in practice.

If any changes are needed, they can be made after that. I do not think that it will be necessary to change once we move to steady state but I hope that the review will reassure people that we can change once the agency has two years' experience under its belt.

The Convener: Can I check a couple of things on that, cabinet secretary? By summer 2021, we will have moved over to any fresh assessments for disability. We will roll out assessments for adults at roughly that point, and that process will have to be bedded in as well to enable us to see how the code of practice, which is still to be drafted, and the various regulations, which we hope to agree today, work in practice.

You mentioned the commitment to a review after two years. I am not hung up on whether it takes place after 18 months or after three years; I do not want to pick a number for the sake of picking a number, cabinet secretary. The point I am trying to get at is whether we are talking about holding a review a couple of years after the final benefit of wave 2 comes in—that is, a couple of years after the disability assessments for adults have been implemented. What is the starting gun in relation to the review?

Shirley-Anne Somerville: I apologise if I was not clear, convener. We are working towards a review two years from when the regulations are passed.

The Convener: That is helpful.

I have another question on the reassurances that have been offered this morning about how GPs will or will not release medical data, as appropriate, to authorised investigating officers. Will best practice in relation to that particular element be contained in the code of practice? The fact that a code of practice exists does not mean that GPs are aware of what the expectations are of them and what the limitations should be on their sharing of medical information. Will guidance be available to GPs? I suspect that they will arrive at informed professional views irrespective of guidance. They are fierce defenders of their

patients' medical records anyway, but will some supportive guidance be given to GPs proactively instead of when an authorised investigating officer asks for specific information for the first time?

Shirley-Anne Somerville: I go back to the point that I made earlier about our responsibility to get the initial contact with a GP right. These cases will vary greatly, so the important aspect is that our agency officers are exceptionally well trained and use the code of practice and the guidance to shape their approach to a GP or whoever. It is probably difficult to set out guidance for other professions because it will vary from case to case, but there is a requirement on us to make it as easy as possible for people to take part in the process, so they do not feel that it is overburdensome for them. We can best do that by having regular engagement with, for example, professional bodies and the national health service, so that they are entirely up to speed with what is being proposed, what is in the regulations and how that will develop, and being able to get constant feedback from them.

I hope that that provides reassurance that we are not doing this in a vacuum within the agency, but that the agency is going out and discussing these matters with relevant agencies, professional bodies and stakeholders that may be impacted by them.

The Convener: It is good to get that on the record, cabinet secretary. We will move to the next line of questioning.

Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP): You have touched on some of the reasons why you are avoiding what might be called target-based activity. Will you elaborate on your thinking behind that?

Shirley-Anne Somerville: It is important that what we do is exceptionally targeted. That includes whom we approach and the cases that are taken on. There will be a requirement for the agency to look into cases when, for example, an approach has been made internally by a member of staff. There will be times when an approach is made to the agency by an outside individual—a member of the public—and we will ensure that we investigate those cases. However, there will be no target-based activity in relation to fraud. I suppose the obvious reason for that is that it is very difficult to see how you could have fairness, dignity and respect at the same time as doing that.

We have restricted the remit of investigators to that of expert evidence gatherers. All the decision making will take place outside the investigation team, so there is a separation of responsibilities there. I hope that, as we build through all the different aspects of the system that I have highlighted at a higher level, people will be

reassured that we will carry out an investigation only when it is deemed necessary and only to the extent that is deemed necessary, to ensure fairness, dignity and respect.

Dr Allan: On that issue—or, indeed, on any issue—have you responded to or reflected on the views that you gained from your meetings with the stakeholders and experience panels in the process of bringing forward the regulations?

Shirley-Anne Somerville: Very much. Right from the start, I knew we would have a particular challenge in reassuring people that there can be dignity, fairness and respect in fraud investigation just as there can be in any other part of the system.

We have taken our time to look at the areas where there was concern. One of those areas, which we have discussed already, is the requirement for exemptions for certain types of organisations. I thank the organisations that took part in the detailed discussions that we had, which went through their particular circumstances.

As with all such things, there may be unintended consequences of the drafting of the regulations. I would certainly hope that this Government—or any Government—would not misuse the regulations, but they could be misused or misinterpreted in the future. We have to future proof the regulations not just by saying, “Please be reassured that we would not use them like that,” but by trying to draft all the unintended potential consequences out of them.

There has been a great deal of work with stakeholders, the Crown Office and Procurator Fiscal Service and the Information Commissioner’s Office. We have tried very hard to ensure that we have taken on board the genuine and legitimate concerns that stakeholders had at the start of this process and have amended the regulations to alleviate those concerns.

Michelle Ballantyne (South Scotland) (Con): I want to look at what the regulations say about the data side. This is more a query about the way in which the regulation is phrased, just to check why it is phrased in that way. There may be a logical explanation for that, which I have missed. I refer you to part 3, regulation 4(3)—the wording is repeated in regulation 7(6).

Shirley-Anne Somerville: Could you repeat that a little more slowly?

Michelle Ballantyne: Sorry. In part 3 of the regulations, regulation 4(3)—the wording is repeated in regulation 7(6)—is to do with the disposal of data during or after an investigation. The regulations state:

“An authorised officer must destroy any information received in response to such a notice as soon as it ceases

to be needed in connection with the matters that may be investigated.”

The same phrasing is repeated in regulation 7(6). The draft code of practice states:

“When the investigation and all related action has concluded, the documents and evidence gathered will be retained and destroyed in line with Social Security Scotland’s data retention policy.”

Why does the language that is used in the regulations state that the information must be destroyed

“as soon as it ceases to be needed in connection with the matters that may be investigated”?

Shirley-Anne Somerville: If there is any confusion or dubiety around that, we are happy to look at the draft code of practice, to see whether any of it can be resolved. I do not know whether Colin Brown wants to say something about the drafting. If there is any dubiety or any concern that there is a contradiction in the code, it can be looked at, because it is a draft.

Michelle Ballantyne: The code makes sense to me: you destroy everything once you have completed your investigation. The wording in the regulations seems to suggest that—

Colin Brown (Scottish Government): The regulations may be worded to say that there may be cases in which that would happen sooner. The information received may have no bearing on the on-going investigation, and it would simply not be retained.

Shirley-Anne Somerville: Going back to Pauline McNeill’s references to medical records, an example could be that the agency might get something that was not relevant to the investigation and that needed to be destroyed before the conclusion of the investigation because it was nothing to do with the investigation. We might not ask for it, but the agency might get information that needs to be destroyed sooner than the end of the process.

09:45

Michelle Ballantyne: But that would cover everything, including how you handle data and everything that is used in the investigation. The wording does not seem to say that, although maybe it does. It is just that, when I was reading it—

Shirley-Anne Somerville: We will reflect on that point and see whether any changes require to be made to the code.

Michelle Ballantyne: Thank you.

The Convener: I am just repeating what you said, cabinet secretary, for clarity for the *Official Report*. Are you confident that any lack of clarity in

the statutory instrument can be resolved with clarity in the code of practice?

Shirley-Anne Somerville: I do not think there is any lack of clarity in the regulations. The regulations state that data can be destroyed earlier than the end of an investigation—for example, if it is not relevant, it should be destroyed before the end of the investigation—and that not everything should be kept right until the end of an investigation. I am content that the drafting allows the destruction of any information during the investigation if that is required and also allows us to take the necessary steps once an investigation has been completed and closed.

The Convener: The code of practice can illustrate when it would be appropriate to do those things, but the power is contained within the instrument.

Shirley-Anne Somerville: We can look to see whether further drafting is required on that point.

Michelle Ballantyne: The regulations do not say specifically that all documentation must be destroyed on the conclusion of the investigation; they just say that it must be destroyed

“as soon as it ceases to be needed in connection with the matters that may be investigated.”

Shirley-Anne Somerville: If there is a prosecution, we are obliged to retain the information until that point. However, under wider data protection requirements, nobody can keep data if they do not need it.

Michelle Ballantyne: Your clarification is that the regulation concerning the control of data is contained elsewhere and does not need to be contained in these regulations.

Shirley-Anne Somerville: Yes.

Michelle Ballantyne: That is fine. Thank you.

The Convener: As there are no other questions for the cabinet secretary, we move to agenda item 2. I invite Ms Somerville to move motion S5M-20206.

Motion moved,

That the Social Security Committee recommends that the Social Security Assistance (Investigation of Offences) (Scotland) Regulations 2020 [draft] be approved.—[*Shirley-Anne Somerville*]

The Convener: I know that this part of the process can be a bit artificial at times, cabinet secretary, but there is the opportunity for debate. Members may wish to put some general reflections on the record, and you will have the opportunity to sum up at the end of the debate. I should point out that your officials cannot participate in the debate.

Are there any points that members would like to make?

Alison Johnstone: I am appreciative of the evidence that we have heard this morning. It is very important that we conduct any benefit fraud investigation in a way that does not exaggerate the scale of the problem. The cabinet secretary highlighted a loss of some 2.7 per cent of benefit expenditure, whereas a Trades Union Congress poll a few years ago suggested that members of the public thought that fraud was occurring in 27 per cent of cases. The figure is small.

I welcome the cabinet secretary's assurance that targets will not be set, but I still have concerns.

People should have the right to know whether an investigation has taken place, regardless of the outcome, and I am concerned that a person's not having that information may show that the system is not really respecting their right to privacy. The code of practice makes it clear that investigations must be proportionate. However, if someone is unaware that they have been or are being investigated, they cannot challenge the investigation on the ground of proportionality. The Information Commissioner's Office has said that an individual should be made aware that an investigation is being conducted, and I think it is very important, particularly when even a small part of their medical record may have been investigated, that an individual is aware of that.

I appreciate the fact that the agency has been clear about the need to distinguish between fraud and errors in a sympathetic manner.

Mark Griffin asked whether the broad scope of organisations that can be asked to provide information could be only temporary, before we move to a defined list. I appreciate that exceptions have been made as a result of evidence from Inclusion Scotland and so on, but I am still unconvinced—as the Child Poverty Action Group was when it responded to the consultation—that starting off with such a long list is wholly necessary or the right way in which to proceed.

I am also concerned about who will carry out the investigation. Training is absolutely key, and I have concerns about whether there are sufficient safeguards in place concerning the individuals who will be accessing the information and excessive use of the powers to request information. My main concern is about the power to require information from anyone, albeit with the list of exceptions.

I will leave it at that, convener.

Pauline McNeill: I am happy with most of what the cabinet secretary has said. It is quite difficult to say whether we are satisfied because the

regulations are a framework and we do not know how that framework will operate in practice. For that reason, I think that Alison Johnstone was perfectly correct to raise the issues that she raised. I suppose that it will all be down to the leadership and management of the service, and the tone that is set for the test. As the cabinet secretary rightly said, there is a reasonableness test. I think that the committee—whoever is on it—should keep a close eye on whether reasonableness, as an ordinary person would see it, is being complied with.

I expressed, during the passage of the Social Security (Scotland) Bill, concerns about framing of offences: the wording that was used was something like “known or ought to have known”. I also did that on behalf of a group of lawyers who were not convinced, and who thought that it was quite a low test and that there would be a fine line between error and fraud. I record that I remain concerned about the framing of the offence and the rules around investigation of fraud. That matter should be returned to in order to ensure that the end point is as we envisaged it would be.

Jeremy Balfour (Lothian) (Con): I thank the cabinet secretary and her team for drawing up the regulations, which are very helpful and strike the right balance between being able to investigate in a proper way and providing individuals with information. Having sat on tribunals and heard the final outcomes in cases, I know that a power to investigate without the person knowing initially, and there being no list of people who have to give information is a better way forward, because that will give investigating officers the freedom to go where they think the investigation has to go.

I also welcome the cabinet secretary's commitment that there will be a review after two years, because I think that the system will probably need tweaks. No system is perfect, so it will be helpful for whoever is on the committee in two years to be able to look at what has happened in practice and to make tweaks. However, the tone and direction of travel are absolutely correct.

I take the opportunity to put on the record, as the convener likes to say—this is for the committee as well as for the cabinet secretary—that I think that we need separate meetings. We should take evidence one week then be able to reflect, rather than having to vote immediately. I hope that the clerks and the cabinet secretary's team would be able to diarise that, because coming down the line there might be regulations on which there are questions that the committee will want to discuss in private after the meeting, and we do not have that opportunity. I am in no way making a political point: it is for the committee and the cabinet secretary's team to ensure that such time is in the diary so that we can have a gap

between hearing evidence and making a decision. The process is too quick if we do both on the same day. However, I thank the officials for the work that they have put in.

Keith Brown (Clackmannanshire and Dunblane) (SNP): On that last point, I assume that it is open to the committee to defer a decision for a period, although I am not too concerned about that. I agree with the bulk of what Jeremy Balfour has just said: the right balance has been struck.

On a point that has been made previously, our notes say that in relation to PIP, fraud is about 1.6 per cent and that 89 per cent of cases of alleged disability benefit fraud have been found to be non-fraudulent, after examination by the DWP. The cabinet secretary made the point that fraud in the benefit system is a fraction of the amount of tax evasion. Nevertheless, it is important that people have faith in the system and that fraud is properly tackled.

I do not have concern about saying who should have to give information; I am not sure who one would want to exempt from an investigation into fraudulent activity. Who would be on the list of persons who should not answer questions about potential fraud in respect of public funds?

Alison Johnstone made a point that I thought was important, which I cannot remember just now, and cannot read my own writing.

Alison Johnstone: My point was that a person should know if they are the subject of an investigation.

Keith Brown: That was the point. Jeremy Balfour was right to say that there might, initially, be a case for not telling people. A person who has been investigated will certainly know about it if investigators think that there is something there, because the investigators will take the case through due process. However, if they do not find anything, why should the person not be told that they have been investigated? That is consistent with the point about getting rid of data that has been accumulated during the course of an investigation and which is not needed. The system should be really rigorous about doing that. It is a bit like the new power to forget. I think that it is very important.

We should be rigorous and vigorous with fraud: people expect that. I wish that we were much more rigorous and vigorous on tax evasion. I am very encouraged by the approach that has been taken, and that there will be a review in two years.

The Convener: If no other member wants to speak, I will make a few comments before the cabinet secretary sums up. On Mr Balfour's point, how we choose to scrutinise such statutory

instruments is a housekeeping matter for the committee. We have discussion of our work programme on the agenda for our first committee meeting in the new year, at which the committee will decide, as we always do, how we will scrutinise statutory instruments as they come forward. The committee was able to have two evidence sessions on these regulations, so I am sure that the Government would, as always, respond positively to such requests. That is wholly a committee matter, rather than a Government matter.

I was not going to mention fraud, but I was struck by Keith Brown's comments about how low the level of fraud is in relation to PIP and disabled living allowance, in particular. I think of PIP and DLA, and about fraud and injustice, in relation to my constituents who are being wholly unsuitably, inaccurately and incorrectly assessed and who through punitive guidance are not getting the decisions that they deserve. The new regulations will put in place a much fairer system so that people get the decisions that their medical conditions require. Frankly, when I hear the word "fraud", I think of the fraud that is being committed on our disabled community, who are not getting the justice that they deserve, because of how disability benefits are dealt with by the United Kingdom Government.

I want to make three points about the regulations. I found very interesting the debate about whether to put in legislation specifically who an investigating officer can contact in an investigation, or to have that as a broad power with limitations and restrictions being brought in as appropriate, as the Scottish Government has done with advice and advocacy services. The cabinet secretary is open minded on adding to the list of restrictions as appropriate, and to taking stock in two years of whether to change the list or put something in legislation. The door is not closed on that, so I am content.

Also, there will be a review of how medical data has been used by GPs and of what GPs think about how the system has worked. It will be important to look at that.

10:00

Alison Johnstone spoke about individuals being alerted to investigations about alleged fraud. I know from my casework that a lot of very vulnerable people who have vexatious claims made against them are unnecessarily stressed and made anxious about fraud claims that have no substance. Do they have a right to know about investigations?

There is a balance to be struck. I would be interested to know what the experience panels

think about people who are living with disability and who are making new claims, or having claims reassessed, having vexatious allegations of fraud being made about them. Would people want to know about an investigation irrespective of how anxious it would make them feel? This is about empowering claimants to work out what is best for them, so I hope that that can be considered in the review.

I am pleased that the Government has broadly got the balance right. As Jeremy Balfour did, I thank the cabinet secretary and the officials for getting us to this stage.

The cabinet secretary will sum up.

Shirley-Anne Somerville: Thank you, convener. I will make a few brief remarks. As you rightly said, convener, it is up to the committee to determine its own timetable: I will always come when asked, whenever the committee decides it wishes me to be here and however it wishes me to give evidence. I am entirely in the committee's hands in that process.

That short debate has summed up one of the challenges in establishing the system from scratch, and the necessity for the Government to be willing to look at how it is working after a couple of years. We are doing things from scratch, so there is a responsibility on the Government to be open to different approaches and to different ways of doing things, and to reflect on how things have worked in practice. That will not necessarily mean that there will be changes before we move to a steady state, but I am not sitting here, in full defence, saying that things will never change. We must always be open to change. The regulations cover an area that is a particular challenge because there is nothing to compare it to in terms of another system that runs with dignity, fairness and respect in it. That is the test to which we will have to hold the system, which will include the agency and Government looking at it.

The other aspect that ties into that is transparency, whether in the statistics that we produce or our being open about how the powers have been used. We will certainly reflect on the comments that have been made today as we move forward to the next annual report and the next batch of statistics.

Finally, the convener asked what the experience panels have said about the right to know. I have checked with my officials: it is fair to say that there was a very mixed response. Some people thought that it would be a good idea, but others pointed to the fact that to build that into the system would make people more anxious, more concerned and more stressed. That is tied to the idea that there is not a right or wrong, black or white answer to some such questions. There is a judgment call to

be made about how decisions have been arrived at. The matter can be examined when we consider review processes. I am very open to that, as I often am when I come to the committee on such things.

The Convener: Thank you very much, cabinet secretary.

The question is, that motion S5M-20206, in the name of Shirley-Anne Somerville, be agreed to. Are we agreed?

Alison Johnstone: No.

The Convener: There will be a division

For

Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Balfour, Jeremy (Lothian) (Con)
Ballantyne, Michelle (South Scotland) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Doris, Bob (Glasgow Maryhill and Springburn) (SNP)
Griffin, Mark (Central Scotland) (Lab)
McNeill, Pauline (Glasgow) (Lab)
Robison, Shona (Dundee City East) (SNP)

Abstentions

Johnstone, Alison (Lothian) (Green)

The Convener: The result of the division is: For 8, Abstentions 1.

Motion agreed to,

That the Social Security Committee recommends that the Social Security Assistance (Investigation of Offences) (Scotland) Regulations 2020 [draft] be approved.

The Convener: That ends agenda item 2. I thank the cabinet secretary and officials for coming along. Happy Christmas, when it comes.

10:05

Meeting suspended.

10:08

On resuming—

Scottish Tribunals (Eligibility for Appointment) Amendment Regulations 2019 (SSI 2019/384)

The Convener: Agenda item 3 is also on subordinate legislation. I refer members to paper 4, which is a note by the clerk. The committee is invited to consider the Scottish Tribunals (Eligibility for Appointment) Amendment Regulations 2019, which are subject to negative procedure. I remind members that the principal regulations were considered by the committee in October last year, which was seamless, was it not? I am sure that members all remember it.

Does the committee agree to make no recommendations on the instrument?

Members indicated agreement.

Decision on Taking Business in Private

Meeting closed at 10:08.

10:08

The Convener: Agenda item 4 is to ask the committee to agree that work programme discussions be held in private at future meetings. Does the committee agree?

Members *indicated agreement.*

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