

SPICe

The Information Centre
An t-Ionad Fiosrachaidh

Social Security (Amendment) (Scotland) Bill

Introduction

This is the final evidence session on the Social Security (Amendment) (Scotland) Bill. The Committee will hear from:

- Shirley-Anne Somerville, Cabinet Secretary for Social Justice
- Iain Hunter, Bill Team Leader
- Kayleigh Blair, Solicitor, Scottish Government Legal Department

Background

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

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

The [SPICe Bill briefing](#) provides more background.

The Committee held a 'call for views' which received [27 responses](#), 10 of whom also responded to the Scottish Government consultation. 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.

The Committee has taken oral evidence over four meetings and received written submissions from [Audit Scotland](#) and [Who Cares? Scotland](#).

The DPLR Committee has considered the Bill and received a [written response from the Scottish Government](#). They [published their report on 26th March](#) welcoming

commitments to stage 2 amendments but also drawing the lead committee's attention to:

- The breadth of power in making regulations for Care Experience Assistance
- The inclusion of certain powers to create offences in relation to compensation recovery.

During evidence taking, there was a generally positive view of most provisions in the Bill with the exception of information for audit, about which most witnesses had concerns. Some witnesses also had concerns about liability for overpayments.

Overview of the Bill

New benefits. Part 1, sections 1 and 2 set up the legal framework that would allow new benefits for care experienced people and for families with children to be introduced in future. This would allow the proposed 'Care Leaver Payment' to be introduced and allow Ministers to introduce regulations to change the legislative footing of the Scottish Child Payment.

Late applications. Part 2, section 3 repeals COVID 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.

Overpayments. Part 4, sections 9 to 13 make changes to the rules on liability for 'assistance provided in error'.

Appointees Part 5, sections 14 and 15 concern arrangements where someone who cannot manage their own benefit payments (such as a child or an adult with incapacity) has an appointee to manage their benefits for them.

Providing information Part 6, Section 16 would require individuals to provide information to Social Security Scotland in order to estimate the amount of fraud or error in the system as a whole.

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. Some of the compensation payment would be paid to Scottish Ministers.

Scottish Commission on Social Security 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 (Table 5, Financial Memorandum). Once fully up and running, the administrative provisions in the Bill may generate a net saving of between £1.1 million and £4.5 million per year. Most of the estimated savings arise from compensation recovery.

Themes for discussion

The following suggests eight themes for discussion:

- Theme 1: New benefits (Part 1 of the Bill)
- Theme 2: Applications for assistance (Part 2 of the Bill)
- Theme 3: Challenging decisions (Part 3 of the Bill)
- Theme 4: Overpayments (Part 4 of the Bill)
- Theme 5: Appointees (Part 5 of the Bill)
- Theme 6: Information for audit (Part 6 of the Bill)
- Theme 7: Compensation recovery (Part 7 of the Bill)
- Theme 8: SCoSS (Part 8 of the Bill)
- Theme 9: Financial Memorandum

Theme 1: New forms of benefit (Part 1 of the Bill)

Witnesses welcomed the provision for Childhood Assistance and Care Experience Assistance, giving suggestions for how they may be used.

Scottish Child Payment

In the Call for Views CPAG stated that:

“we will be very disappointed if future childhood assistance regulations do not address the issues already identified with Scottish child payment as a ‘top-up’ benefit.”

Suggestions for changes to the Scottish Child Payment included; increasing the amount, eligibility changes, further provision for backdating, covering gaps in payments, introducing a taper, introducing a ‘run-on’ after qualifying benefits stop and better alignment with other ‘five family payments’.

CAS cautioned that care should be taken to make sure that: “qualification does not become excessively more complex.”

Care Experience Assistance

The Bill would create a new category of benefit – care experience assistance. The Scottish Government has consulted on introducing one specific form of assistance – the Care Leaver Payment. However, the regulation making powers themselves are very broad enabling a wide range of possible policy choices.

The way the Bill is drafted gives the Scottish Government the option to create Care Experience Assistance as Social Security Scotland benefits or via some other agency such as local authorities. It is also drafted in a way that means that the

general framework of social security – the principles, charter, appeals system, annual uprating, take-up strategy do not automatically apply.

The Committee has heard different opinions on this issue.

In their submission and in their oral evidence CPAG recommended that Social Security Scotland should be the first option for new payments. In their written submission they said:

“CPAG in Scotland believes in the default of all assistance being developed and delivered by Social Security Scotland, unless there is very good reason. This ensures that the development and delivery of the assistance is in keeping with the Scottish social security principles such as dignity and respect, contributes to the realisation of human rights and the reduction of poverty, as well as continuous improvement.”

Similarly, in oral evidence, Erica Young (CAS) said:

“The key is consistency and predictability for those who are accessing their right to social security. Everything being in the one agency is critical, given the number of agencies already operating in this space.” (Committee Official Report, 7 March, col 7).

In contrast Who Cares? Scotland:

“support the Bill as drafted, leaving the possibility of delivery by other agencies, such as local authorities.”

Their main concern is that young people may not apply and therefore miss out on support. They propose:

“a duty on local authorities, to apply on behalf of a young person who is leaving their care.”

The DPLR Committee raised concerns with the Scottish Government about the lack of detail in this regulation making power. In [reply the Scottish Government](#) said that:

“The power taken in the Bill, and the procedures that will be followed to make regulations under this power, are consistent with the approach for other forms of assistance.”

The [DPLR Committee recommended](#) that the lead Committee take further evidence from the Scottish Government on the breadth of this regulation making power. This Committee wrote to the Cabinet Secretary on 28 March. [A reply from the Scottish Government](#) was received on 15 April which stated that a stage 2 amendment would make care experience regulations subject to SCoSS scrutiny.

Annual uprating

During consideration of [annual uprating regulations on 22 February](#), the Committee asked the Cabinet Secretary whether there should be a statutory requirement to uprate Care Experience Assistance and/or Scottish Child Assistance. She said:

“I will keep that under review as the bill develops. After the bill, if Parliament chooses to pass it into an act, we will do everything that we need to do in secondary legislation, as it is sometimes more important and more reasonable to do things in secondary rather than primary legislation.”
([Committee Official Report, 22 February 2024, col 4](#)).

For other benefits the requirement to uprate is in [section 86B of the Social Security \(Scotland\) Act 2018](#) rather than in regulations.

Members may wish to discuss:

- 1. Does the Cabinet Secretary think it would be beneficial for Care Experience Assistance to be subject to the general statutory framework for social security – including the statutory principles, appeals, the take-up strategy, annual uprating, scrutiny by SCoSS and the Charter? If so, why not provide for this in the Bill in keeping with most other forms of Scottish social security?**

Theme 2: Applications for assistance (Part 2 of the Bill)

This theme looks at the deadlines for applying for benefits. Theme 3 looks at the deadlines for challenging decisions.

Currently, applications can be made more than a year late where the reason they are late relates to COVID. The Bill would repeal this. In their submission CPAG said:

“It would improve the system for people in vulnerable situations if regulations allowed late applications when there are good reasons for the delay.”

Both Richard Gass (7 March col 8) and CAS (written submission) recommended allowing late applications in exceptional circumstances.

A number of early appeals to the First-tier Tribunal concerned the lack of flexibility in the ‘application window’ for Best Start Grant. See for example [‘decision report 14](#) which, in relation to an unsuccessful appeal for the early learning payment states:

“the child’s mother missed the deadline for claiming this benefit by five days. There are no provisions within the regulations that apply that take account of “exceptional circumstances or good cause. No allowance is made for any application being accepted late even by such a short period.”

The Scottish Government consider that there are sufficient flexibilities already. The Policy Memorandum states:

"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." (PM, para 55)

Backdating

A related issue to late applications is backdating. In oral evidence Jon Shaw (CPAG) discussed backdating to before a client first contacts Social Security Scotland. For example, in Scottish Child Payment:

"there is not provision for Scottish child payment to be treated as having been made before the date when it is submitted to Social Security Scotland."
(Committee Official Report, 7 March col 11)

Such a provision could be useful if someone receives a backdated award of a qualifying benefit which confers eligibility back to a date before that person applied for Scottish Child Payment. Another example is Carer Support Payment which can be backdated for up to 13 weeks prior to the date a carer becomes eligible. This can allow for long processing times of disability benefits. However [latest ADP statistics](#) show that 25% of ADP claims are processed within three months and 49% within four months. In oral evidence, Vicki Cahill (Alzheimer Scotland) said:

"We therefore have an opportunity to look at how the approach to backdating and processing claims can be made simpler to ensure that people are not disadvantaged by the current processes." ([Committee Official Report, 21 March, col 5](#))

Members may wish to discuss:

- 2. The Committee has heard that it would be beneficial if, for benefits which must be claimed within a certain timeframe, claimants were able to make late applications 'in exceptional circumstances.' The Committee has also heard calls to extend provision for backdating. What is the Cabinet Secretary's view?**

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

Part 3 of the Bill would:

- Allow requests for re-determination and appeal to be submitted after a year in exceptional circumstances (section 4)
- Allow individuals to withdraw their re-determination request (section 5)
- Require Ministers to complete a re-determination (section 6)

- Allow appeals to ‘lapse’ where the clients consents to a more advantageous award offered by Social Security Scotland (section 7)
- Clarify the actions that a Tribunal can take following a process appeal (section 8).

Submissions from witnesses and evidence heard

Witnesses generally welcomed these provisions but some had suggestions for additional changes. CAS and Carers Scotland emphasised the importance of clear guidance and clear communication in all of these measures.

Deadlines

Witnesses agreed with accepting redetermination requests and appeals after a year in ‘exceptional circumstances’. The policy memorandum states that guidance will be provided on what ‘exceptional circumstances’ means for re-determinations ([PM, para 63](#)). Suggestions made by witnesses included:

- Life events, such as illness or bereavement and the impact of living with a cognitive impairment (Vicki Cahill, Alzheimer Scotland, 21 March, col 5)
- Things that disrupt a person’s life – significant time in hospital, moving to residential care at short notice, bereavement or change in the provision of unpaid care. (Allan Faulds, Alliance, 14 March, col 3)
- Being subject to compulsory treatment (Craig Smith, SAMH, 14 March, col 4)

Craig Smith (SAMH) suggested that a ‘generous’, ‘empathetic and compassionate approach’ should be taken. Vicki Cahill made similar points, although Craig Smith did acknowledge that this “might not chime very well with ‘exceptional’.” (14 March col 4, 21 March, col 5).

Several witnesses suggested that deadlines for requesting redeterminations should be consistent, as the different timescales make it unclear for those trying to use the system. (For example, CPAG, CAS, Carers Scotland). Deadlines to request and complete a redetermination vary by benefit, as set out in the table below.

Table 1: Re-determination timescales

Benefit	Deadline to request a re-determination	Social Security Scotland time limit to complete re-determination
Best Start Grant Scottish Child Payment Funeral Support Payment Young Carer Grant Winter Heating Payment	31 days	16 working days
Child Winter Heating Payment	42 days	16 working days
Carer Support Payment Child Disability Payment Adult Disability Payment	42 days	56 days

Withdrawing re-determination requests and lapsing appeals

Witnesses agreed with the right to withdraw a redetermination request and lapse an appeal.

There was concern by some (SAMH, Glasgow City Council, RNIB) that people should not be pressurised into lapsing appeals. CAS stress the need for clear guidance. The Policy Memorandum states that “robust guidance” will be put in place ([PM para 91](#)).

Most witnesses agreed with the provision that appeals should only lapse if the client consents (eg Law Society, SAMH). CPAG took a different view, suggesting that consent was not necessary partly because the new award has to be more advantageous and can be appealed (Jon Shaw, CPAG, 7 March, col 19).

Several witnesses suggested adding a right to re-instate a withdrawn request within a certain timescale (eg Diane Connock (Stirling), Jon Shaw (CPAG), 7 March, col 16, Craig Smith (SAMH), 14 March col 6). Diane Connock explained:

“there also needs to be that time period given to people during which they can change their mind. That has to be a reasonable time period too, because people might want to seek advice, which can take time.” (Committee Official Report, 7 March, col 16).

CPAG suggested removing the requirement for an ‘error’ to be identified before an appeal can be lapsed. This would allow appeals to be lapsed if Social Security Scotland take a more generous view of the same facts.

Other proposed changes: Required re-determination stage

The Bill makes doesn’t change the requirement for a redetermination prior to appeal. The Committee has heard different views about this.

CAS, CPAG and Rights Advice Scotland argued that it would simplify matters to be able to go straight to appeal. Erica Young (CAS) said:

“If there was just one step where a claimant could simply lodge a challenge that would be treated as an appeal and at that point Social Security Scotland could make a decision whether they would use the appeal lapsing process to make a redetermination to avoid an unnecessary appeal hearing. That’s a much more streamlined process.” ([Committee Official Report, 28 March, col 33](#))

She considered that with the proper ‘framing’, the process ought not to be off-putting. They intend to raise this issue as part of the formal review of ADP.

Other witnesses, such as SAMH, Stirling Council and RNIB considered that, on balance, the redetermination stage should remain mandatory.

RNIB and CPAG both make a more specific point that a redetermination shouldn't be required if someone is challenging the decision that results from a lapsed appeal. They should be able to go straight to appeal, even if redetermination remains mandatory in other situations.

Other proposed changes: Process appeals

The Bill clarifies the actions that the First-tier Tribunal can take when deciding a process appeal. Witnesses suggest additional changes:

- Both CPAG and RNIB suggested that the First-tier Tribunal ought to be able take a decision about entitlement based on the available evidence: “to prevent people who cannot meet evidence requirements getting stuck in a process decision loop.” (CPAG written submission, RNIB 14 March, col 7). This ‘loop’ could happen if the tribunal decides that further information is needed and sends it back for another redetermination, which is then appealed back to the Tribunal, who decide further information is still needed and send it back again for redetermination and so on.
- CPAG’s written submission suggested allowing a further right of appeal to the Upper Tribunal “to help develop the case law around process decisions”

Non-legislative measures

Witnesses also raised issues of policy and practice which could improve the redeterminations and appeals process. The Committee is taking evidence on this from Social Security Scotland and the First-tier Tribunal next week on these issues.

Members may wish to discuss:

- 3. The Committee has heard how confusing social security can be. One suggestion made by several witnesses is to have the same deadline across all benefits for requesting a determination. What is the Scottish Government view?**
- 4. It has been suggested to the Committee that instead of redetermination followed by appeal, a simpler approach would be to go straight to appeal. Any unnecessary appeals could be avoided by lapsing appeals where necessary. What is the Cabinet Secretary’s view of this suggestion?**
- 5. It has also been suggested that the current legislation is too inflexible because it requires appeals to be made on a specific form. What is the Cabinet Secretary’s view?**

Theme 4: Overpayments (part 4)

Part 4 of the Bill would:

- Make formal representatives (such as guardians or appointees) liable for overpayments in some circumstances but only if they had misused the funds (sections 9 to 11).

- Result in the individual being liable for overpayments caused by their representative (whether noticeable or not), so long as the representative had not misused the funds (Section 9)
- Clarify that overpayments can be recovered from the deceased's estate and extend this to include decisions on overpayment liability taken after the individual had died (section 12)
- Introduce review and appeal right for decisions on overpayment liability (section 13)

Submissions from witnesses and evidence heard

Liability of representatives and individuals

The balancing of liability between individuals and representatives was a difficult issue for several witnesses. (eg. Allan Faulds, Alliance, 14 March, col 10, Craig Smith, SAMH, 14 March, col 10, Claire Andrews, RNIB, 14 March, col 12)

Craig Smith (SAMH) said:

“that was one of the most contentious areas of the bill for us when we were coming to our view. Ultimately, we agree with the proposals. In principle, a person who benefits should be liable. [...] but the measure must be treated with some caution because, ultimately it holds an individual responsible for something that they may not have done but have benefited from.” (Committee Official Report, 14 March, col 10)

In contrast Vicki Cahill (Alzheimer Scotland) and Fiona Collie (Carers Scotland) were clear that individuals should not be held liable for the mistakes of their representatives. Fiona Collie said:

“If someone has a representative acting for them, that is because they require support to manage their social security, so they should not be liable for that. That seems fundamentally unfair.” ([Committee Official Report, 21 March, col 11](#))

At the same time Fiona Cahill also emphasised the need for compassion when considering liability of carers for overpayment:

“There should be compassion in the system. We know that there can be significant consequences for unpaid carers if there is an overpayment, because of the nature of the benefit. In general, the liability should be not with the individual who is being represented but with the representative, but we need to be careful about that, because we do not want to discourage individuals from supporting disabled people.” ([Committee Official Report, 21 March, col 9](#))

Representatives would only be liable if they act in breach of their duties. Claire Andrews (RNIB) considered, on balance, this was the right approach, saying:

“The approach could potentially be off-putting for a small number of people, but in the round, that is probably a risk worth taking.” (Committee Official Report, 14 March, col 12).

Identifying who has benefited

Several witnesses who agree in principle queried how, in practice, it would be possible to decide whether funds had been misused, and how liability might be shared between different individuals. (Erica Young, CAS, Jon Shaw, CPAG and Richard Gass, Glasgow Council, 7 March cols 20-22; Craig Smith, SAMH 14 March, col 11; Fiona Collie, Carers Scotland and Vicky Cahill, Alzheimer Scotland, 21 March col 9-10). For example, Craig Smith said:

“The issue is not straightforward, particularly in situations in which an appointee is a family member or a close friend, there is joint budgeting for travel and food bills.” (Committee Official Report, 14 March, col 11)

Vicki Cahill pointed out that that it could be difficult to identify whether particular items of expenditure would be considered ‘misuse’:

“If there is no direct requirement for people to provide or purchase particular things with their benefit, who is to say that, for example, going on holiday, going out socially or purchasing a vehicle is a misuse of funds, when that could benefit the individual for whom the benefit is being claimed? In and of itself, that can be challenging.” ([Committee Official Report, 21 March, col 10](#))

She asked for:

“fair and reasonable processes and clear and robust structures need to be in place to support carers and representatives.” ([Committee Official Report, 21 March, col 10](#))

Review and appeal rights

Witnesses welcomed the introduction of the ability to challenge decisions on overpayment liability, but CPAG consider that it would be simpler to provide a right to redetermination rather than creating a new review process. They suggested this could be achieved by adding liability decisions to the list of decisions that are considered ‘determinations’ under section 50 of the 2018 Act (7 March, col 22).

Liability of deceased’s estate

The Bill clarifies that overpayments can be recovered from the deceased’s estate. This was always the policy intention, but the Bill clarifies the drafting. Fiona Collie (Carers Scotland) emphasised how stressful a time this can be:

“it is really distressing when you are trying to deal with everything else. There is a need for a bit of balance to ensure that individuals are not put under additional stress.” ([Committee Official Report, 21 March, col 11](#)).

Vicki Cahill suggested that the wording of official letters could be improved, which:

“initially offers a degree of condolence to the individual in question who is responsible, but the next line is a demand for money. That is not the most compassionate or appropriate way in which to make a request for additional funds.” ([Committee Official Report, 21 March, col 12](#))

She also highlighted the ability to ask for an overpayment to be written off.

Other proposed changes: threshold for debt recovery

There is already a statutory requirement to have regard to financial circumstances and discretion whether to recover overpayments. CAS recommend introducing an income threshold for debt recovery. In their written submission they said:

“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 with be sufficient to clear the debt over time or written off at the end of the payment period.”

Members may wish to discuss:

- 6. The Committee has heard some objections to individuals being liable for the ‘good faith’ errors of their representative. Can the Cabinet Secretary explain why someone should be liable for an error that was neither their fault nor something a person might be expected to notice?**
- 7. Several witnesses were concerned that in many situations, such as shared household finances, it would be difficult in practice to identify whether funds had been misused. How will such decisions be made?**

Theme 5: Appointees (Part 5)

Under the Bill, 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). These [checks include visiting](#) both the appointee and the person who has the appointee.

This is already in place for individuals transferring from PIP or DLA onto CDP or ADP. Section 14 of the Bill would enable it to be put in place for other situations, such as when someone moves from England or Wales to Scotland.

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

There was little comment on these provisions in the witness submissions in the Call for Views or in oral evidence. Witnesses welcomed the temporary recognition of DWP appointees in the Scottish system. Some, such as Vicki Cahill (Alzheimer Scotland) said they had had little experience of the Social Security Scotland process as it was fairly new. Craig Smith (SAMH) described how their organisation had been instrumental in securing additional requirements for the Scottish system saying that:

“some additional safeguards, which we welcome, are therefore built into the Scottish system.” (Committee Official Report, 14 March, col 14)

Vicki Cahill (Alzheimer Scotland) emphasised the importance of sharing information between DWP and Social Security Scotland where possible, to make the process easier for appointees and the people they care for.

“It might be worth having a look at what reciprocal arrangements can be agreed between the DWP and Social Security Scotland. Some of the checks that have been carried out by the DWP could be shared to enable Social Security Scotland to carry out a quick oversight or vice versa, particularly if someone has had an appointeeship organised within the past six to 12 months.” ([Committee Official Report, 21 March, col 13](#))

Members may wish to discuss:

- 8. Social Security Scotland already recognises DWP appointees as part of the transfer process. How do the two agencies work together to streamline the approval process?** (For example, does Social Security Scotland request information from DWP or does it ‘start from scratch’ each time?)

Theme 6: Information for audit (Part 6)

Part 6 of the Bill would give Ministers the power to require clients to provide information so they can establish estimates of error and fraud. If they fail to do so, then their benefit could be suspended.

People will be identified through random sampling. Although the primary purpose is to provide system-wide estimates, if information submitted suggests that eligibility has changed, then a new determination can be made to change the level of award. If information is not provided and if that results in benefit being suspended, entitlement will be reviewed. If eligibility cannot be confirmed then the award could be ended.

Consultation

Most witnesses raised concerns about this part of the Bill. These provisions were not consulted on. The Policy Memorandum states that:

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

Purpose of measures

The Policy Memorandum explains how the information will be used:

“robust and reliable audit and reporting mechanisms are required to provide assurance that payments are correct, and where they are not, to accurately quantify rates of overpayment, underpayment and fraud. This informs official statistics, identifies areas for improvement and helps to ensure that Social Security Scotland’s expenditure is in line with its statutory powers and parliamentary authority” (PM para 152)

The Policy Memorandum states that if individuals were able to opt-out:

“this would prevent reliable estimates of overpayments, underpayments and fraud being obtained 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 in any process that is likely to scrutinise their entitlement, defeating the purpose of the audit.” (PM para 157-8).

Audit Scotland submission

Audit Scotland has recommended that Social Security Scotland improve its estimates of error and fraud. In their [written submission, Audit Scotland](#) emphasise the need to have robust estimates of error and fraud:

“it is vital that that Social Security Scotland develops a strong understanding of the different benefit streams it administers and the associated risks of error and fraud within them. It is the agency's responsibility to assess the levels of error and fraud in the benefits in its accounts. To do this it needs to have adequate arrangements in place to assess, monitor and report on fraud and error levels in the benefits that it pays out”

[...]

Monitoring and publishing these estimates are an important element of the agency's public performance reporting, supporting its accountability to the Scottish Parliament and public.”

Audit Scotland describe the proposed checks as being part of internal audit.

“This is auditing activity carried out by the management of an organisation to help support its own internal control over the use of public funds, and for reporting on this as part of its accountability to the Scottish Parliament and public”

Audit Opinion

Unlike DWP benefits, Social Security Scotland payments made in error would not affect Audit Scotland’s opinion on the regularity of the accounts. In their submission they say:

“The same regularity issue does not affect the benefits directly administered by Social Security Scotland. This is due to the different legislation which applies to these benefits which requires Social Security Scotland to make a

payment where it has determined someone is eligible. Any payment in line with a determination is deemed to comply with the legislation, irrespective of whether this has been based on incorrect or fraudulent information.

This means that the provisions of the Bill would not directly affect the work we undertake to reach our regularity opinion.”

The Bill would:

- require individuals to provide information to Social Security Scotland about their entitlement or payment. The information would be used to estimate the amount of fraud or error in the system as a whole.
- benefits could be suspended if clients fail to meet the deadline to provide information.
- **Safeguards** are:
 - Regulations will set out who is exempt from being asked to provide information
 - Clients can ask for the request to be withdrawn if they have a ‘good reason’. Ministers define ‘good reason’, and their decision is final.
 - Clients can have a supporter present during interviews and phone-calls
 - Disabled clients have a right to independent advocacy

Suspending benefit

Schedule 11 to the 2018 Act already allows benefits to be suspended if:

- The client has failed to provide enough information to determine their entitlement,
- There is an appointee in place and they are unable to continue.
- There is an appointee in place and financial abuse is suspected.
- The client has requested a temporary stop.

This Bill would add a further reason to suspend benefit – that the client has failed to provide information for audit within the required deadline.

The existing provisions on suspension require that:

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

See section 51 and Schedule 11 to the 2018 Act.

If someone continually fails to provide information, further regulations under section 52 of the 2018 Act could provide for an unscheduled review of entitlement. Where entitlement could not be established, payment could be ended. (Such

regulations would, following this Bill, be scrutinised by the Scottish Commission on Social Security). The Policy Memorandum states that:

“Where, following suspension they still fail to provide the requested information an unscheduled review may be triggered to review their entitlement, which could be brought to an end if appropriate in the circumstances.” (PM para 153).

An unscheduled review would result in a new determination of entitlement which could be redetermined or appealed in the normal way.

Witness submissions and evidence taken

There were strong concerns about the making failure to provide information for audit a reason to suspend benefit payments. For example Allan Faulds (Alliance) said:

“We have a lot of concerns about how the process will work in practice. People’s payments should not be suspended for a failure to provide information once they have already established a valid claim.” (Committee Official Report, 14 March col 18).

Witnesses were concerned that the provisions **conflated error and fraud**:

- “We took a dim view of the linkage that is made in the bill between an error and fraud. That certainly strikes us being a rather harsh approach.” ([Michael Clancy, Law Society, 7 March, col 27](#))
- “The critical point about the mix-up between error and fraud in the provisions simply must be addressed.” ([Erica Young, CAS, 7 March, col 29](#))
- “there would not need to be suspicion of fraud for people to end up losing their money.” ([Jon Shaw, CPAG, 7 March, col 28](#))

Witnesses felt the proposal did not reflect the **Social Security Principles**:

“suspending payments does not really align with social security principles.” ([Vicki Cahill, Alzheimer Scotland, 21 March, col 15](#))

“the measure is not designed for the people of Scotland on the basis of evidence and that it does not put the needs of those who require assistance first.” ([Jon Shaw, CPAG, 7 March, col 28](#))

Others were concerned that it could add to **stigma**:

“The audit process will absolutely feed into that, particularly the sense of welfare stigma and a constant feeling of having to demonstrate and prove entitlement.” (Claire Andrews, RNIB, 14 March, col 18)

Many emphasised the **vulnerability** of some people receiving disability benefits:

- disability benefit recipients: “will incorporate some of the most vulnerable people in our society.” (Erica Young, CAS, 7 March col 30).
- “Having to respond to correspondence could be another factor that puts them under additional stress or pressure.” (Kirstie Henderson, RNIB, 14 March, col 16).
- “With adult disability payment, we are talking about people who may have a wide range of vulnerabilities, including mental health problems such as suicidal ideation, and real challenges in general in engaging with the system. Being asked to take part in an audit process could be inherently very challenging for them.” (Craig Smith, SAMH, 14 March, col 16).

Others wanted far **more information** about how it would work in practice. Vicki Cahill (Alzheimer Scotland) said,

“We need to think about how information is communicated and how it is possible for decision makers or people who are requesting information to explore the needs of claimants, to ensure that their needs are being met and that they can be supportive in providing what they are being asked for.” ([21 March, col 15](#))

Suggestions for change

Several witnesses queried whether there were **alternative approaches** to mandating participation in information gathering. They suggested there was considerable information that could be gleaned from the initial application and the outcomes of reviews, redetermination and appeals.

“I suspect that there are agencies that could give the Scottish ministers advice on getting information without their having to go to the extent of imposing such sanctions. There might be foster ways of encouraging people to provide information.” (([Michael Clancy, Law Society, 7 March, col 28](#)).

On the other hand, Diane Connock (Stirling Council) considered that:

“If the system was voluntary you might struggle to get enough information.” (7 March, col 28)

Witnesses offered additional suggestions they felt would improve the proposals:

- We would like much more consultation on the issue (Craig Smith, 14 March, 2024, col 17)
- A ‘test and learn’ approach initially, during which there is no suspension (Claire Andrews, RNIB, 14 March, col 19).
- People will be exempt if Ministers agree that they have ‘good reason’ for not participating. Jon Shaw suggested there should be right to challenge Ministers’ decisions on ‘good reason’. (col 29, 7 March, col 29) and others

suggested Ministers interpret ‘good reason’ generously. (Craig Smith, SAMH, 14 March, col 17, Claire Smith, 14 March, col 19))

- Someone who has recently had their benefit reviewed should be exempt from having to provide information for audit (Richard Gass, Glasgow Council, 7 March, col 31)
- There should be various ways of trying to establish contact with the claimant – it should not just be a letter or two followed by a suspension. [...] if someone does not respond or fails to provide information, the local delivery services could have a role in following up with that person locally (Kirstie Henderson, RNIB, 14 March, col 16).
- We need clear guidance, co-produced with people with mental health problems and other disabilities. (Craig Smith, SAMH, 14 March, col 17). Similarly Fiona Collie, (Carers Scotland) said: “If that part of the bill remains in place, we need to make sure that very good information is made available for advisers and for the public.” ([21 March, col 14](#))
- SCoSS should scrutinise the regulations (col 28, Jon Shaw, 7 March)
- The [Law Society wrote to the Committee](#) suggesting that all regulations making powers under Part 6 should be subject to the affirmative procedure, noting that: “Whilst the powers [in paras 51-54 \(of the delegated powers memorandum\)](#) may well be technical and administrative in nature their impact will be associated with the potential suspension or withdrawal of assistance from vulnerable people.”

Members may wish to discuss:

- 9. We’ve heard strong views on the provisions in Part 6. Why didn’t the Scottish Government consult on them and will they do so now?**
- 10. What alternative approaches did you consider? Could a less intrusive measure have achieved the required result?**

Theme 7 Compensation Recovery (Part 7)

Part 7 of the Bill would introduce a scheme of compensation recovery, similar to that which exists for DWP benefits. This is a long-standing feature of the reserved benefit system.

This 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 the social security payments from the compensation due to the individual and pay it instead to Scottish Ministers. No money is recovered from individual benefit recipients. Instead, they get less compensation than they would otherwise have received.

In the written submissions, Stirling and Glasgow Councils agreed with the proposals and other witnesses did not comment.

The Committee took evidence from insurers on 28 March. They emphasised:

- The importance of a streamlined, prompt system for issuing certificates. Ideally they would like to see a single certificate covering both Scottish and DWP benefits.
- Their strong preference for delivering this via Agency Agreement with DWP.

Lynne Macfarlane, (Forum of Insurance Lawyers) also suggested the possibility of “a little bit of confusion and a little bit of uncertainty” on different appeal routes for Scottish and DWP benefits. She said:

“Under the bill as it is drafted, if someone wishes to appeal on Scottish benefits, they would have to do so to the Scottish ministers, but if they wish to appeal on English benefits, they would have to appeal to the DWP. There is, therefore, some prospect of a divergence in practice in relation to the appeal process. We do not know how that will play out in due course, but it might cause a little bit of confusion and uncertainty.” (Committee Official Report, 28 March, col 11)

The Bill requires a ‘compensator’ to pay relevant amounts to Scottish Ministers within 14 days of a compensation payment being made or ‘certificate of recoverability being issued (s94E inserted by s.17 of the Bill). This provision is enforced by giving Ministers powers of investigation (s94U inserted by s.17 of the Bill). These could include criminal offences of:

- Intentionally delaying or obstruction of an authorised person in the exercise of any functions conferred by regulations,
- Refusing or neglecting to comply with any requirement relating to the provision of information or access to electronic information

The DPLR Committee raised concerns about creating criminal offences by regulations. In [their reply the Scottish Government](#) clarified that:

“It is the intention that this power will be used in relation to any person who is or has been liable for making a compensation payment, or a payment to the Scottish Ministers under 94E. This may include, for example, an insurer.

[...]

The offences to be created will only apply where an investigation occurs in terms of regulations made under section 94U, and a person intentionally delays or obstructs an authorised person in the exercise of their functions, or refuses or neglects to comply with any requirement in relation to the provision of information or access to electronic information. As such, failure to comply with the requirements of an investigation by omission will be caught within the terms of any offences made under these provisions.”

In their [report, the DPLR Committee](#) recommended that:

“The Committee asks the lead committee to seek further evidence from the Scottish Government in relation to the inclusion of the power to create “neglect” offences, and consider whether an amendment to remove the reference to “neglect” in section 94U(2)(i) is necessary.

In considering this, it may be helpful in particular for the lead committee to seek the Scottish Government's views on how it proposes that the regulations will define when a person is committing an offence due to the neglect to comply with any requirement to provide information or give access to electronic information by an authorised officer.”

The equivalent legislation for DWP benefits is found in [section 111 of the Social Security Administration Act 1992](#). The offences are set out on the face of the Act rather than, as proposed in this Bill, made in regulations.

The Scottish Government replied to the Committee on this issue on 15 April, making the following points:

- There will be in-depth consultation with stakeholders prior to setting out the detail of these offences in regulations.
- Compensators will be aware of their obligations following a request for information or access to electronic information and will not therefore be committing an offence in ignorance. Refusal to comply and neglecting to comply may both arise in practice and must be provided for.
- There are other powers to set out offences in regulations in the 2018 Act – such as in the provision for ‘top-ups to reserved benefits – ([s. 79\(2\)\(g\)](#)), and investigation of offences [84A\(2\)\(b\)](#).

Members may wish to discuss:

11. Can the Cabinet Secretary explain why the provisions for offences are not placed on the face of the Bill but left to regulations?

12. The Committee has heard that there is potential for “a little bit of uncertainty” from having different appeal routes for recovery of Scottish and DWP benefits. How could this be addressed?

Theme 8: SCoSS (Part 8)

The [Scottish Commission on Social Security](#) (SCoSS) is established under the 2018 Act to:

- Scrutinise draft social security regulations
- Report on the implementation of the Social Security Charter

- Respond to requests from the Parliament and Ministers to report “on any matter relevant to social security”

An [independent review of SCoSS reporting in 2023](#) made recommendations for change, some of which are implemented by this Bill.

The Bill would:

- Add to the list of draft regulations that SCoSS scrutinise
- Remove its status as a corporate body
- Remove the requirement to audit its accounts

Witness submissions and evidence received

In their [written submission, CPAG](#) pointed out that the Bill includes a large number of new regulation making powers which are not added to SCoSS’s remit. They say that: “All should be subject to statutory scrutiny by SCoSS.” They drew particular attention to the regulation making powers for:

- **Care Experience Assistance** –other social security payments are subject to SCoSS scrutiny. The DPLR Committee also recommended ‘super-affirmative’ scrutiny of these regulations.
- **Information for Audit** – “independent, expert scrutiny should be built in to ensure that people’s rights are properly considered and protected.”
- **Compensation Recovery** – the equivalent UK scheme is subject to scrutiny by the Social Security Advisory Committee which is the UK equivalent to SCoSS.

Following the DPLR consideration, the Scottish Government has agreed to add a requirement to consult before making regulations about who will be exempt from providing information for audit ([para 65 of DPLR report](#)). It did not specify whether this would include consulting SCoSS.

Of the new regulations making powers created by the Bill, the following would fall within SCoSS’s remit:

- Childhood Assistance (automatically within SCoSS remit as they would be made under Chapter 2 of Part 2 of the 2018 Act)
- Timescales for reviews and appeals about liability for overpayments (added to SCoSS remit by s.18(2) of the Bill)

Members may wish to discuss:

- 13. Why does the Scottish Government consider that SCoSS scrutiny is not necessary for Compensation Recovery or Information for Audit?**

Theme 9: Financial Memorandum

One of the aims of the Bill is value for money. The [Financial Memorandum](#) refers the principles of continuous improvement and value for money saying that,

“The Bill includes [...] a number of provisions intended to deliver increased efficiency and value for money.” (FM, para 5)

Those provisions highlighted as relevant to value for money considerations are: **Information for Audit.** The Policy Memorandum refers to the principles of value for money and states: “To those ends, robust and reliable audit and reporting mechanisms are required to provide assurance that payments are correct, and where they are not, to accurately quantify rates of overpayment, underpayment and fraud.” (PM para 152).

Compensation Recovery. The Policy Memorandum states: “To achieve efficiency and value for money, it is required that the Scottish Government ensures that every avenue is explored to attain maximum value for funds spent. Implementing recovery of social security assistance from compensation payments is a way in which this can be realised.” (PM para 167)

The FM suggests that by 2028-29 the measures in the Bill could result in net savings of £3.5 million per year (low-cost estimate) or net loss of £0.1 million per year (high cost estimate). (FM para 9).

The table below is a summary of Table 5 in the financial memorandum which provides estimates costs and savings of individual measures in the Bill.

Table 1: Summary of costs and savings

Bill	Measure	Implementation	Annual		
			cost low	cost high	savings
		costs			
s.2	Care experience assistance	£2.0 to £5.7	£0.20	£0.20	n/a
s. 4	Deadline extension	£0.3 to £0.9	n/a		n/a
s.5	Withdraw redetermination request	£0.7 to £1.9	n/a		n/a
s.7	Lapsed appeals	£1.4 to £3.8	n/a		£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		n/a
s.17	Compensation recovery	£1.4 to £3.8	£1.7	£5.1	£5.5
s.16	Information for audit	£1.4 to £3.8	£0.1	£0.1	n/a
s.20	Removal of SCoSS accounting duty	n/a	n/a	n/a	£0.08
	Total	£10.2 to £27.8	£2.02	£5.40	£6.68

Source: Financial Memorandum, table 5.

Table 1, above shows that most of the savings are expected to come from compensation recovery – at up to £5.5 million per annum. The annual costs range

from £1.7 million to £5.1 million. The financial memorandum emphasises the “significant degree of uncertainty” in their estimates.

14. Compensation recovery could cost up to £5.1 million per year and estimated income is up to £5.5 million. What is the financial justification for bringing in compensation recovery?

**Camilla Kidner
SPICe
April 2024**