POLICY NOTE

THE SOCIAL SECURITY ASSISTANCE (INVESTIGATION OF OFFENCES) (SCOTLAND) REGULATIONS 2020

SSI 2020/XXX

The above instrument was made in exercise of the powers conferred by section 75(1) of the Social Security (Scotland) Act 2018 ('the Act'). The instrument is subject to affirmative procedure.

Purpose of the instrument.
When implemented, the Social Security Assistance (Investigation of Offences) (Scotland) Regulations 2020 will allow Social Security Scotland to undertake investigative activity into suspected benefit fraud. The Investigation of Offences Regulations detail the circumstances in which a person may be authorised to use the powers contained within the Regulations. These include specific investigative powers granted to require information (both in physical and electronic form) and the power to enter and search premises. The Regulations also provide for offences in relation to delay and obstruction of an investigation.

Policy Objectives

Social Security Scotland will eventually be making regular payments to some 1.4 million citizens in Scotland, with a value in excess of £3 billion per year. The Scottish Government is responsible for the proper handling and reporting of public funds. The Scottish Government's zero tolerance approach to fraud is laid out in the Scottish Public Finance Manual[1] Also, Social Security Scotland has a zero tolerance approach to fraud, as outlined in its Counter Fraud Strategy2. Alongside this, The Social Security Assistance (Investigation of Offences) (Scotland) Regulations 2020 will allow Social Security Scotland to proportionately and effectively investigate possible cases of fraud to ensure protection of public funds. This is consistent with the principles laid out within the Act and with the Social Security Charter[3].

Sections 71-74 of the Act create offences in relation to devolved benefits:

- The offence of trying to obtain assistance by deceit;
- The offence of failing to notify a change in circumstances;
- The offence of causing a failure to notify; and
- Individual culpability for offending by an organisation.

[1] https://www.gov.scot/publications/scottish-public-finance-manual/fraud-and-gifts/annex-1-counter-fraud-strategy/
[2] https://dgxmvz0tqkndr.cloudfront.net/production/images/general/Social-Security-Scotland-Counter-Fraud-Strategy.pdf
[3] https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2019/01/charter/documents/charter-expect-scottish-government-social-security-scotland/charter-expect-scottish-government-social-security-scotland/govscot%3Adocument/00545455.pdf

Section 75 of the Act gives powers to the Scottish Ministers to make regulations about the investigation of offences laid out within the Act. Specifically, Scottish Ministers may make regulations in relation to the entry and search of premises and the seizure of material relevant to the investigation that is found within the premises.

The regulations may also create offences in relation to a failure to provide information requested for the purposes of an investigation, obstruction of an investigation and any breach of the regulations.

Consultation

The initial consultation process on the approach to dealing with suspected fraud was carried out as part of a wide ranging consultation between 29 July and 30 October 2016 that informed the drafting of the Scottish Social Security Bill. Respondents were invited to express their views on the general principles and approach to fraud investigation and generally, most respondents were content with the proposed approach. A scoping workshop was also held with stakeholders in March 2018 to discuss in more detail the content of the regulations and associated Code of Practice.

A public consultation[4] ran between 6 August and 29 October 2018. The consultation specifically sought views on whether respondents agreed with the approach to requiring information (including electronic information), the approach to entry and search of premises and the approach to dealing with delays/obstruction of an investigation. Over 200 individuals and relevant organisations were contacted directly to invite views. A total of 18 responses were received. As part of the consultation, a stakeholder workshop was also held on 2 October 2018 in Glasgow. The views expressed in response have helped to shape an amended set of regulations to be laid in the Scottish Parliament.

A number of consultation respondents representing welfare rights organisations expressed concerns about the draft regulations. Specifically, they were concerned that the scope of the proposed powers would negatively impact on their ability to provide effective and confidential advice and information. They considered that potentially vulnerable clients may be less willing to seek support if they perceived that any information they provided when seeking support could be accessed by Social Security Scotland when investigating possible cases of benefit fraud. The overriding concern was raised in relation to the proposed powers to require information, including the power to access electronic information and, the power to enter and search premises. There was also concern around the offences of delay and obstruction of an investigation.

The policy intent that underpins the draft Regulations is solely to ensure that appropriate powers are in place to investigate possible cases of fraud. The intention is not to use regulatory powers to cause undue stress to individuals, nor to undermine confidentiality between individuals and organisations that provide advice and information.

[4] https://consult.gov.scot/social-security/fraud-investigations/

As the Scottish social security system is still developing and exact eligibility criteria for all benefits are not yet known, it isn't possible to cover within the regulations specifically what information would be required (or from whom). Similarly, it was not feasible to replicate the existing DWP discrete list of organisations from whom information could be sought. This list is based upon DWP eligibility and take no account of emerging Scottish benefits such as the Scottish Child Payment (SCP). The flexibility of this proposed investigative approach follows a similar principle to that in the Revenue Scotland and Tax Powers Act 2014.

THE SOCIAL SECURITY COMMITTEE

At its meeting on 27 September 2018 the Social Security Committee sought written views on the draft regulations and Code of Practice for investigations, which at that time were subject to public consultation. The Committee received one response from a welfare rights organisation. This response expressed concerns in relation to the power to compel organisations and individuals to comply with requests for information.

Substantive changes made to the draft regulations in light of consultation are described below.

POWER TO REQUIRE INFORMATION

Regulation 3 sets out the basis on which a person may be authorised to exercise the powers contained in regulations 4, 7 and 8. Such a person is to be known as an authorised officer.

Regulation 4 contains the power for authorised officers to require information. The power in this regulation is strictly limited to requesting information relevant to a matter whose investigation is allowed by the regulations. An authorised officer may only exercise the power in regulation 4 to seek information if they have cause to believe that the person from whom it is being required is in possession of it. It must also be reasonable for the authorised officer to require the information in connection with the investigation.

To address concerns raised at consultation about the effect of requiring information, regulation 4 has now been narrowed in its scope by the inclusion of a new a regulation 5. Regulation 5 places restrictions on the power to require information and the requirement to provide it. To address the concerns around potential impacts on client confidentiality, this regulation provides an exemption for those organisations whose main purpose is provision of support and advice on a not for profit basis. These organisations will not be expected to disclose any information provided to them by a client, as part of the process of seeking welfare rights advice, information or related services. Engagement with stakeholders has indicated that this exemption is welcomed.

ACCESS TO ELECTRONIC INFORMATION

Regulation 7 gives power to require access to electronic information and has been drafted to reflect modern and efficient methods of investigation. The regulation allows authorised officers to enter into arrangements to access information electronically where facilities exist to do so. An example of this would be in relation to credit reference agencies who could

provide direct on-line access to their databases instead of processing individual enquiries in writing. The DWP already has a similar power under the Social Security Administration Act 1992.

Some concern was raised at consultation that regulation 7 might enable information to be required that could not be required under regulation 4. This was of particular concern to welfare rights organisations, given the potential impact on confidentiality. In light of the concerns, the regulation now states explicitly that this power only allows access, in electronic form, to information which could be accessed under the general power to require information. No additional information can be sought via this regulation; it just enables it to be given in a different form. The regulation also makes it explicit, that this means no electronic infomation can be accessed from a body which falls within regulation 5, as one existing primarily to provide advice etc. Discussions with stakeholders on this amended regulation have indicated that the clarification has been welcomed.

ENTRY AND SEARCH OF PREMISES

The draft regulations as consulted upon, proposed to give authorised officers the power to enter premises, either alone or accompanied, to make enquiries and gather evidence in relation to potential fraud. This could only be done with the permission of the owner or occupier of the premises. Some respondents were concerned this meant an owner could be asked for permission, as an alternative to asking the occupier, or perhaps after the occupier had refused permission. Regulation 8 now makes it explicit that permission will only ever be sought from the occupiers of premises rather than the owners (except in cases where the premises are unoccupied, or where the owner and occupier are the same person). This clarification has been welcomed by stakeholders.

The regulation has also been amended, to make clear that there is no basis to enter any part of premises used solely as living accommodation, even with the permission of the occupier or, where relevant, the owner. As consulted upon the regulation only excluded entry to dwelling houses; it did not capture premises used partly for work and partly for living.

DELAY, OBSTRUCTION ETC OF AN INVESTIGATION

When investigating fraud, it is important that authorised officers are able to gather any relevant supporting information as quickly as practicable and regulation 9 creates offences relating to obstruction of an investigation. This is a necessary element of a professional investigation. The respondents to the consultation seemed broadly supportive of this. However, some were concerned around what might constitute a 'reasonable excuse' for failing to comply with a requirement under the Regulations and potential for inadvertently committing an offence. The regulation has been amended to make it clearer that any delay or obstruction must be intentional (which ensures that no-one can unwittingly commit an offence).

A full list of those who responded to the consultation and who agreed to the release of their names is attached to the consultation report published on the Scottish Government website. It includes Inclusion Scotland, the Scottish Independent Advocacy Alliance, the Child Poverty Action Group in Scotland, Citizens Advice Scotland, NHS National Services Scotland, One Parent Families Scotland, Poverty Alliance, Shelter Scotland, Scottish Women's Aid and the Information Commissioner's Office.

Impact Assessments

An Equalities Impact Assessment, Islands Impact Assessment, and the Child Rights and Wellbeing Impact Assessment (CRWIA) have been completed on The Social Security Assistance (Investigation of Offences) (Scotland) Regulations 2020 and are attached.

Financial Effects

A partial Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. The Scottish Government is unaware of any evidence to suggest that Scottish businesses will be significantly impacted by the introduction of the Social Security Assistance (Investigation of Offences) (Scotland) Regulations 2020.

Scottish Government
Social Security Directorate

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