

SOCIAL SECURITY (SCOTLAND) BILL POLICY POSITION PAPER

SOCIAL SECURITY FRAUD AND OFFENCE PROVISIONS

October 2017

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Introduction

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

Background

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

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

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

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

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

Bill Provisions – Fraud Offences

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

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

Fraud Offences – Obtaining Assistance by Deceit

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

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

Fraud Offences – Failing to Notify a Change in Circumstances

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

- the person was told by the Agency that the change in circumstances needs to be reported;
- the change in circumstance is one which would, if reported, have led to a reduction in assistance, and

- the person knew, or ought to have known, that not notifying the Agency of the change of circumstances may result in the individual getting more than he or she should.

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

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

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

Fraud Offences – Convictions

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

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

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

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

Conclusion

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

- (a) intentionally provides false or misleading information; or
- (b) fails to notify a change of circumstances that they have been told must be notified.

In both cases, there is no offence unless the act or failure advantages the person who is seeking or receiving assistance. In practice, the agency will consider whether to report a potential offence to the Procurator Fiscal, who will decide if prosecution is in the public interest.

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

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