

Analysis of Responses to the Consultation on the Investigation of Offences Regulations and Code of Practice for Investigations

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Introduction

Background

The Social Security (Scotland) Act 2018 created new social security powers for Scotland including responsibility for the investigation of fraud in relation to the benefits being delivered under the Scottish social security system. This includes investigation of the offences set out in sections 71-74 of the Act that may be committed by individuals and organisations, including obtaining social security assistance by deceit, failing (or causing another person to fail) to notify a change of circumstances, and individual culpability for corporate offending.

Social Security Scotland will be a Specialist Reporting Agency (i.e. an agency able to report cases to the Procurator Fiscal) and will be responsible for investigating and gathering evidence in relation to allegations or suspicions of fraud. To guide the operation of this new organisation, section 75 of the Act sets out a power for Scottish Ministers to make regulations for the investigation of fraud offences as well as placing a duty on Ministers to produce a Code of Practice for Investigations.

In developing initial proposals for how suspicions of fraud will be investigated, the Scottish Government sought views as part of a wider Consultation on Social Security in Scotland¹ during 2016. It also worked directly with a range of stakeholders and public sector organisations to understand the types of fraud that might face Social Security Scotland in relation to devolved benefits. This included the Department for Work and Pensions (DWP) which currently undertakes investigations of benefit fraud in Scotland.

The draft Investigation of Offences regulations specifically sets out the information gathering powers that allow authorised officers to compel people and organisations to provide information, shifting the onus of accountability onto Social Security Scotland. The draft regulations also set out the consequences for non-compliance with a request for information.

The draft Code of Practice sets out how the agency will use the powers in the Investigation of Offences regulations, as well as detailing the standards of conduct to be employed during investigations more generally, to ensure that the overarching principles that people are treated with dignity, fairness and respect are met by Social Security Scotland.

Given their integrated nature, a consultation was launched in August 2018 to gather feedback on both the draft Investigation of Offences regulations and the Code of Practice for Investigations. This report presents the findings from that consultation.

¹ <https://consult.gov.scot/social-security/social-security-in-scotland/>

Respondent Profiles

The consultation opened on 6 August 2018 and ran for 12 weeks, closing on 29 October 2018.

A total of 18 responses were received - ten via the Scottish Government's online portal Citizen Space, and eight by email directly to the Scottish Government. A total of 12 responses came from organisations (including local authorities, NHS and third sector support organisations) and the remaining six came from individuals.

All respondents who contributed written responses were asked to submit a Respondent Information Form (RIF) alongside their consultation response, indicating if they were willing for their response to be published (or not), either with or without their name. All agreed to their responses being published, with 10 requesting to remain anonymous and eight indicating that they were happy for their identity to be disclosed. The full published responses can be found [here](#).

Analysis and Reporting

The Scottish Government appointed an independent research company to undertake analysis of the consultation responses and provide a report.

The consultation contained a total of 19 questions and was structured to seek views on each of the five separate chapters contained within the Code of Practice, these being:

- Powers to Investigate and Safeguards;
- Standards for Counter Fraud Officers;
- What to expect if you are being investigated;
- Outcome of an investigation; and
- Complaints.

The consultation made reference, where appropriate, to the corresponding powers as set out in the draft regulations and also asked for views in relation to other relevant legislation. It also contained dedicated questions to explore impacts of the proposals, both business related impacts and equalities impacts.

All but two questions had both a closed 'tick box' component, (asking participants if they agreed/disagreed with the proposals) and an open 'text box', which gave participants a chance to express their views in more detail.

All responses were read and logged into a database and all were screened to ensure that they were appropriate/valid. Only one response was removed for analysis purposes, because one individual submitted a response via both Citizen Space and directly to the Scottish Government and the substantive content was the same.

Closed question responses were quantified and the number of respondents who agreed/disagreed with each proposal is reported below. Comments given at each

open question were examined and, where questions elicited a positive or negative response, they were categorised as such. For most of the questions, respondents were also asked to state the reasons for their views, or to explain their answers. The main reasons presented by respondents both for and against the various specific proposals were reviewed, alongside specific examples or explanations, alternative suggestions, caveats to support and other related comments. Verbatim quotes were extracted in some cases to highlight the main themes that emerged.

Narrative feedback from respondents is presented alongside a summary of the number of respondents who agreed or disagreed with each of the questions, or who provided substantive responses to the more general questions. Raw numbers are presented alongside percentages, for ease of interpretation although these percentages should always be interpreted with caution, since they relate to small actual numbers of responses. Due to the small number of responses received overall, it was also not appropriate to provide disaggregated analysis by respondent 'type' e.g. individual, support organisation, local authority, etc., however, where a view was expressed by only one 'type' of respondent group, this is indicated in the text.

As a guide, where reference is made in the report to 'few' respondents, this relates to three or less respondents. The term 'several' refers to more than three, but typically less than ten.

Despite most respondents being willing for their names to be published alongside their response, a decision was made to anonymise all responses in the final report. Similarly, where verbatim extracts have been included in the report, these have also been anonymised.

Responses to each of the questions are summarised below, in the order that they appeared in the consultation document.

Research Caveats

While the number of responses to the consultation was encouraging, it is important to remember that this report presents only the views of those who contributed. It should not be considered as representative of the wider stakeholder population, nor should the findings be generalised too broadly.

Importantly, the Scottish Government welcomed the views of people who may have had experience of a benefit fraud investigation and, recognising the potential sensitivity around sharing experiences of this nature, anonymity was offered. Despite this, the number of individuals who responded was small and there was also no clear evidence in the responses received from those individuals to indicate that they had personal experience of fraud investigations. Indeed, most feedback regarding individuals who had been subject to an investigation was received via support organisations who responded on their behalf. There will, inevitably, be a wide range of responses to the proposals set out which may never be captured by a consultation exercise of this kind, as some people choose not to engage.

Finally, it is important to note there may be some inherent bias into the findings presented here. While supportive comments in relation to the regulations were welcomed, the main purpose of the consultation was to identify any potential issues with the draft documents so Scottish Ministers could consider if they could be improved. This means that most of the feedback included offered negative sentiments or views against the proposals. While the findings presented below may, therefore, highlight mostly the perceived gaps or weaknesses of the draft regulations or the Code of Practice, it is important to remember the numbers of people who supported the proposals too (and this can be seen in the response summary tables presented throughout).

Chapter 1 - Powers to Investigate and Safeguards

The first part of the consultation relates to Chapter 1 of the Code of Practice and sets out the offences that will be investigated, the principles and legislation that govern investigation and the range of information gathering powers that counter fraud officers of Social Security Scotland will have available to them as tools in their investigation. It also details the rights and responsibilities of those who the agency may request information from in relation to investigations and how such information would be sought.

Powers for Authorised Persons to Obtain Information

Regulation 4 of the Investigation of Offences regulations specifically sets out the power to request information from any individual or organisation thought to have information relevant to one or more of the matters under investigation (including visiting premises to obtain information). This is a departure from existing DWP powers which are limited to a prescribed list of organisations. The need for this more flexible approach is linked to the fact that the new agency is still evolving and the full list of organisations from whom information may be required is not yet known. Having a more flexible arrangement is likely to cover a wider range of eventualities once the agency is in full operation, negating the need to revise or revisit the regulations on multiple occasions in the future.

Q1. Do you agree with our approach to requesting information in regulation 4 of the Investigation of Offences regulations? If not, please explain why.

| | Number of Respondents | % of Respondents |
|-------------|-----------------------|------------------|
| Yes | 7 | 38% |
| No | 10 | 56% |
| No response | 1 | 6% |
| Total | 18 | 100% |

Just over half of respondents indicated that they did not agree with this approach.

While respondents generally seemed to welcome maintaining flexibility for the expansion of devolved benefits, some indicated that they felt the regulations were too broad as specified and that a more definitive list of persons or organisations who were in or out of scope should be provided. It was suggested that a non-prescribed list may risk undermining the discrete nature of investigations, and extensive discretion was inconsistent with a rights-based approach. Another organisation suggested that the flexibility was disproportionate to the issue of possible fraudulent claims within the Scottish Social Security system.

Several of the support organisations who provided a response stressed concerns about the impact of the regulations on their ability to offer client confidentiality:

“We have very deep concerns about the extension of investigatory powers to compel any and all agencies and individuals to comply with requests for information in relation to possible social security related offences. We believe that this would make it impossible for Third Sector Agencies, and their employees, who provide services to their clients on a confidential basis to continue to offer such services on that basis in the future.”

Two organisations noted that, while they welcomed the exemption for legal privilege for solicitors, regulation 4 did not support the function of non-government organisations (NGOs) and third sector agencies. Similar provisions should be in place to protect these relationships too, it was suggested. Another stressed that independent advocacy organisations needed to be considered more in the regulations since to compel such organisations to provide information would negatively impact confidentiality and client trust. A third organisation stressed that this, in turn, would lead to clients disengaging with services and being left without the support that they need:

“Confidentiality is a key principle of independent advocacy and is crucial to building a trusting relationship with advocacy partners. Any potential compromise of confidentiality will have a negative impact on the relationship between an independent advocate and their advocacy partner. We believe this does not fit with a rights-based approach.”

One organisation stressed that they already had strict criteria in place to allow disclosure of confidential information in a finite set of cases, where it was absolutely necessary. They felt that the proposed regulations could not be justified on the grounds of providing any additional safeguards. Others too felt that the regulations, as specified, would conflict or breach existing confidentiality governance such as that which applies to counselling services². Again, it was stressed that organisations’ ability to offer client confidentiality would be undermined and this would impact negatively on the support which could be offered (i.e. clients may be less willing to disclose and so support/advice could not be tailored appropriately). The same organisation suggested that the draft regulations could be modified or strengthened to allow exemptions for specific named organisations as well as removing any possibility of the powers being used speculatively. They also suggested retaining the existing DWP approach of having a prescribed list of organisations from whom information could be sought.

One organisation specifically commented that there was insufficient justification set out in the consultation for the departure from DWP rules and again indicated that broad discretion was inconsistent with a rights-based approach. Examples of why existing powers were thought to be insufficient would be welcomed and it was

² One organisation indicated that the regulations represented “an unnecessary interference to an individuals’ right to privacy under article 8 of the European Convention of Human Rights.”

suggested bringing additional organisations within the regulations should be scrutinised further by Parliament ahead of additional powers being introduced.

One organisation indicated that they supported the clear statutory basis for this power and welcomed that only information which was relevant to the investigation would be required. The same organisation, however, urged that the exceptions in regulation 4(7) (i.e. spouses and legal clients) be clearly stated in any notices given to individuals/organisations to provide information.

A final specific concern (mentioned by two individuals) was the assumption that notices to provide information would always be received by the intended individuals/organisation. Notices sent may not be received and there may be a requirement to have a process in place which provides proof of delivery or receipt, it was suggested, otherwise there would be insufficient evidence to demonstrate non-compliance.

Electronic Records

In addition to the more general information gathering powers proposed above, the draft regulations make provision for authorised officers to obtain information that may be held electronically. This power is only to be used to investigate an offence under the Social Security (Scotland) Act 2018 and only authorised Social Security Scotland officers may use it.

Q2. Do you agree with our approach to obtaining electronic information under regulation 5? If not, please explain why.

| | Number of Respondents | % of Respondents |
|-------------|-----------------------|------------------|
| Yes | 8 | 44% |
| No | 8 | 44% |
| No response | 2 | 12% |
| Total | 18 | 100% |

There was a clear split in views in relation to this question, with half of those who gave a response offering agreement and half disagreeing with the approach set out.

Given that much information is stored electronically by organisations, some reiterated earlier comments about client confidentiality, suggesting that the same principles and basis for their objections would apply:

“As stated above even a single instance of breach of confidentiality because an agency was compelled to provide information and/or electronic records could destroy the absolutely essential trust that such agencies must foster with their, often highly vulnerable, client groups. If the intent is not to use such powers to

compel NGOs to breach confidentiality then this should be clearly stated on the face of the regulations.”

One organisation which broadly supported requesting information *per se* (in line with regulation 4) offered strong views against regulation 5 on the basis that it presented the opportunity for “*significant intrusion into people’s privacy*”. A more thorough assessment of risks and impacts associated with allowing access to electronic records was urged³:

“We question the necessity and proportionality of these authorised officers having access to entire sets of electronic records when they will already have powers to require the same information under regulation 4. A thorough assessment of the data protection and human rights impacts should be undertaken on this proposal before introducing the Regulations to the Scottish Parliament.”

Indeed, several comments were made that the regulations around electronic records seemed disproportionate and unnecessary and some stressed that they were unjustified - “*No examples of why the current powers are felt to be inadequate have been provided*”. Greater clarity around why this was deemed necessary would be welcomed. One organisation questioned why separate regulations were required for electronic information, and why this had not been considered as part of wider regulations around access to information.

One organisation stressed that they may face a conflict between needing to meet both the requirements set out in the Investigations of Offences regulations and their responsibilities under the General Data Protection Regulation (GDPR). Breaching either may result in a fine, it was perceived, leaving organisations in a no-win situation. Another pointed out that support organisations often use electronic case management systems to securely manage and store personal confidential data in accordance with GDPR requirements and that being compelled to provide access to this was unacceptable.

One other organisation questioned regulation 5(3)(c) around requirements restricting the disclosure of information and noted that the Scottish Ministers would need to be mindful that any such restrictions on disclosure needed to be compatible with both data protection law and freedom of information law, as appropriate.

Finally, one individual stressed that “a person” was not clearly defined, and one individual raised concern about whether electronic data could be certified as required under the Criminal Procedure (Scotland Act 1995, S179, Schedule 8 Act of Adjournal (Criminal Procedure Rules) 1996.

³ One respondent suggested that a Data Protection Impact Assessment should be conducted in each case where data was requested from a data controller to assess necessity and proportionality.

Visiting and Searching Premises

Regulation 6 proposes a move away from DWP powers which currently allow authorised officers to visit premises to search them for the purposes of examination and inquiry in connection with the prevention, detection and securing evidence of social security benefit fraud. While DWP's policy is that officers can only enter premises with consent, the Scottish Government proposals would allow authorised officers to do this subject to specified restrictions and only with the permission of the owner or occupier. Similarly to regulation 4, a person cannot be made to provide information that is self-incriminating to them or their spouse/civil partner or that would be subject to legal privilege.

Q3. Do you agree with our approach to entry and search of premises for the purposes of a fraud investigation under regulation 6? If not, please explain why.

| | Number of Respondents | % of Respondents |
|---------------|-----------------------|------------------|
| Yes | 6 | 33% |
| No | 8 | 44% |
| Agree in part | 1 | 6% |
| No response | 3 | 17% |
| Total | 18 | 100% |

Again, almost half of respondents indicated that they did not agree with this proposal.

While some welcomed that the regulations specified that an authorised officer could only enter premises with the permission of the owner or occupier, some stressed that it was not clear whether consent was required from both the owner and occupier where this was not the same person. In such cases, permission should be sought from both parties, it was suggested, and this should be made clear in the regulations:

“...we would recommend that the regulations be adapted to require the permission of the occupier in all circumstances.”

Many organisations were concerned that premises could be searched without the consent of an occupier in the case of landlord arrangements:

“The problem with the regulations as currently worded is that the authorised officer need only obtain the consent of the landlord (owner) to search premises used by the “occupier” who might well be a Third Sector agency (the regulations state the authorised officer must obtain the permission of the “owner or occupier” and not both).”

This particular issue may be problematic for third sector support organisations or NGOs occupying rented premises (from commercial or local authority landlords), where permission to enter and search premises granted by the landlord may mean that agency staff could search records stored by support organisations on site, without any permissions being sought from the organisation in question.

On a related note, one organisation indicated that the searching of premises by agency staff, even if consent is gained, may lead to the inadvertent access to data linked to persons other than the individual under investigation. It was suggested that the data management systems used by different organisations may mean that this is inevitable and would be an unjustified breach of confidence.

As with comments made in relation to access to information, one organisation questioned the legal basis of the regulations, and suggested that leniency was being afforded to authorised officers which was disproportionate to other organisations, such as the police:

“We are also concerned about the fact that the investigatory power regulations appear not to require reasonable grounds of suspicion, that there is no judicial oversight for exercise of powers of entering and searching premises or requiring information from third parties, to ensure that there are reasonable grounds for use of these powers. We believe that there are human rights implications here which give more powers and latitude to the Social Security Agency than would be available to the police.”

One individual also questioned if warrants could be obtained, where necessary, if consent had not been provided (and another pointed out that to enter and search premises the police are required to obtain a warrant from the court - no such requirement seemed to be in place for ‘authorised officers’). The same respondent also questioned if it would be an offence for persons within premises not to provide their personal details. Greater clarity was needed, it was felt.

One specific type of premises where application of this rule was seen as particularly inappropriate was refuges that house women and children fleeing abuse - the need to keep such premises secure and maintain users’ confidence that they were a place of safety and security was emphasised.

Overall, the justification for the move away from DWP rules was not clear, it was suggested, and greater clarity around the rationale for regulation 6 was encouraged.

Deliberate Obstruction or Delay of an Investigation

Regulation 7 sets out proposals for penalties to be in place in cases where an authorised officer is deliberately hampered in their attempts to carry out an investigation. A number of offences were proposed to cover cases where an individual or organisation fails without justification to comply with a request, deliberately provides false information or does anything else deliberately to delay or

obstruct an authorised officer in carrying out their duties under the regulations. Such offences may incur a penalty in the form of a fine of up to £1,000.

Q4. Do you agree with our proposal for new offences relating to delay or obstruction of an investigation? If not, please explain why.

| | Number of Respondents | % of Respondents |
|---------------|-----------------------|------------------|
| Yes | 7 | 39% |
| No | 7 | 39% |
| Agree in part | 1 | 6% |
| No response | 3 | 16% |
| Total | 18 | 100% |

There was an equal split in the number of respondents who provided support for and against this proposal.

Some support organisations disagreed on the basis that the protection of client confidentiality may be perceived as legitimate obstruction:

“Given our concerns outlined in the previous two answers - around the potential breach of confidential relationships that third sector organisations hold with the people they work with - we cannot agree with the proposal for new offences relating to delay or obstruction of an investigation. As it stands, third sector organisations could be at risk of a fine of £1,000 if they sought to protect confidential relationships with the people they support in the event of fraud investigations being undertaken.”

One organisation suggested that many agencies would simply be unable to afford such fees and would feel compelled to provide information even though it undermined their service provision. Others would potentially incur fines and legal costs which would also take money away from vital front-line service provision:

“...the proposed regulations are a dangerous extension of investigatory powers into areas which could, and would over time, undermine the Third Sector's ability to provide confidential services to vulnerable individuals and groups.”

The draft regulations note that offences would only be penalised if an individual or organisation failed to comply “without reasonable excuse”. Two organisations commented that the notion of reasonable excuse needed to be more clearly defined and another noted that the term ‘deliberately’ (i.e. that a person must be perceived to deliberately delay or obstruct investigations) needed to be operationalised. One noted that client confidentiality should be included as a permissible reasonable excuse not to comply with investigations:

“While the regulations make provision for individuals to not comply with requirements if there is a “reasonable excuse”, what is deemed to be a “reasonable excuse” is left to the Agency to determine. We...recommend that the regulations and Code of Practice are amended to explicitly state that the maintenance of confidential relationships are permissible reasonable excuses.”

One organisation suggested that this regulation appeared contradictory to the provisions in regulation 6, i.e. if an owner does not provide permission to access a premises, would that be considered an obstruction offence? Another organisation also questioned what would happen if an offence was committed, and a fine was paid, but information or access was still sought in relation to the investigation. A further organisation noted that the appeals process was also unclear.

On a related note, the proposed fine may not be considered a sufficient deterrent by some and this may mean that compliance with investigations would still be refused:

“Section should also address what happens if an organisation fails to provide required information, is prosecuted and fined, but SSS still requires information from them. Can a fresh request be made, leading to a second prosecution? This would be good, as for some business a single fine of £1000 might be inconsequential and of little deterrent value to other potentially non-compliant businesses.”

In contrast, concerns also included that some vulnerable adults (including those with mental health issues or learning disabilities) may not fully understand the gravity of non-compliance, therefore placing them at greater risk of being penalised than others, and that these groups might also be perceived as being obstructive, whereas the true reason for non-compliance may be lack of understanding. Clearly differentiating between wilful non-compliance and unintentional non-compliance may add clarity to the regulations.

Finally, the one respondent who agreed ‘in part’ noted that the regulations seemed appropriate for those who knowingly and wilfully obstruct an investigation⁴, but the inclusion of support organisations within the remit (and the associated problems around confidentiality discussed above) meant that they did not accept the proposals in full.

⁴ One other respondent suggested that the regulations should include the possibility of a witness, alleged partner, etc. being guilty of an offence if they have knowingly provided false information in a witness statement or interview.

Other Comments

In addition to the specific questions above, more general comments were also invited on the proposed powers to investigate and safeguards, as set out in Chapter 1 of the Code of Practice.

Q5. Do you have any other comments about Chapter 1 of the Code of Practice for Investigations?

Nine respondents provided additional comments and their concerns were quite disparate.

Four organisations expressed concern about the suggestion of giving powers of covert surveillance to social security fraud investigators, which they believed was disproportionate and overly intrusive. The need for counter fraud officers to always act in a way that was “proportionate” was also open to wide variation, it was suggested, and was not adequately formalised or operationalised within the draft regulations:

“We are unable to identify where this principle is enshrined in the draft regulations or indeed what limits are set by the draft regulations on the exercise of wide, discretionary powers.”

One respondent perceived that the Regulation of Investigatory Powers (Scotland) Act 2000 was intended for use in counter-terrorism and national security matters, rather than in social security policy, where they perceived fraud was rare.

One organisation also highlighted that ‘surveillance’ was also often a feature of abusive relationships (i.e. ex-partners covertly watching the behavior patterns of females, in particular) and suggested that the surveillance of benefit claimants in the way proposed may replicate this activity and add to the stresses experienced by victims of domestic abuse. On a similar note, one support organisation noted that ex-partners can often have demonstrated financial abuse or controlling of partners’ incomes and that ex-partners could sometimes provide wrong information or report non-intentional fraud as a means of prompting investigations against their ex-partner (hence continuing financial abuse against them):

“Multiple investigations by the DWP could be seen as another form of abuse and continuation of financial abuse. We hope this will be avoided in the devolved social security system and that there will be consideration of the impact of domestic and financial abuse which can result in the fear of retribution from an ex-partner.”

Another organisation indicated that surveillance was especially inappropriate for dealing with cases of disability benefit fraud because it may inadvertently dissuade people living with disabilities from living 'freely':

"... disabled people are becoming increasingly frightened of engaging in any social activity...because they fear that their benefits will be taken away from them as a consequence."

Two organisations urged greater clarity throughout Chapter 1 in relation to data protection. One organisation stressed that authorised officers wishing to use publicly available information for their investigation as described in the Code of Practice would still require to comply with the data protection law and this was perhaps not made explicitly clear in the Code, as worded⁵.

Greater clarity was also advised around how data controllers (including support service providers who store client data) would determine if an exemption from the normal rules preventing disclosure of information was valid, not least when regulations had yet to be published. This rule may be subject to differential interpretation (especially with regard to the way that 'sensitive information' is defined) and could, in some cases, result in organisations being penalised for their decisions:

"The information gathering powers which are to be set out in the Investigation of Offences regulations are not yet available. Therefore, we have no idea of what will be the 'defined circumstances' in which these very wide powers - including entry of premises and seizure of information - will be exercised. In other words, we are being asked to endorse the granting of very wide powers with no idea of the circumstances in which they might be used. This is simply not acceptable especially given that the exercise of the powers might lead to breaches in confidentiality and trust between Third Sector agencies and their clients and the imposition of fines on those who try to uphold duties of trust and confidentiality."

Another organisation also indicated that the Scottish Government and its agencies should consider carefully any assumption around exemptions:

"The exemptions in schedule 2 of the DPA only allow certain rights and/or data protection principles to be restricted. They do not provide a lawful basis for processing the personal data in any way, and do not exempt a data controller from requiring a lawful basis for processing."

⁵ The same organisation noted that paragraph 15 of the draft Code was incorrect in stating that paragraph 2 of schedule 2 to the DPA allows counter fraud officers to make requests of other organisations. The legal basis for authorised officers to request information, including personal data, will come from regulation 4 of the proposed Regulations. Equally, that will be the legal basis for any person disclosing personal data to an authorised officer.

Agency staff should receive data protection compliance training specific to their role on a regular basis, it was suggested (a point that was stressed again in response to the proposed standards for counter fraud officers, discussed in the following chapter below).

One local authority respondent suggested that Chapter 1 of the Code could give consideration to data sharing in cases where local authorities need to work alongside the Social Security Agency or where their own independent investigations may benefit from access to the data gathered by the agency.

Some specific points of clarification were also suggested by one public body, including:

- at paragraph 5 of the Code, use is made of the term ‘whistle-blowing’ which has a specific legal status⁶ and replacing this with an alternative, such as ‘allegation hotline’ may help to avoid confusion;
- at paragraph 11, the words “and by whom” should be added to reflect that a fundamental aim of an investigation is to establish who has committed an offence;
- at paragraphs 37 and 38, reference to “directed surveillance” should be replaced with “authorised directed covert surveillance” and this term should be used consistently in both paragraphs; and
- at paragraph 40, clarity is required that only public authorities named in the Act can conduct joint investigations, and not all public authorities.

⁶ <https://www.gov.uk/whistleblowing>

Chapter 2 - Standards for Counter Fraud Officers

Chapter 2 of the Code of Practice sets out the standards for counter fraud officers - i.e. the civil servants working in Social Security Scotland who will be responsible for implementing fraud investigations. The proposals specify that only a small number of specially trained and accredited officers will be able to use the powers set out in the investigation regulations (referred to as 'authorised officers') and that a formal process would be in place to authorise and restrict the use of powers by these individuals.

Limiting Activities of an Authorised Person

Under the proposals, prescribed limits to the circumstances under which an authorised person can use their information gathering powers are limited to:

- securing the evidence required to prove whether social security assistance has been provided where there is reasonable suspicion that there was no entitlement or reduced entitlement;
- investigating the circumstances of accidents, injuries, etc. in relation to employment-injury assistance claims and any other claims where this is relevant; and
- investigating the possible commission of devolved social security offences.

Views were sought on the appropriateness of this approach.

Q6. Do you agree with our approach to authorising a person to use the information gathering powers set out in the Investigation of Offences regulations? If not, please explain why.

| | Number of Respondents | % of Respondents |
|-------------|-----------------------|------------------|
| Yes | 5 | 28% |
| No | 9 | 50% |
| No response | 4 | 22% |
| Total | 18 | 100% |

Half of respondents said that they did not agree with the approach to authorising a person to use the information gathering powers as set out in the regulations.

While respondents generally welcomed the overall approach and the inclusion within the Code that authorised officers must demonstrate integrity, honesty, objectivity and impartiality, most felt that they did not go far enough in specifying what would be required and, specifically, that the training specified would be

insufficient for people in this role. Four organisations expressed concern that there was a lack of clarity in the regulations about the training that would be provided and/or indicated that the training described in Chapter 2 of the Code was inadequate:

“Whilst the chapter notes that ‘all counter fraud officers will be specially trained members of staff’, no further detail of this special training is given, aside from the mandatory data protection, equality and diversity training which is given to all Social Security Scotland staff.”

Several organisations suggested that a more rigorous and bespoke training programme for counter fraud officers should be provided. As well as covering mandatory data protection, equality and diversity training, it should also include training on investigation practices, relevant legislation, equalities, causes of fraud and rights-based approaches to communication. Other specific areas that could be covered included poverty awareness, domestic abuse training and mental health training. Enshrining mandatory data protection, equality and diversity training of staff within the regulations would safeguard against this being abandoned in the future without anyone being accountable for its abandonment, it was suggested. One organisation pointed out that advice on the specialist training required could/should be sought from academic experts⁷.

While the consultation noted that only a small number of specially trained officers would be able to use the powers to obtain information set out in the regulations, comments were made about the unspecified number of officers who would actually be authorised to use the powers, as set out:

“Unfortunately, the draft regulations do not specify in any way whatsoever that the number of authorised officers will be small nor how their numbers will be limited now or in the future. As the draft regulations stand any, or all, individuals who are employees of a public body within the meaning of section 12(2) of the act could be authorised to have investigatory powers. That in turn means that a future Minister could give a blanket authorisation for many or all Agency staff to be granted investigatory powers... we would suggest that Scottish Government clarifies how authorisations will be limited to a small number of specially trained officers - e.g. they could specify that Ministers can only authorise the granting of investigatory powers to those who have undergone lengthy, specialist training.”

One individual also noted that they felt that all counter fraud officers should be authorised, rather than only some, indicating that the regulations could be misinterpreted (i.e. if the intention is that all officers be authorised, this could be made more explicit in the regulations). Authorising all officers may reduce bureaucracy and delays, it was suggested. Another individual also suggested that

⁷ One respondent specifically mentioned the Centre for Counter Fraud Studies at the University of Portsmouth as potentially being able to provide advice and insight on what would constitute a robust training programme.

more detail was needed as to how Scottish Ministers would decide in which cases authorisation would/would not be given.

Overall, feedback concentrated on the need for limiting authorisation and training to just a small number and the need for more specialised and clearly defined training regimes:

“We feel counter fraud officers should have specially tailored training. The training as defined in the consultation document does not give enough detail of what that would involve. We believe that it should show how permissions will be restricted to specially trained officers and so the regulations should specify that only those staff who have undergone tailored, expert training would be granted investigatory powers.”

Additional Restrictions on Authorised Officers

Q7. Do you think the restrictions placed on authorised officers are correct as shown in regulation 3? If not, what other restrictions do you feel are required?

| | Number of Respondents | % of Respondents |
|---------------|-----------------------|------------------|
| Yes | 9 | 50% |
| No | 2 | 11% |
| Agree in part | 1 | 6% |
| No response | 6 | 33% |
| Total | 18 | 100% |

Half of respondents agreed that the restrictions placed on authorised officers were correct and a further third of respondents gave no response to this question.

Of the two that did not agree (one individual and one organisation), one gave no explanation why and the other indicated that they disagreed on the basis that they perceived that RIPA (Regulation of Investigatory Powers Act 2000) powers were to be made available to the new Scottish Social Security (which was an inaccurate view).

One other respondent who supported the restrictions also commented that there needed to be clarity regarding the use of powers and that they should only be used if the person being investigated had failed to provide information.

One organisation agreed in part on the basis that authorised powers should only be used as a last resort. While they agreed with the restrictions overall, they commented that alternative, less intrusive means of information gathering should be used wherever possible and that this should always include making direct

contact with the person under investigation to afford them adequate opportunity to provide the information being sought:

“In order to ensure that these powers are used with the highest degree of dignity and respect... the claimant should, in the majority of cases, be notified in writing that, unless they provide the information themselves within a given timeframe, the authorised officers will seek to gather the information from third parties.”

Another organisation suggested that specially trained, authorised officers should only use the powers described in extreme circumstances:

“We feel to sit with the principles of dignity, respect and a person-centred approach then information gathering should be done where possible through communication with the person under investigation.”

No other suggestions were made for additional restrictions and comments mainly related to narrowing and clarifying restrictions wherever possible.

Other Comments

Q8. Do you have any other comments about the contents of Chapter 2 of the Code of Practice for Investigations?

There were very few other comments offered in relation to the Standards for Counter Fraud Officers, and most simply reiterated their comments above regarding limiting authorisation and ensuring rigorous and wide-ranging training for authorised officers.

One organisation specifically stressed that they were not reassured by the fact that counter fraud officers would be subject to the Civil Service Code since this was often not demonstrated in practice, they felt, and the same organisation also stressed that there were no safeguards around monitoring appropriate practice in the field:

“Nowhere in the regulations does it state that counter fraud officers will receive special training. Nor does it state that any training is needed before or after being granted a certificate issued in accordance with regulation (3) of the draft regulations in order to be granted, or to exercise use of, additional powers. Nor are we reassured that use of the powers will be overseen by other counter fraud officers.”

More was needed to safeguard against counter fraud officers supporting one another inappropriately in cases where powers may have been abused, it was perceived.

One comment was also made that Paragraph 49 of the Code of Practice, as currently drafted, does not adequately reflect the Information Commissioner’s role and should be rewritten to cover his/her tasks under article 57 of the GDPR and schedule 13 of the DPA.

Chapter 3 - What to Expect if Being Investigated

The guiding principles for the new Social Security Scotland agency are that people be treated with dignity, fairness and respect. In developing the new investigative Code and regulations, consideration was given to how these principles could be embedded, including how the purpose and scope of an investigation was communicated to individuals and organisations, and what they should expect once asked to engage with the agency in relation to an investigation. Chapter 3 of the Code of Practice sets out what individuals should expect if they are invited to take part in an interview under caution as part of an investigation, as well as what would be required of them in providing documentary evidence to investigations (including timescales for producing the evidence required).

Treating People with Fairness, Dignity and Respect

A catch all question was asked about whether the Code was sufficiently detailed to explain how a person would be treated if subject to an investigation.

Q9. Does Chapter 3 of the Code of Practice provide sufficient detail to explain how a person will be treated with fairness, dignity and respect during a fraud investigation? If not, please explain what else you think could be added to ensure this.

| | Number of Respondents | % of Respondents |
|-------------|-----------------------|------------------|
| Yes | 7 | 39% |
| No | 8 | 44% |
| No response | 3 | 17% |
| Total | 18 | 100% |

Just under half of respondents indicated that they did not feel that sufficient detail had been provided to explain how individuals subject to investigation would be treated with dignity, fairness and respect, however, the comments received were comprehensive in nature.

Communicating the Right to Advocacy and Support

While it was welcomed that the Code of Practice recognised that many individuals require support when being interviewed under caution, it was suggested that clear advice needed to be made routinely available to let individuals know what support was available (including interpreters), and how to access that support:

“In order to ensure this support is available, individuals should be asked routinely, before any interview, if they would need someone present or if any other reasonable adjustments are required. Clearly advising individuals of their rights at the point they are invited to an interview under caution may be the best way of getting this information.”

Advising all individuals in advance of their right to be accompanied to an interview would help to further strengthen the Code and help it realise the principles of fairness, dignity and respect, it was suggested. Making provisions to routinely offer pre-interview support was also encouraged:

“Independent advice should be given to the individual before the interview under caution takes place, this would ensure that the individual is clear about the status of the interview, how it will be conducted, what will happen to the information provided and the potential implications of this.”

Several organisations highlighted that the right to advocacy support should be explicit in the regulations and was particularly important for adults with disabilities, including learning disabilities as well as older adults and other vulnerable groups:

“...we strongly believe that the agency should state explicitly (and also actively encourage) in all communications leading up to the interview that the person should seek support and can bring a friend or advocate to the interview as this will help to ensure that dignity and respect for the person being investigated are upheld.”

Importantly, any communications from the agency should differentiate between the right to advocacy and advice during interviews as well as encouraging people to seek support before and after the interview, it was suggested. Adopting this approach as standard was encouraged, with extra safeguards for those with additional support needs.

Additional information and clarity around what an advocate or advisor can and cannot do during an interview was also sought by one organisation.

Interview Approach

Based on experience, several support services provided comments that clients were currently often not treated with dignity, fairness and respect during investigations and that these were often perceived to be stressful and intimidating. However, the Code of Practice, as currently drafted, was felt by some not to provide reassurances that client experiences would improve under the new Social Security Scotland agency.

Another specific issue raised was that lack of awareness among interviewing officers may mean that some adults could find themselves interviewed without sufficient advocacy or support, simply because officers are not aware of/able to correctly identify the extent or depth of impairments.

A similar issue was highlighted in the need for officers to be appropriately alert to issues of domestic abuse which may mean tailoring interview approaches differently, i.e. that they be trained to recognise and respond appropriately to domestic abuse related cases.

One organisation stressed that it was important that individuals be made aware that they were *“innocent until proven otherwise”* and another organisation stressed that interviews must be conducted *“with a presumption of innocence at the outset”*. Counter fraud officers should also demonstrate this in their practice and interview approach:

“Confirmation bias should be avoided and the proceedings should be impartial - the technique of using leading questions and making assumptions from statements should be avoided.”

Again, based on experience, this organisation reported that investigations can sometimes be experienced like an interrogation and that individuals would not respond well to an accusatory approach which may cause undue distress - thus going against the principles of dignity, fairness and respect.

One organisation agreed that interviews should be guided by the Scottish Social Security principles but also that they should employ the following principles of good investigative practice currently operated by DWP, namely:

- the aim of investigative interviewing is to obtain accurate and reliable accounts from victims, witnesses or suspects about matters under investigation;
- investigators must act fairly when questioning victims, witnesses and suspects. Vulnerable people must be treated with particular consideration at all times; and
- interviewing should be approached with an investigation mind-set. Accounts obtained from the person who is being interviewed should always be tested against what the investigator already knows or what can reasonably be established⁸.

The same organisation stressed, however, that *“good investigative technique should not be followed at the expense of respect for the dignity of the individual in question.”*

Some practical issues could perhaps also be made more explicit in the Code, it was suggested, including the need to clearly communicate to individuals what type of interview they will be attending, the time and place of interviews (ensuring that these are ‘family friendly’ and do not discriminate against some individuals based

⁸ Fraud Guide: staff guide Interviews Under Caution, 01 Planning and Preparation, page 515 - Department for Work and Pensions
www.gov.uk/government/uploads/system/uploads/attachment_data/file/523527/fraud-guide-feb-2016.pdf

on their caring commitments), the option to be interviewed by same gender officers, if appropriate, and making sure that language used in communications about interviews was clear and accessible.

One organisation specifically commented on the severe detriment that may be experienced by children and young people living in households where Family Allowance and Tax Credits may be stopped, indicating that what they perceived was a “heavy-handed approach” was contradictory to the UN Convention on the Rights of the Child:

“...the process of investigations and particularly the stoppage of other benefits is extremely detrimental to families and can leave them with financial hardship, stress and anxiety as a result. Many are forced to become completely reliant on charities to survive: for foodbank parcels and for credit for gas and electricity meters, which is counter to the principles of dignity and respect. Further, families are often not aware of when the investigation would be resolved or if they would get any money back or re-instated.”

In such cases, it was seen as essential that the presumption of innocence was employed and that benefits are not stopped until a conclusion is reached and an individual is proven to be guilty of benefit fraud. Social Security Scotland should be clear in their approach to this, it was stressed.

Interview Recordings

Comments were also made that individuals should be able to request a copy of any recorded interviews in **all** cases, and not only in cases passed to the Crown Office and Procurator Fiscal Service (COPFS), as specified in the Code:

“We also recommend that, in order to ensure all individuals are able to seek redress in cases where they feel they have been subject to investigations that undermine principles of dignity, fairness and respect, all individuals should have the right to access copies of interview recordings.”

This was especially important in cases where individuals may wish to make a complaint regarding the conduct of an interview (discussed in more detail below).

Other Comments

Q10. Do you have any other comments about the contents of Chapter 3 of the Code of Practice for Investigations?

Four respondents provided other comments in relation to Chapter 3 of the Code of Practice, some of which simply reiterated points made earlier in the consultation.

One organisation commented that, while the Code of Practice dictates that individuals will not be told they are under investigation while the facts are being established (so as to avoid unnecessary worry and distress), care needed to be taken that the practice of Social Security Scotland in this respect was compliant

with the duty to provide information under section 44 of the DPA. The exemptions from this duty as currently set out would not allow information to be withheld. The same organisation noted that, *“where an exemption can be applied in a particular investigation, information about the ability of Social Security Scotland to conduct investigations into possible fraud should still be made available to the public generally, for example, as part of a privacy notice provided to people when they first apply for a devolved benefit.”*

One individual commented that the proposals seemed “unfair” because many people in receipt of benefits and who may find themselves subject to investigation were likely to be unable to afford legal representation. If people chose not to attend interviews as a result, the outcome of the investigation may also be negatively impacted:

“Being interviewed under caution without a legal representative or being able to afford a legal representative is a weakness of this proposal. By the claimants - very position [as] unemployed/sick/ disabled, etc. they are in no position to seek legal advice.”

Finally, one individual also objected to the use of the term ‘story’ used within the Code of Practice (i.e. that individuals will always be given an opportunity to put their side of the story and offer a reasonable explanation at interview). It was suggested that the chapter be redrafted or that this term be removed completely as it may: *“imply an element of fiction or at least a biased interpretation of events that is not reliably truthful.”* An alternative may be to rephrase this as an opportunity for the individual to *“comment on the evidence gathered”*, it was suggested.

Chapter 4 - Outcome of an Investigation

Chapter 4 of the draft Code of Practice for Investigations sets out the responsibilities of Social Security Scotland staff to clearly communicate the outcome of investigations to individuals concerned, including 'next steps' with regards to their benefit payments. It also sets out the range of options available to Social Security Scotland depending on the facts of the case, these being:

- If benefit was paid correctly or there is no case to answer, no further action will be taken;
- If evidence suggests a determination of entitlement is wrong, Social Security Scotland will correct the determination of entitlement to assistance and ask for any overpaid assistance to be repaid; and
- If the benefit was paid incorrectly and the facts of the case and evidence suggest an offence has been committed, Social Security Scotland may send a report to the COPFS, allowing that body to consider prosecution.

The Code also sets out clearly how data that have been gathered during investigations will be handled, including what, if any, data will be retained or destroyed in line with Social Security Scotland data retention policy (a link to which was provided in the Code).

Communicating Outcomes

Views were sought on the specific procedures outlined for communicating outcomes.

Q11. Does Chapter 4 of the Code of Practice clearly set out how the potential outcome of an investigation will be explained to an individual? If not, what else should this chapter explain?

| | Number of Respondents | % of Respondents |
|---------------|-----------------------|------------------|
| Yes | 10 | 55% |
| No | 3 | 17% |
| Agree in part | 1 | 6% |
| No response | 4 | 22% |
| Total | 18 | 100% |

This section of the consultation received the least feedback overall. Almost all who provided a response to this question agreed that the Code of Practice was clear in relation to how the potential outcome of an investigation would be explained to an individual. Only three people said that it was not clear, and one agreed only in part.

The main thing that should be added to the Code, which was mentioned by one individual and two organisations, was that information on decisions would be provided in a range of accessible formats, as preferred by the individual under investigation (e.g. in writing, electronically, by audio file, etc.):

“...in keeping with the recognition of inclusive communication and accessible information set out in sections 4 and 5 of the Social Security (Scotland) Act, the information should be given to the individual in a format that is accessible to them.”

One local authority also suggested that consideration should be given to including an explanation of what would happen in the case of joint investigations, for example, those run between the Social Security Agency and a local authority. For example, would both parties be responsible for notifying the individual of the outcome of the investigation.

The only other comment received, from an individual, put forward a view that cases where fraud is suspected after the investigation should be referred to the criminal courts for determination, unless there was good reason not to do so (thus supporting the third outcome option set out in the Code).

Other Comments

More general views were also sought on whether the procedures set out would help to ensure that individuals were treated with fairness, dignity and respect.

Q12. Do you believe that our approach set out in Chapter 4 of the Code of Practice will help to ensure a person is treated fairly, with dignity and respect? If not, please indicate what else you think we might do to ensure this.

| | Number of Respondents | % of Respondents |
|---------------|-----------------------|------------------|
| Yes | 8 | 44% |
| No | 5 | 28% |
| Agree in part | 1 | 6% |
| No response | 4 | 22% |
| Total | 18 | 100% |

Again, this question attracted very few responses with most either agreeing with the Code, as written, or offering no response.

Of the five who did not agree with the approach, one organisation provided a view that the Code of Practice needed to be clearer in setting out that referral to COPFS would not occur in cases where it was decided that overpayment did not require to

be paid back. The same organisation also expressed that a rights-based approach would entail giving individuals the opportunity to challenge decisions made by the agency regarding repayment before the case is referred to COPFS.

The same organisation also highlighted that there was ambiguity in the regulations and Code of Practice around changes made to an individual's entitlement due to a change in circumstances and the point at which this may become a fraud investigation:

“Concern was raised during the Stage 2 debate that the legislation was drafted in such a way that those who made a genuine error could be caught by the definition of fraud. Reassurance was given that the Code of conduct, and additional guidance, would ensure this is not the case...In line with the Minister’s assurances the Code of Practice should be strengthened to provide clear guidance as to when cases should be referred, including detailed guidance to ensure cases of genuine error are not referred for prosecution (although in these cases it may be that any overpayment can be recovered).”

Several organisations noted that, where there was no case to answer, it was important that the individual be made aware of the investigation which had been carried out into their case (and the fact that the investigation would be on their record), but that this be done in a way that does not cause distress or alarm. Indeed, another organisation pointed out the Scottish Government (and Social Security Scotland as an executive agency) has a duty to provide individuals with any information that they hold about them (if requested) and this would include individuals being told that an investigation had been/was being conducted. Trust and respect need to be upheld in such cases and the Code could be clearer in detailing or stipulating this duty.

Four (including the one that agreed ‘in part’) commented that their support was contingent on individuals also being referred to independent advocacy, advice or other forms of support, as required, to help them in understanding and managing the outcome of investigations (including access to legal advice or specialist domestic abuse support, where appropriate).

Finally, one organisation commented that, while they agreed with Chapter 4 on the whole, they felt that cases where the individual was evidenced to have done no wrong (including cases where they may have been overpaid due to an administrative error), a written apology should be issued by Social Security Scotland. This was in keeping with the Social Security principles, it was felt.

Overall, Chapter 4 of the Code of Practice received little feedback and most comments related to strengthening the proposals by ensuring that individuals were supported with clear communication and advice both before, during and after investigations were carried out.

Chapter 5 - Complaints

Chapter 5 of the draft Code of Practice sets out the process for individuals and organisations wishing to make complaints in relation to fraud investigations, including being able to express dissatisfaction about Social Security Scotland’s action or lack of action, or about the standard of service provided by it. The process set out covers complaints in relation to both direct interaction with Social Security Scotland and authorised surveillance. It also sets out that complaints would be handled independently by a separate complaints team for Social Security Scotland and would not impact negatively on benefits received by the complainant. At the time of the consultation, the agency’s full complaint process was not finalised but the intention is that it would be complete at the time that a final published version of the Code was available. This can be found on [the Social Security Scotland website](#).

Approach to Complaints

Respondents were invited to express agreement or disagreement with the complaints process as set out.

Q13. Do you agree with our approach to complaints in Chapter 5 of the Code of Practice for Investigations? If not, please tell us what else you would like to see included.

| | Number of Respondents | % of Respondents |
|---------------|-----------------------|------------------|
| Yes | 7 | 39% |
| No | 7 | 39% |
| Agree in part | 1 | 6% |
| No response | 3 | 16% |
| Total | 18 | 100% |

This question generated an equal split in the number of respondents who agreed and disagreed.

Of the seven who did not agree, two did so on the basis that the Code should give individuals the right to request a copy of interview recordings in **all** cases. This would be in the interests of upholding transparency as well as dignity, fairness and respect. Another organisation suggested that Chapter 5 should either be embedded within Chapter 4 (given the direct link between the complaints procedure and the principles of dignity and respect), or more explicit reference be made in Chapter 5 to dignity and respect that will underpin the complaints procedure.

One organisation suggested that within the Code, greater recognition was needed of barriers to making complaints and specifically, people not making complaints for

fear of being penalised, sanctioned or losing benefits as a result. Providing details of the complaints process in all communications from the agency may help to remove this barrier, it was suggested, as well as signposting people to relevant support which would assist them in raising a complaint. Having a “*visibly independent feedback/complaints team*” was welcomed as giving confidence to potential claimants.

One organisation questioned how people subject to covert surveillance would ever be made aware of that surveillance and therefore how they would, in turn, be able to complain about it. The same organisation suggested that there should be some way of complaining to the Agency and having a complaint about surveillance resolved prior to it having to go to an Investigatory Powers Tribunal.

A different organisation commented that a means of compensating individuals whose complaints are upheld may be appropriate⁹:

“compensation should be made available when it is found that people have not been treated with dignity and respect by Social Security Agency staff. Even a token amount such as £50 - £100 would encourage staff to be respectful in their dealings with claimants and make Agency staff more accountable when they failed in their statutory duty.”

It was felt that such compensation would help the agency be more accountable and encourage both compliance with the Code and upholding of the principles of Social Security Scotland.

Finally, two respondents commented that there was insufficient detail in the Code, as presented, to allow considered responses to be made. Both welcomed a chance to comment on the full complaints process once finalised.

⁹ The same organisation sought reassurances that any failure or error by Agency staff that led to a loss of benefits would be compensated to the loss suffered.

Annex of Relevant Legislation

In the annex to the Code of Practice, a list of relevant legislation was set out which, alongside the Code itself, would guide the agency in implementing and carrying out investigations. This included various criminal justice, data protection and human rights legislation links. Comments were sought on whether there was any other relevant legislation which should be applied in guiding the investigation of fraud offences which had been overlooked in the draft Code.

Additional Legislation to be Included

Q14. Do you believe we have identified the correct legislation and Codes of Practice that will be relevant to fraud investigations for devolved benefits? If not, what else do you think should have been included?

| | Number of Respondents | % of Respondents |
|-------------|-----------------------|------------------|
| Yes | 6 | 33% |
| No | 3 | 17% |
| No response | 9 | 50% |
| Total | 18 | 100% |

Three respondents provided details of additional legislation which they felt should have been included.

One organisation commented that reference should be made to both the Proceeds of Crime Act 2001 and the Investigatory Powers Act 2016 (but did not say why).

Another organisation commented that reference should also be made to the statutory data sharing Code of Practice produced by the Information Commissioner's Office under section 121 of the DPA. It was suggested that this would help to inform Social Security Scotland's approach to obtaining evidence and making arrangements for access to electronic records.

One other organisation used this question to comment more broadly on what they perceived to be the inappropriate granting of RIPA powers to the Social Security Scotland Agency, although this response was based on a misunderstanding of what was being proposed.

Content of the Code

A more general question was also asked around whether the content of the draft Code of Conduct for Investigations was right or, again, if anything had been overlooked.

Q15. Is the content of the Code of Practice for Investigations right? If not, what else do you think should have been included?

| | Number of Respondents | % of Respondents |
|-------------|-----------------------|------------------|
| Yes | 6 | 33% |
| No | 5 | 28% |
| No response | 7 | 39% |
| Total | 18 | 100% |

Some respondents simply cross-referenced their substantive comments in relation to the earlier consultation questions, suggesting that any perceived gaps or limitations with the Code had been highlighted in their earlier responses. Five respondents provided specific suggestions for additional material that could have been included (with some suggesting more than one addition).

Two organisations suggested that clearer differentiation should be made in the Code between instances of genuine fraud and incorrect benefit claims that had occurred by error since both may require a different investigative approach. This echoed earlier comments about unintentional versus wilful fraud cases:

“There is an opportunity to uncouple the link that is mistakenly made between error and fraud. Social Security Scotland can play a role in tackling the incorrect public perceptions of fraud levels for disability benefits...Strategies for dealing with both fraud and error are concerned with protecting public money, but causes of error are not the same as causes of fraud and one strategy does not fit both fraud and error.”

One of these organisations also highlighted that the Code of Practice does not make clear what would trigger the start of an investigation, beyond a situation “where a suspicion has arisen”. Addressing this perceived gap in the Code, may also help to more clearly differentiate between intentional fraud and error, it was suggested:

“Due to the wide scope of the new offences, the Code of Practice should be strengthened to provide clear guidance as to when an investigation should be opened. Doing this could make clearer the distinction between possible fraud and innocent error.”

One individual commented that it would be helpful if the Code made reference to obtaining warrants to search premises in cases where it was deemed proportionate and necessary.

One organisation suggested that there may be some disconnect between the two documents being consulted upon, i.e. the draft regulations and the Code, and suggested that this needed to be addressed before either were finalised:

“There is at times a gulf between the policy intent outlined in the Code of Practice and the content of the draft regulations. We think that this needs to be addressed before the final version of the Code and regulations are sent for Parliamentary approval.”

A different organisation supported this view and suggested that the Code may be “unnecessarily bulky” and “open to criticisms caused by different interpretations” when put into practice:

“...the language in which the document is written moves uncomfortably between the formality of a CoP and informality of an information leaflet. A separate document, designed for the public to consume, could better convey the principles and values that the SSSA intends [to] uphold in its operational approach.”

Code of Practice for Investigations

To provide respondents with an opportunity to comment on the Code of Practice for Investigations as a whole, or to identify any issues which were not covered by specific consultation questions, a single open-ended question was included towards the end of the consultation.

| |
|---|
| Q16. Is there anything else you would like to tell us about the Code of Practice for Investigations? |
|---|

Three additional comments were provided in relation to the Code of Practice for Investigations - all provided by organisations.

One organisation noted that the duty placed on Ministers in the Code to “*establish effective whistle-blowing procedures*” was also a requirement of section 81 of the DPA. Cross-referencing of the legislation may be appropriate.

Two other organisations commented that there should be some clearly communicated strategy for reviewing the Code of Practice (perhaps on an annual basis) to ensure that it remained fit for purpose:

“...we would encourage the Scottish Government to provide further details on the process for reviewing the Code of Practice and assessing its impact, and in particular its value in realising the principles of dignity, fairness and respect.”

One of these organisations commented that, this aside, the Code of Practice was “*informative and well thought out.*”

Investigation of Offences Regulations

A similar open-ended question was included to capture wider feedback on the Investigation of Offences regulations.

Q17. Is there anything else you would like to tell us about the Investigation of Offences regulations?

Four additional comments were provided - two from individuals and two from organisations.

One individual commented that affording people the right to legal advice during investigations (the same as DWP investigations) would have an impact on solicitor input/legal aid budgets and this may need further consideration.

One local authority also commented that further consideration should be given to the additional administrative burdens which may be placed on other public bodies once the agency was up and running, especially in the context of information gathering/sharing. This should be monitored over time to ensure that sufficient funding is allocated to public bodies to help them resource any additional requirements placed upon them.

One organisation stressed that they viewed the proposals for detecting cases of fraud related to social security assistance as being 'reactive' and not seeking to diminish fraud. An audit of the patterns of fraud and more engagement with benefit claimants and support organisations to learn about professional and lived experience may give a better insight into what needs to be changed to tighten up what they perceived to be a "*frail system*."

Finally, one organisation highlighted that there appeared to be no powers to suspend payment of benefit during an investigation. This may be detrimental, it was suggested, as it may result in increased overpayment while investigations are being carried out and result in a greater burden of debt for the recipient if found guilty. To minimise any risks in this regard, a commitment to conclude investigations as soon as possible should be made, as well as any re-determination of entitlement taking place "*as sufficient evidence is available, even if an investigation of possible fraud is still underway*." It was suggested that any consequences of the lack of a power to suspend payments should be monitored with a view to considering whether legislative changes are needed¹⁰.

¹⁰ This view contrasted with others' comments elsewhere in the consultation that payments should never be suspended or stopped until fraud had been proven.

Overarching Comments

Other more general comments that were received in relation to the consultation as a whole included a view that there was an opportunity for organisational learning by publishing statistics on the number of investigations that are undertaken, the number of investigations that result in no case to answer and the number that result in prosecution:

“Measures of success of this policy must include how well it is aligned with principles of dignity and respect and a rights-based approach.”

Some respondents pointed out that overall levels of benefit fraud were quite low and that any proposals for investigating fraud should be proportionate rather than too heavy handed (as well as being mindful of the difference between intentional fraud and unintentional error).

One organisation urged the Scottish Government to continue to engage with relevant stakeholders in finalising the draft documents, adopting the same co-production principles that had been evidenced with other areas of development and planning for the new Social Security Scotland agency.

One organisation highlighted that where a ‘competent authority’ is processing personal data for the purpose of preventing, investigating, detecting or prosecuting criminal offences, they must comply with the law enforcement provisions in Part 3 of the Data Protection Act 2018 (the DPA). Scottish Ministers are listed as a competent authority in schedule 7 of the DPA and, as an executive agency of the Scottish Ministers, Social Security Scotland will be subject to the law enforcement provisions (rather than the GDPR) when processing personal data as part of investigating an offence related to devolved social security matters. This could, perhaps, have been made clearer in the draft regulations and Code of Practice.

Finally, one individual expressed a view that the consultation itself asked the same questions, in different ways. This same individual commented that they viewed the proposals as *“illegal and an abuse of various acts including the Human Rights Act.”* Again, however, this was a lone view and no other negative comments were made about the nature of the consultation *per se* or the way in which questions had been asked.

Impact Assessments

As part of the development of the Social Security (Scotland) Bill, a number of impact assessments were published. A commitment was made that all secondary legislation emanating from that Bill would also be accompanied by appropriate impact assessments.

The final part of the consultation sought views on both the business related and equalities impacts which the Scottish Government considered may result from the implementation of the Investigation of Offences regulations and the Code of Practice for Investigations.

Responses to this part of the consultation would be used to develop and publish full impact assessments.

Business Impacts

Comments were invited on the Business and Regulatory Impact Assessment (BRIA) by means of a single open-ended question.

Q18. Have we identified all of the business-related impacts?

| | Number of Respondents | % of Respondents |
|-------------|-----------------------|------------------|
| Yes | 6 | 33% |
| No | 3 | 17% |
| No response | 9 | 50% |
| Total | 18 | 100% |

Half of respondents gave no response to this question and most of those who did indicated that all business-related impacts has been appropriately identified.

Five suggestions were made for business related impacts which may have been overlooked, including that no data protection impact assessment had been mentioned, as defined under DPA 2018. A suggestion was made that this should be considered further:

“It seems likely that processing personal data as part of a fraud investigation would lead to a high risk to the rights and freedoms of individuals. As such, we would have expected to see at least a draft data protection impact assessment (DPIA) published with this consultation. We expect Social Security Scotland either to conduct a DPIA prior to the investigation of any offences or to document its rationale as to why a DPIA is not necessary.”

Similarly, the same organisation suggested that, as part of its preparations, Social Security Scotland should consider what it will provide to any other person from whom it requires personal data to assist that individual in evidencing their compliance with data protection law when disclosing personal data relevant to a particular investigation.

Specifically in relation to business impacts, one organisation also commented that the regulations would, in general, severely and negatively impact on the way in which support organisations carry out their work and this had not been addressed as part of the business-related impacts. Another support organisation endorsed this view and commented that the new regulations would, in particular, result in an increase in requests for information and support from existing services. Another organisation highlighted that fines arising from organisations' non-compliance to share what they perceived to be confidential data regarding their clients was also a relevant business impact:

“...we would like to object again to powers to fine being used to threaten or force NGOs to comply with information requests which would breach their duty of confidentiality towards clients and damage or destroy the trust that must be established between clients and Third Sector agencies.”

Overall, the impacts of requirements on the workloads for support organisations (including the requirement to share client information) had not been given sufficient thought, it was suggested.

Equalities Impacts

Comments on the Equality Impact Assessment (EQIA) were also sought by means of a single open-ended question.

Q19. Are you aware of any equality issues we have not identified in terms of introduction of the Investigation of Offences regulations and fraud investigations more generally?

| | Number of Respondents | % of Respondents |
|-------------|-----------------------|------------------|
| Yes | 4 | 22% |
| No | 7 | 39% |
| No response | 7 | 39% |
| Total | 18 | 100% |

Again, most respondents either gave no response to this question or indicated that there were no equality issues which had been overlooked.

Among the four who felt that specific equalities issues had not been identified, one suggested that disabled people were likely to be disproportionately affected by the

proposals and that insufficient attention had been given to this group in the equality impact assessment:

“The vast bulk of the spending in the benefits/assistance budget will be on disabled people and their carers (i.e. Children's DLA, PIP, AA and Carer's Allowance). Thus, we would expect that there would be a recognition in the Equality Impact Assessment that there might also be a disproportionate impact on individuals and organisations supporting disabled people and carers as the bulk of fraud investigations are also likely to be conducted on disabled people and their carers.”

Additional safeguards could be built into the regulations and Code of Practice to support and protect this group, it was felt. Disabled women experiencing domestic abuse were considered to be a particularly at-risk group to whom further consideration of impacts should be given.

While two organisations explicitly highlighted and supported the acknowledgement of the potential impact of coercive control within the Equality Impact Assessment, another felt that this acknowledgement did not go far enough:

“We believe the EQIA does not fully consider the impacts on women that the regulations as drafted will present. The consultation notes that some organisations have highlighted that gender may be an important aspect of some benefit fraud, due to aspects of coercive control and domestic abuse. However, this is not reflected within the EQIA assessment which states that there will not be any particular impact on groups who share protected characteristics as the principal interaction will be between officers of the agency and organisations... We recommend that a more detailed EQIA is carried out to fully understand and address the implications of the policy on women's equality.”

Finally, two organisations again encouraged the routine monitoring of investigations and public sharing of activities for accountability/transparency purposes. This was especially important to test the assumption that there would be no impact on groups who share protected characteristics.

Discussion

Main Findings

The analysis of consultation responses showed some strong themes, however, it should be noted that a number of individuals and organisations opted not to respond to some of the questions, and that those who did respond were small in number.

With this in mind, however, the main views expressed in relation to each of the Chapters of the draft Code of Practice for Investigations were:

- Chapter 1: Several support organisations expressed strong views against the draft regulations in relation to counter fraud officers being able to request information to support investigations. This was mainly on the basis that the regulations were too broad, and that they would undermine organisations' ability to offer client confidentiality, therefore risking delivery of appropriate support. This proposal was seen as going against the rights-based approach advocated by the Scottish Government (i.e. undermining the basic principles of fairness, dignity and respect). For the same reasons, strong views were also expressed against widescale access to electronic information being allowed and proposals to allow entry to premises/searching of premises which may house confidential client records. The approach set out in Chapter 1 was seen by many as disproportionate and heavy-handed compared to existing DWP practice which was viewed as more appropriately constrained.
- Chapter 2: In relation to authorised officers, and restrictions placed upon them by the regulations, feedback concentrated largely on the need for limiting authorisation and for more rigorously defined and specialist training to be offered to just a small number of staff. This may give greater reassurance to a wider range of individuals who may be subject to an investigation as well as to the various organisations who may support them.
- Chapter 3: While respondents agreed with much of the content of the Code around what individuals could expect if being investigated, it was felt that practice could be strengthened by ensuring that individuals were routinely signposted to advocacy and advice to support them at all stages of the investigation process. Putting in place even clearer guidance around what people could expect, including what role an advocate or supporter could play, was welcomed, as were clearer guidelines for directing officers' approach to communication and investigatory interviews. Allowing all people who are interviewed under caution a chance to access a recording of the interview was also considered to be appropriate in meeting the principles of Social Security Scotland.
- Chapter 4: Very few comments were received in relation to proposals for the way that outcomes of investigations are communicated. Ensuring that all

communications and information provided to individuals and organisations is accessible and available in a wide variety of formats was seen as key, as was ensuring that people were supported to understand and manage the outcomes of any communications received.

- Chapter 5: Feedback related to the complaints procedure set out in the Code of Practice focused mainly on the need to ensure that the procedure was clearly communicated to individuals and organisations, including the right to access materials collected during investigations to help an individual/organisation support their complaint (especially recordings of interviews). It was felt that further consultation with relevant stakeholders may be required once a final complaints procedure has been developed by the agency.
- Chapter 6: Most relevant legislation had been correctly referenced in the Code of Practice, it was felt, although cross-referencing of the regulations and Code of Practice with the Data Protection legislation (including GDPR) could be strengthened.

Very few comments were made in relation to either business-related impacts of the regulations, or equality impacts. The main comments were linked to the need for a full Data Protection Impact Assessment to accompany the regulations and Code, as well as greater consideration of the needs of females and disabled adults as groups who may be disproportionately more likely to be in receipt of benefits and therefore more likely to be affected by the changes being proposed. This would strengthen the existing assessments that had been undertaken.

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.

More general feedback received throughout the consultation suggests that there may be opportunities for even greater consultation or engagement with claimants and support service providers to learn from their respective experiences in relation to fraud to help the agency adopt an even more tailored and practical approach to reducing benefit fraud. It was stressed that preventative work, as well as reactive strategies to deal with fraud (both intentional and unintentional), should also be explored.

Regular monitoring of the Code of Practice was also encouraged as a longer-term commitment from the Scottish Government to ensure that the Code was being complied with and remains fit for purpose over time.

Again, it is important to highlight that the relatively equal split in opinion is not necessarily reflected in the narrative reporting above, because the majority of qualitative feedback received was presented by those who identified limitations with

the proposed drafts. The consultation questions deliberately invited respondents to critically review the regulations and Code of Practice and so this skew in the data presented was, to some extent, inevitable.

Next Steps

The findings presented above will be used by the Scottish Government to inform decisions on the final policy position. The regulations and Code may be revised in line with the feedback received and both will then be laid in Parliament. As set out in the Social Security (Scotland) Act 2018, the fraud investigation regulations will be subject to affirmative procedure in the Scottish Parliament. Post-consultation, the Code of Practice also requires to be published and a copy laid in the Scottish Parliament.

Conclusions

While there was agreement with much of the content being proposed, the consultation was important in highlighting areas where respondents felt the regulations and Code of Practice required to be strengthened ahead of being finalised and put into operation. It has also shown where stakeholders feel that more information on the justification for changes may be required to increase confidence, as well as the areas where further consultation may be required.

There was clear evidence that organisations and individuals welcomed the development of a Code of Practice to act as a reference point and, subject to the changes suggested being put in place, this was seen as being a helpful tool in raising awareness of what could and should be expected from Social Security Scotland. Support organisations, who offered the most resistance to the proposals around access to information, were also keen to endorse those aspects of the proposals which sought to eliminate intentional defrauding of the system. Keeping this as the key focus, and not allowing attention to be diverted to those who may unintentionally fall foul of the system, was seen as key. This would ensure that those who need benefits and assistance the most continue to receive the support required.



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