

Stage 1 Briefing

Social Security (Amendment) (Scotland) Bill

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Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

The Social Security (Amendment) (Scotland) Bill¹ (the Bill) was introduced by the Scottish Government into the Scottish Parliament on 31 October 2023. We submitted written evidence to the committee in January 2024.² We also provided oral evidence as part of the committee's stage 1 consideration of the bill on 7 March 2024.³ We further wrote to the committee following our evidence session on 26 March 2024.⁴ The Social Justice and Social Security Committee's stage 1 report on the Social Security (Amendment) (Scotland) Bill (the stage 1 report)⁵ was published on 14 May 2024.

The Law Society of Scotland's Administrative Justice Sub-committee welcome the opportunity to consider and provide comment on the Bill ahead of the Stage 1 debate scheduled for 4 June 2024.

General Remarks

We note from the Policy Memorandum that the aim of the Bill is to improve the Scottish system of social security established under the Social Security (Scotland) Act 2018 (the 2018 Act). The Scottish Government believes that social security is a human right and a shared investment to help tackle poverty and build a fairer, more equal society. The Policy Memorandum indicates that the Bill includes a number of provisions intended to improve the experience of people using the services provided by Social Security of Scotland and a number of provisions intended to make the system more efficient.⁶

¹ [Social Security \(Amendment\) \(Scotland\) Bill \(parliament.scot\)](https://www.parliament.scot/bills/2023-24/social-security-amendment-scotland-bill)

² [social-security-amendment-scotland-bill-002.docx \(live.com\)](https://www.parliament.scot/bills/2023-24/social-security-amendment-scotland-bill-002.docx)

³ [Official Report \(parliament.scot\)](https://www.parliament.scot/bills/2023-24/social-justice-and-social-security-committee-stage-1-report)

⁴ [law-society-of-scotland-social-security-amendment-scotland-bill--7-march-2024.pdf \(parliament.scot\)](https://www.parliament.scot/bills/2023-24/social-justice-and-social-security-committee-stage-1-report)

⁵ [Stage 1 Report on the Social Security \(Amendment\) \(Scotland\) Bill \(parliament.scot\)](https://www.parliament.scot/bills/2023-24/social-justice-and-social-security-committee-stage-1-report)

⁶ [Policy Memorandum Accessible \(parliament.scot\)](https://www.parliament.scot/bills/2023-24/social-justice-and-social-security-committee-stage-1-report)



Comments on Parts of the Bill

Part 1

Part 1 makes provision for regulation-making powers for the Scottish Ministers to create two new forms of social security assistance, one for individuals with children – childhood assistance- and one for individuals with experience of having been in care – care experience assistance.

The Stage 1 report confirms a range of potential payments could be introduced as forms of Care Experience Assistance, specifically the Care Leaver Payment.⁷ We welcome the provisions in Part 1 of the Bill pertaining to the existing Child Payment and the proposed new assistance for care-experienced young people. The former is aimed at achieving the Government's aim of reducing child poverty in Scotland and the latter is fully in line with the Government's commitment under 'The Promise' to provide targeted financial support to enable young care-experienced people to move more securely and confidently from care to independent living.

We have suggested that the powers relating to care experience assistance should be exercised after consultation with the care sector, and specifically those organisations that support children and young people in care.⁸

Part 2

Part 2 makes provision to repeal the sections of the 2018 Act containing emergency coronavirus provisions.

We have no specific comments on this part.

Part 3

Part 3 makes provisions around re-determination or appeal requests including the right to withdraw a re-determination request, provisions clarifying Scottish Ministers duties in the circumstance they have failed to complete a re-determination within statutory deadline and provisions introducing a new power for Scottish Ministers to create a new determination following an error, with the effect of ending an ongoing appeal. Part 3 also makes provisions relating to the "process appeal" and sets out the powers of the First-tier Tribunal, along with the consequences of the Tribunal's decision.

The various provisions in Part 3 concern the deadlines for re-determination and appeal in 'exceptional circumstances', in order to prescribe the circumstances under which the existing deadline of one year may be extended, either by social security decision-makers or on appeal by an appeal tribunal. It is proposed that 'exceptional circumstances' will be defined in guidance, which would appear to be

⁷ Stage 1 report, para 52

⁸ [law-society-of-scotland-social-securityamendment-scotland-bill--7-march-2024.pdf](https://www.parliament.scot/bills/2024-25/law-society-of-scotland-social-securityamendment-scotland-bill--7-march-2024.pdf) ([parliament.scot](https://www.parliament.scot))



a sensible and flexible approach. The stage 1 report confirms that deadlines to request and complete a redetermination will vary by benefit.⁹

Whilst on the face of it these provisions appear to be beneficial, they run the risk of unnecessarily complicating the review and appeal provisions of the Scottish welfare system, the relative simplicity of which was one of its key advantages when it was first introduced.

Some might take the view that the existing deadline of a year to request a re-determination or an appeal is already generous enough, and that trying to over-prescribe the circumstances in which an extension might be allowed will over-complicate the system to the extent that it will become difficult to administer and for customers to understand. Neither the explanatory notes to the Bill nor the policy memorandum provides any estimate of how many cases will be likely to benefit from this change, but it would not be unreasonable to assume that there are unlikely to be many in light of the already generous one year deadline. The question then is whether these provisions will in fact improve the overall client experience as intended, which we would suggest they will not.

Part 4

Part 4 makes provisions modifying the 2018 provisions on liability for overpayments, and introduces a right to review and a right to appeal to the First-tier Tribunal for Scotland, against a finding of liability for an overpayment.

We have no specific comments on this section.

Part 5

Part 5 makes provision allowing for Scottish Ministers to treat persons as though they were an appointee under the 2018 for a limited time, if they are appointed by the UK Department for Work and Pensions. Part 5 also makes provisions to make appointees liable to the person they act for where they are in breach of their duties.

We have no specific comments on this section.

Part 6

Part 6 of the Bill concerns the provision of information for audit and provides that Ministers may request an individual to provide information about their entitlement to assistance and the payment of assistance. It also provides that a request for information under these provisions may only be made for the purposes of auditing the monetary value of error and fraud in the system and to correct apparent errors and carry out investigations into fraud (and other auditing activities). Information can be provided by interview, by telephone or video call, in writing or in such other form as prescribed by Ministers.

⁹ Stage 1 report, para 101

These are unusual and rather confusing provisions, which appear to conflate audit and fraud, despite these being two entirely separate issues. We take the view that there should be a clear differentiation between 'auditing' and 'fraud investigation'. The withdrawal of benefits from vulnerable people for an 'audit' is draconian and undermines the dignity of the claimant and should be rethought. We note the stage 1 report confirms the committee's assurance to asking the Scottish Government for a more expansive explanation as to why the provisions do not, in its view conflate audit and tackling fraud.¹⁰

Neither the explanatory notes to the Bill nor the policy memorandum explains why these provisions are thought to be necessary, other than as stated 'for the purpose of auditing the monetary value of error and fraud in the system'. The policy memorandum states that 'this provision aligns with the practice of other government departments', though falls short of specifying which departments. No public consultation took place around this provision because of its 'high priority and it being fundamental to the functioning of the system'. Being of such high priority and so fundamental would suggest there is even greater reason for consultation.

It is not clear why individuals should need to be involved in auditing the system in this way, or indeed, why Ministers could not obtain the information they need through other channels. On the other hand, if fraud is suspected in an individual case Ministers already have the power to seek information in connection with an individual's entitlement to assistance.

Regulations will prescribe categories of individuals who cannot be required to provide information, for example, for reasons of inherent vulnerability, which would appear to be reasonable. We welcome the Scottish Government's intention to amend the Bill to specify that regulations on the categories of people who would be exempt from the information audit requirement will be subject to a form of "super-affirmative" procedure which requires consultation of the regulations.¹¹

The proposal in section 16 of the Bill to add a new Section 87B to the 2018 Act is particularly concerning in that it gives Ministers the power to suspend, and in some cases terminate, assistance to an individual who fails to provide the required information by a particular deadline. Thereafter, there follows a procedure between Ministers and individuals around the reason for delay in providing the required information and whether there might be good reason why a request should be withdrawn, e.g. because of illness or bereavement. There are also provisions for an individual to be accompanied by a supporter in connection with providing the required information and for the provision of advocacy support for disabled individuals in connection with providing information, which we would suggest gives an indication as to the draconian nature of this provision.

¹⁰ Stage 1 report, para 207

¹¹ Stage 1 report, para 206



With regard to the powers in Part 6 concerning Information for Audit, we would hope that these provisions will be subject to amendment in light of the concerns that the Society and others have raised about the conflation of audit and fraud in the Bill. In the event that they do not change we would suggest that the exercise of these powers should be by way of the affirmative procedure rather than the negative procedure, as currently proposed. Whilst the powers in paras 51-54¹² may well be technical and administrative in nature their impact will be associated with the potential suspension or withdrawal of assistance from vulnerable people. The affirmative procedure will ensure that any ensuing regulations will require Parliamentary scrutiny before they are enacted.

Part 7

Part 7 makes provisions creating powers allowing Scottish Ministers to recover devolved social security assistance from awards of compensation, where they have both been awarded in relation to the same accident, injury or disease.

We have no specific comments on this part.

Part 8

Part 8 makes provisions that amend the remit and operation of the Scottish Commission on Social Security.

We have no specific comments on this part.

Part 9

Part 9 makes provision for the final and general provisions for the Bill.

We have no specific comments on this part.

¹² [Explanatory Notes \(parliament.scot\)](http://parliament.scot)



For further information, please contact:

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