

Draft Investigation of Offences Regulations and Code of Practice for Investigations

Scottish Government response to the Consultation on draft Investigation of Offences regulations and Code of Practice for Investigations

August 2019



Scottish Government
Riaghaltas na h-Alba
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Ministerial Foreword



Implementing the work of Social Security Scotland is a significant undertaking. Once the agency is in steady state operations it will be making regular payments to some 1.4 million citizens in Scotland, with a value in excess of £3 billion per year.

While all of the work carried out by Social Security Scotland will be underpinned with the ethos of treating people with fairness, dignity and respect at all times, unfortunately, it is to be expected that some attempts will be made to defraud the Scottish social security system.

We have consulted on proposals for how investigations of potential fraudulent activity would be carried out and the additional information gathering powers that Social Security Scotland would need to undertake investigations.

While I am pleased that most of the questions in the consultation received, on average, predominantly supportive responses, I recognise that a number of stakeholders raised issues of concern that the Scottish Government is giving careful consideration to.

In this document, we provide a response to the main views expressed during the consultation process, outline where the draft Code of Practice will be amended as a result of the feedback received and highlight the areas within the draft Investigation of Offences Regulations that are being reviewed.

In the interim period and to allow Social Security Scotland to undertake investigations using existing powers, we will publish a Non-Statutory Code of Practice. This will allow people to understand the standards Social Security Scotland should meet when undertaking fraud investigations and what people should expect if they are under investigation.

When a final draft of the Investigation of Offences Regulations have been approved by the Scottish Parliament, a final Code of Practice explaining how the powers of investigation given by the regulations will be used, will be laid in the Scottish Parliament in line with the duties laid out in section 76 of the Social Security (Scotland) Act 2018.

Finally, I would like to place on record my gratitude to all who participated in the consultation exercise for both the concerns highlighted and the broad level of support for the Regulations and draft Code of Practice where offered.

A handwritten signature in black ink, appearing to read 'S Sille'.

Shirley-Anne Somerville MSP
Cabinet Secretary for Social Security and Older People

Introduction

1. The Scottish Government consulted on the content of the draft Code of Practice for Investigations and the information gathering powers contained within the proposed Investigation of Offences Regulations between 6 August and 29 October 2018.
2. A total of 18 consultation responses were received. Of the responses, 12 came from organisations (including local authorities, NHS and third sector support organisations) and the remaining 6 were submitted by individuals.
3. The Scottish Government engaged KSO Research Ltd to undertake an independent analysis of the consultation responses and produce a final report. This report can be accessed [here](#).
4. The consultation responses indicated no overwhelming consensus either for or against any of the proposals contained within the draft Code of Practice for Investigations or the information gathering powers contained within the proposed Investigation of Offences Regulations (2018).
5. The analytical report does clearly state that ‘the fact that most questions attracted, on average, more supportive responses than non-supportive responses should not, however, be overlooked. Indeed, the only three areas where sentiments were clearly balanced against the proposals were around requests for information, information gathering practices and the proposed rules for entering and searching premises’.
6. This response from the Scottish Government relates to the main views expressed during the consultation process and sets out where the draft Code of Practice will be amended as a result of the feedback received. It also highlights areas within the draft Investigation of Offences Regulations that are being reviewed as a result of the consultation exercise.

About the Consultation Process

7. The initial consultation process on the approach to fraud was carried out as part of a wide ranging consultation on the content of Scottish Social Security Bill between 29 July and 30 October 2016. Respondents to that consultation were invited to express their views on the general principles and approach to fraud and a full written response can be found [here](#).
8. Generally, most respondents to that consultation were content with the proposed approach and supported the distinction that was drawn between error and fraud. Respondents were split upon whether the existing Department for Work and Pensions (DWP) Code of Practice for investigations should be adopted or whether a bespoke Scottish system should be implemented.
9. The Social Security Bill was introduced to the Scottish Parliament in June 2017 and during its passage through Parliament, there was consensus among stakeholders and parliamentarians that there should be a clear distinction between intentional fraud and cases where a genuine error may have led to an overpayment. In response to these concerns, Section 40 (now section 72 of the Social Security [Scotland] Act 2018) was amended to ensure that an individual

would not have committed an offence where they had a 'reasonable excuse' for failing to report a relevant change of circumstances that may impact on their eligibility for social security assistance.

10. Section 75 of the Social Security (Scotland) Act 2018 (the Act) enables the Scottish Ministers to make regulations dealing with the investigation of the offences which the Act creates. It provides that the regulations might include, in particular, powers of search and seizure of relevant items, as well as creating offences in relation to a failure to cooperate with an investigation.
11. Section 76 of the Act places a duty on Scottish Ministers to lay a Code of Practice before the Scottish Parliament setting out how investigations carried out relying on powers in regulations made under section 75 are to be undertaken. It should be noted that Section 76 does not specify the content of that Code of Practice. Neither of these sections of the Act were subject to amendment during the Bill's passage.
12. A stakeholder workshop took place on 26 March 2018 to obtain views on what should be contained within the Code of Practice and the Investigation of Offences Regulations. The Scottish Government also consulted with a number of other public bodies with similar investigatory functions such as the Northern Ireland Department for Communities, NHS Scotland, the Student Awards Agency for Scotland and DWP, as well as the Police and Crown Office and Procurator Fiscal Service.
13. As a result, a draft Code of Practice and draft Investigation of Offences Regulations were developed and a public consultation ran for 12 weeks between 6 August and 29 October 2018. Over 200 individuals and relevant organisations were contacted directly to invite views. A further stakeholder workshop to gain feedback on the draft Investigation of Offences Regulations and the draft Code of Practice was held on 2 October 2018 in Glasgow, attended by representatives of five organisations.
14. The consultation contained a total of 19 questions specifically structured to seek respondent's views on the draft Investigation of Offences Regulations and each specific chapter of the draft Code of Practice for Investigations.
15. A total of 18 responses were received, 10 via the Scottish Government's Citizen Space online portal and eight sent directly to the Scottish Government. Of the responses received, 12 were from organisations (including local authorities, NHS and Third Sector Support organisations). The remaining six consultation responses were received from individuals.
16. Permission was sought from each respondent to publish their response and these can be accessed at: https://consult.gov.scot/social-security/fraud-investigations/consultation/published_select_respondent

Chapter 1 - The Investigation of Offences Regulations

Regulation 1- 3 – Citation and Commencement, Interpretation and Authorisations for Investigators

17. As the consultation contained no specific questions in relation to draft regulations 1-3 and only a small number of comments were received in relation to them as part of the process, the Scottish Government does not intend to review the content of these regulations or make any changes at this time.

Regulation 4 – Power to require information.

18. Regulation 4 of the Investigation of Offences Regulations 2018, provides a power to require information from any person thought to have information relevant to one or more of the matters that may be investigated.
19. The flexibility of this proposed investigative approach follows a similar principle to that in the Revenue Scotland and Tax Powers Act 2014. It recognises that the Scottish Government is engaged in a rolling programme of benefit implementation where the detailed eligibility criteria of some of the benefits have yet to be defined. As a result, it was not thought possible to prescribe a discrete list of organisations from whom information could be sought when drafting the Investigation of Offences Regulations.
20. Just over half of the consultation respondents expressed concerns regarding the level of discretion afforded by the proposed regulation. It was suggested that it was not compatible with the rights based approach underpinning the Act and the principles enshrined within it and the Social Security Charter. Although it should be noted that one respondent did welcome the 'clear statutory basis for this power'.
21. The Scottish Government is keen to reassure stakeholders that the policy intent underpinning 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 displace confidentiality between individuals and organisations that provide support and advice. Information will only be sought where necessary to enable the proper investigation of a suspected offence.
22. To ensure this, the proposed power in regulation 4 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 if they have cause to believe that the person from whom it is being required is in possession of relevant information. It must also be reasonable for the authorised officer to require the information in connection with the investigation.
23. Nevertheless, taking into account the potential negative impacts of any displacement of confidentiality between support organisations and their client, and to address the concerns raised by respondents in the consultation, the Scottish Government is engaging with stakeholders to consider alternative approaches.

Regulation 5 – Power of Scottish Ministers to require electronic access to information.

24. Regulation 5 of the draft Investigation of Offences Regulations will allow authorised officers to enter into arrangements to access information electronically where facilities exist to do so. This power was considered necessary to reflect modern efficient methods of investigation and, by comparison, the DWP already has a similar power under the Social Security Administration Act 1992.
25. One example of how this power might be exercised is in relation to credit reference agencies who could provide direct on-line access to their databases instead of processing individual enquiries in writing. Only authorised officers will be able to access such facilities and only information already within the scope of regulation 4 would be affected by regulation 5. Regulation 5 is not intended to be used gather information not already within the scope of regulation 4.
26. While the respondents were split on the content of regulation 5, with the same percentage agreeing with the proposal as disagreed, the Scottish Government acknowledges the concerns regarding potential intrusion into individuals' privacy.
27. It is recognised that particular care must be taken in the design of processes to access electronic information to ensure compliance with the law enforcement processing provisions of the Data Protection Act 2018 ('DPA'). A Data Protection Impact Assessment (DPIA) has been completed and the Scottish Government is grateful for detailed comments and suggestions of the Office of the Information Commissioner (ICO) in this regard.

Regulation 6 – Entry and search of premises.

28. Regulation 6 of the draft Investigation of Offences Regulations gives authorised officers the power to enter premises, either alone or accompanied, to make inquiries and gather evidence in relation to fraud. The draft regulation states that this would only be done with the permission of the owner or occupier of the premises and this power does not apply to premises used solely as an individual's dwelling place.
29. Almost half of respondents did not agree with this proposal as it required Social Security Scotland to seek permission from either the owner or the occupier, to enter and search premises. There was a particular concern that this could lead to the owner of a premises giving permission, without the occupier being consulted.
30. The Scottish Government agrees with the views expressed by the respondents and will revise regulation 6 to make clear that, where the owner and occupier of premises are separate, permission should be sought from the occupier before entry. The deciding factor relates to who currently has use of the premises, rather than who owns them. The owner should not be able to intervene if the occupier gives, or withholds, permission; the occupier's decision will be final.
31. It was noted that the proposed power in regulation 6 was a departure from the existing practice of the DWP. While the proposed powers do not correspond exactly with the powers exercised by the DWP, it is the Scottish Government's understanding that in practice, the DWP would seek permission before entering

premises. As a result the proposed powers within regulation 6 will more accurately reflect the standard practice that actually occurs.

32. In the consultation exercise, a question was raised regarding would happen in the case of a premises such as a women's refuge, used predominantly for residential purposes, but which is also a place of work. It is not the policy intention to enter these premises and the Scottish Government will give further consideration to how this can be addressed.

Regulation 7 – Delay, obstruction etc of an investigation.

33. When investigating fraud, it is important that authorised officers are able to gather any relevant supporting information as quickly as practicable and draft regulation 7 related to obstruction of an investigation. This is a necessary element of a professional investigation and the respondents to the consultation seemed broadly supportive of the proposed power.
34. One area of concern highlighted a lack of clarity around what might constitute a 'reasonable excuse' for failing to comply with a requirement under the regulations. In particular, whether this would cover maintenance of client confidentiality by welfare rights advisers.
35. A blanket consideration of client confidentiality as a reasonable excuse would be inappropriate as it would enable individuals and organisations not to comply with the requirements laid out within the regulations and undermine Social Security Scotland's ability to prevent and detect fraud. However this is balanced against the stringent circumstances in which information can be required, as laid out in regulation 4.
36. While the Scottish Government does not consider that client confidentiality would be considered as a 'reasonable excuse', in the event that a matter is reported to the Procurator Fiscal and a defence agent is appointed, legal professional privilege would then apply.

Regulation of Investigatory Powers (Scotland) Act (2000)

37. A number of respondents raised concerns about the intention of Social Security Scotland to exercise proposed powers of covert surveillance, as they believed this was disproportionate and overly intrusive.
38. This may be founded upon the misunderstanding that Social Security Scotland would operate within the regulatory framework of the UK Regulation of Investigatory Powers Act (RIPA) 2000 rather than the Regulation of Investigatory Powers (Scotland) Act (RIP(S)A 2000.
39. It is not clear whether all or some of the perceptions about the use of surveillance more generally were informed by this misunderstanding, but some respondents indicated that surveillance was a disproportionate response to tackling fraud and a misuse of powers primarily targeted to tackle matters relating to prevention of terrorism and protection of national security.

40. RIP(S)A provides a regulatory framework, which ensures that any surveillance carried out by public sector bodies is compliant with the European Convention on Human Rights (ECHR). RIP(S)A creates a system of authorisation that must be obtained before surveillance can be used, regulates the use of these techniques and safeguards the public from unnecessary invasions of their privacy.
41. RIP(S)A contains no statutory purpose in relation to national security and the Scottish Government considers it a proportionate tool to prevent and detect offences. It should also be noted that RIP(S)A is already used by several public bodies such as Marine Scotland, NHS Scotland and the Scottish Environmental Protection Agency (SEPA).
42. The Scottish Government recognises that improper use of covert surveillance could have potentially detrimental impacts on clients and any surveillance carried out under RIP(S)A is subject to formal authorisation procedures by the Chief Executive of Social Security Scotland and two codes of practice, which Social Security Scotland will comply with.
43. The power to make these types of authorisations is overseen by the Office of Surveillance Commissioners. The Investigatory Powers Tribunal also has jurisdiction to investigate and determine complaints against the use of investigatory powers and human rights claims. The Scottish Government is content that these measures will prevent improper use of covert surveillance and should alleviate the concerns raised by stakeholders.

Rights Based Approach

44. A number of respondents noted that, in their view, the powers contained within the Investigation of Offences Regulations were in contrast to the 'rights based approach' that underpins the Social Security (Scotland) Act 2018.
45. The Scottish Government is fully committed to a rights based approach and to ensuring that every client is treated with dignity, fairness and respect at all times. While all investigations will proceed with the presumption of innocence, money lost to fraud is money that cannot be used to support people in need.
46. As outlined in the Scottish Government Public Finance Manual¹, the Scottish Government has a zero-tolerance approach to fraud and in line with the Scottish Government's Counter Fraud Strategy 'Protecting Public Resources in Scotland'², any possible cases of fraud will be investigated proportionately and professionally.
47. The Scottish Government will ensure that the powers contained within the amended regulations are consistent with the 'rights based approach', and balance the principles enshrined within the Act and our Charter with the need to prevent and detect crime by investigating possible cases of fraud in a professional manner.

¹ <https://www.gov.scot/publications/scottish-public-finance-manual/>

² <https://dgxmzvz0tqkndr.cloudfront.net/production/images/general/Social-Security-Scotland-Counter-Fraud-Strategy.pdf>

48. It was also noted in relation to Chapter 1 of the draft Code of Practice that a number of domestic abuse related issues may impact on fraud investigations. The Scottish Government understands the sensitivity of this issue, and will ensure that awareness of this is an integral part of training for Authorised Officers. In addition the use of the RIP(S)A regulatory framework for the use of surveillance puts in place important safeguards to ensure it is used proportionately and when necessary.
49. One respondent suggested that the draft Code of Practice should be amended to confirm that authorised officers making use of publicly available information to assist with their investigations, would still be required to comply with relevant data protection legislation. The Non-Statutory Code of Practice has been updated to reflect this.

Chapter 2 - Standards for Counter Fraud Officers

50. Chapter 2 of the draft Code of Practice, laid out the standards required of those tasked with investigating fraud and sets out the safeguards put in place to prevent any misuse of the powers granted to them. Recognising that the scale of powers provided by the regulations is significant, the Scottish Government accepts that the number of officers able to obtain information through the use of these powers will be restricted.
51. Half of the consultation respondents said that they did not agree with the proposed approach to authorising persons to use the information gathering powers as set out in the regulations. The reasons for this included: a lack of detail regarding the number of authorised officers able to exercise these powers; and a lack of detail regarding the training that authorised officers would be required to undertake to perform their roles.
52. The Scottish Government is committed to limiting the number of those able to exercise the proposed powers to an appropriate level. However, it is not currently possible to specify the number of authorised officers within the Investigation of Offences Regulations. As the devolved benefits are being delivered on a phased basis, the number of authorised officers required will be subject to change and explicitly stating a number within either the regulations or the Code of Practice would require them to be updated each time there was a fluctuation in the number of authorised officers required. The number of authorised officers will be limited and proportionate to the benefits that are being delivered at any given time.
53. A number of respondents noted the rigorous and bespoke training in a range of subjects that authorised officers should undergo to allow them to carry out their role effectively. Specific areas of training suggested included data protection, equality and diversity, investigative approaches to fraud, relevant legislation, poverty awareness, domestic abuse and mental health.
54. The Scottish Government recognises the concerns raised with regards to the many varying and complex circumstances that could affect individuals and is committed to ensuring that all authorised officers are fully equipped to undertake

their roles effectively, wholly in accordance with the principles outlined in the Act and our Charter.

55. As training for authorised officers is in its incipient stage and is likely to be updated on an ongoing basis as new investigative practices emerge, the Scottish Government does not believe it would be appropriate to provide the specific details of training programmes within the Code of Practice. This information will be made available, but the appropriate forum for doing so has not yet been defined.
56. An additional safeguard to ensure that all individuals under investigation are treated with dignity, fairness and respect is provided by the fact that all authorised officers will be subject to the provisions of the Civil Service Code. This code sets out the standards of behaviour expected of all Civil Servants to uphold the Civil Service's core values, which are integrity, honesty, objectivity and impartiality at all times.
57. The draft Code of Practice explicitly states that any authorised officer who misuses the power afforded by the proposed regulations will be subject to civil or criminal proceedings as well as disciplinary action. This should alleviate some of the concerns raised by stakeholders and is clearly reflected in the Code of Practice.

Chapter 3 – What to expect if being investigated

58. Chapter 3 of the draft Code of Practice, as consulted upon, is perhaps the most immediately important to those individuals under investigation.
59. For those cases where the evidence points towards an offence being committed, individuals will be invited to attend an Interview Under Caution (IUC) and this will provide an opportunity to offer their version of events. The draft Code of Practice clearly states that this is voluntary and offers a chance to provide a reasonable explanation or to dispute or clarify any of the evidence gathered during the investigation.

Treating People with Dignity, Fairness and Respect

60. A number of respondents noted that it would be beneficial that interviewees, as a matter of course, are asked if they require any support before the IUC proceeds. They also noted that any individual invited for interview should be advised of their right to be accompanied and any provisions for pre-interview support. Others highlighted the importance of support for individuals in the form of advocacy and advice prior to interview as well as adequate provision in terms of accessible and inclusive communications.
61. The draft Code of Practice makes clear that individuals will be informed in advance of their right to be accompanied by another person. Social Security Scotland will aim to ensure accessibility and be as flexible as possible about the time and place of the interview, working with the individual to assess their requirements.

62. The Act ensures provision of several other types of support. Sections 4-6 ensure that all information which is made publicly available is available in formats that are accessible to individuals who have a sensory, physical or mental disability. It stipulates that information should be provided about independent information and advice services, and independent advocacy, and underlines the importance of ensuring that communication difficulties do not present a barrier to justice. This is being carefully considered in the design of communications and interview processes.

Interview Approach

63. A number of additional specific operational points were raised by respondents in relation to how interviews should be carried out. The Scottish Government welcomes this feedback and will take these views into account when Social Security Scotland is developing its detailed operational processes.

64. The Scottish Government is committed to ensuring that everyone is treated with dignity, fairness and respect at all times. In line with the principles laid out in the Act and our Charter, all interviews will be undertaken by staff with appropriate training and will be carried out under a presumption of innocence, consistent with a rights based approach.

Interview Recordings

65. The draft Code of Practice states that a recording will be made available to individuals whose case is referred to the Crown Office and Procurator Fiscal Service (COPFS).

66. It was suggested by some respondents that recordings should be made available in all cases where an individual is interviewed under caution. While a transcript would be available where an interview formed part of the evidence for a prosecution or appeal, the Scottish Government accepts that there may be other situations where an individual may wish for the audio recording to be available, and this will be provided by Social Security Scotland on request.

Chapter 4 – Outcome of an Investigation

67. Chapter 4 of the draft Code of Practice set out the possible outcomes of an investigation and how these will be communicated to an individual, in line with the underlying principles of dignity, fairness and respect.

68. A majority of respondents were content that the potential outcomes of an investigation would be communicated appropriately and they noted no significant concerns beyond a number of practical matters relating to the provision of information in a range of accessible formats.

69. The Scottish Government is committed to providing information in a range of accessible formats through the Act. Our Charter commits us to ensuring that any communications are as simple and clear as possible and adapting any communications as far as reasonably possible to meet individual's needs and preferences.

70. To ensure this is the case in practice, communications, processes and systems remain as simple and clear as possible and these will be tested with the people who will use them.
71. The need to ensure that those who have made a genuine error are not treated in the same way as those individuals who have committed fraud was raised in relation to Chapter 4 of the draft Code of Practice.
72. The purpose of any investigation is to establish the facts that will allow a decision to be made whether unintentional error, deliberate fraud or neither has occurred. The draft Code is clear that investigations will always be carried out under a presumption of innocence and each case will be approached with an open mind. The Scottish Government has also set out separate [Fraud](#)³ and [Error](#)⁴ Strategies which make the clear distinction between them.
73. For a number of reasons e.g. the rights of the individual, the fact that it may remain on their record and the impact on an individuals' right to complain, it was suggested that individuals who had been investigated but no evidence of fraud had been found should be notified. Some respondents also highlighted the emotional impact of investigations both during and after, even where it was only suspected by an individual that an investigation may be taking place.
74. While the Scottish Government understands the reasoning behind these points, the draft Code of Practice notes that investigations are, by their nature, carried out discreetly. An individual will not normally be told that they are under investigation while the facts are still being established, this is to avoid prejudicing the detection, investigation or prosecution of criminal offences. This is consistent with section 44(4)(b) of the DPA.
75. This will also prevent unnecessary worry and distress to those who are found to have no case to answer. Where an individual exercises their right under section 45 of the DPA, this information will be provided in so far as this is thought compatible with the purpose of the processing.
76. There is a balance to be struck between an individual's right to information and the activity associated with the investigation of offences. It is not yet known how many allegations of fraudulent activity might be received, but given that it has been reported⁵ that in excess of 80% of allegations of fraud in the reserved benefits system result in no action, the Scottish Government believe the benefits of notifying the subjects of an allegation in all cases would be outweighed by the potential detriment.
77. Notifying individuals where no action has been taken could also potentially have unintended consequences, such as exposing victims of domestic abuse to repeated vexatious accusations of fraud that negatively impact upon their wellbeing or potential worries about surveillance or the source of allegations.

³ <https://dgxmvz0tqkndr.cloudfront.net/production/images/general/Social-Security-Scotland-Counter-Fraud-Strategy.pdf>

⁴ <https://dgxmvz0tqkndr.cloudfront.net/production/images/general/Error-Control-Strategy.pdf>

⁵ <https://www.theguardian.com/society/2016/feb/27/false-benefit-fraud-allegations>

As some respondents highlighted individuals with a disability may also feel restricted in living their lives to the full.

78. While operational processes are still under development, the Scottish Government is clear that where a person has been investigated with no case to answer there will be no adverse impact on any future benefit claims or interactions with Social Security Scotland.

Chapter 5 - Complaints

79. In line with the principle of ensuring the dignity of individuals is at the heart of Social Security Scotland, the Scottish Government recognises the importance of providing a robust complaints process for anyone who is not content with the way they have been treated during an investigation or who feels that expected standards have not been met.
80. While a minority of consultation respondents did not agree with the proposed approach to complaints laid out in the draft Code of Practice and raised specific issues, a similar number were broadly supportive.
81. It was suggested that the draft Code of Practice should state explicitly that the raising of a complaint would not prejudice future benefit claims relating to the complainant. The Scottish Government is clear that any such behaviour by staff would be a demonstrable breach of the Civil Service Code which could lead to disciplinary action. It would also be directly contrary to the principles as outlined in the Act and our Charter.
82. A further safeguard is built into the system where complaints will always be dealt with by a team which is not linked to either fraud or benefit processing and by an officer that has had no prior involvement in the case. This separation of duties should provide individuals with confidence that raising a complaint will not negatively impact upon any other benefits claim they may have.

Annex of Relevant Legislation

83. As noted in the draft Code of Practice, any investigation into fraud is a law enforcement activity and is subject to a number of protocols and procedural codes normally associated with criminal investigations. Respondents were, in the main, broadly content that the legislation identified in Annex A of the draft Code of Practice was relevant and complete. However the Scottish Government agrees that the Proceeds of Crime Act 2002 is relevant and has amended the draft Code of Practice to reflect this. The Data Sharing Code of Practice that the Information Commissioner is obliged to produce under Section 121 of the DPA is also relevant and shall be added to the final Code of Practice before it is laid.

Content of the Code

84. While there was no overwhelming consensus from the consultation on whether the content of the draft Code of Practice for Investigations was appropriate, more respondents agreed with the content than disagreed. It was noted that the draft Code of Practice would be strengthened by explicitly uncoupling the link between fraud and error. As set out earlier in this response (paragraphs 71-72) the Scottish Government believes that this uncoupling is being achieved through the structure of the Social Security Scotland agency and the production of clear and distinct strategies for dealing with error and fraud.
85. Importantly, this is supported by the fact that the offences highlighted within the Act have been carefully framed to make sure that people who make genuine errors and mistakes will not be criminalised.
86. Although not specifically related to in the content of the draft Code of Practice, the impact of any stoppage of benefits was raised at this point in a consultation response by one respondent. The respondent noted the attendant impact upon individuals if benefits were stopped before a conclusion is reached as to whether or not fraud has occurred. The Scottish Government recognises that this is a complex issue and that the later benefits are stopped, the larger the overpayment which will potentially have accrued if it is decided that fraud appears to have occurred.
87. Where appropriate, a new determination of ongoing entitlement should be made as quickly as is reasonably practicable after sufficient evidence has been gathered to make findings of fact, and the individual has been given an opportunity to provide their own account of the circumstances. An individual's entitlement does not hinge upon whether an offence has been committed but on whether the criteria set out in relevant regulations continue to be met.

Code of Practice for Investigations

88. Section 76 of the Social Security (Scotland) Act 2018 places a duty upon the Scottish Ministers to publish a Code of Practice, keep it under review, and revise it from time to time. It was suggested that a strategy for that review should be published.
89. The Scottish Government is committed to doing this and will review the Code of Practice periodically in line with factors such as changes to legislation, operational policy or stakeholder feedback. However, a body of evidence must be available to inform that review. Investigations and prosecutions routinely take years to reach their conclusion therefore consideration will be given to be the most appropriate time to review the Code.

Investigation of Offences Regulations

90. One respondent commented that pressure may be put on legal aid budgets as a result of providing representation. The Scottish Government understands that Legal Aid Advice and Assistance are provided to a client, if requested, at any stage of a fraud investigation. As the majority of benefits that will be administered by Social Security Scotland are replacing an equivalent reserved benefit, the

Scottish Government does not believe this will lead to significant additional representation being required. However, it will keep this under review and carefully consider any evidence that suggests otherwise.

91. A respondent to the consultation suggested that the proposals in relation to fraud are reactive rather than proactive and greater focus should be put upon the prevention of fraud as opposed to the investigation. The Scottish Government emphasises that the priority is to prevent fraud wherever possible. Social Security Scotland's approach to prevention is set out clearly in its Counter Fraud Strategy⁶. However, the express purpose of both the Investigation of Offences Regulations and the accompanying draft Code of Practice is to set out the powers, and how the Scottish Ministers intend them to be used, where there is a suspicion that fraudulent activity may already have occurred.

Overarching Comments

92. The consultation offered respondents an opportunity to offer any final overarching comments that they wished to have noted at this stage. It was suggested that it would be beneficial to publish statistics upon the number of investigations undertaken and the proportions that result in either no action being taken or prosecution.

93. This along with continued engagement with stakeholders would assist in ensuring that fraud investigation policy remained aligned with the principles of dignity, fairness and respect and a rights based approach. The Scottish Government agrees that measurement of performance is key to creating a culture of openness and transparency and with this in mind, consideration is currently being given to what official statistics should be published.

94. One respondent noted that, as an executive agency of the Scottish Government, Social Security Scotland will be a 'competent authority' when processing personal data for the purpose of preventing, investigating, detecting or prosecuting a criminal offence. This will mean that it will be subject to the law enforcement provisions of the DPA, rather than the GDPR. The Scottish Government has taken account of this in the Code of Practice.

Data Protection

95. The Scottish Government appreciates the comprehensive response provided by Office of the Information Commissioner (ICO) in relation to the use of data in fraud investigations.

96. Although this was not referenced in the consultation document, a full Data Protection Impact Assessment (DPIA) of all fraud processes has been completed and the information provided by the ICO ensures this is compliant with all legislation including the General Data Protection Regulation and the Data Protection Act 2018.

⁶ <https://dgxmvz0tqkndr.cloudfront.net/production/images/general/Social-Security-Scotland-Counter-Fraud-Strategy.pdf>

Impact Assessments

97. As part of the consultation, respondents were asked to highlight any equality, business or regulatory impacts of both the draft regulations and draft Code of Practice that may require mitigation. The Scottish Government will take these into account in the development of its Equalities, Business and Regulatory Impact Assessments which will be published alongside the revised version of the Investigation of Offences Regulations and the final Code of Practice when they are laid in the Scottish Parliament later this year.



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